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# Federal Register

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WHEN: Tuesday, September 14, 2010
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WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

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# Presidential Documents

**Title 3—**

## The President

**Proclamation 8549 of August 27, 2010**

## National Preparedness Month, 2010

**By the President of the United States of America**

**A Proclamation**

During National Preparedness Month, we stress the importance of strengthening the security and resiliency of our Nation through systematic preparation for the full range of hazards threatening the United States in the 21st century, including natural disasters, cyber attacks, pandemic disease, and acts of terrorism. This year marks the fifth anniversary of Hurricane Katrina, one of the most tragic and destructive disasters in American history. In remembrance of this national tragedy, we must reaffirm our commitment to readiness and the necessity of preparedness.

By empowering Americans with information about the risks we face, we can all take concrete actions to protect ourselves, our families, our communities, and our country. The Federal Emergency Management Agency's (FEMA) Ready Campaign provides simple and practical steps every American can take to be better prepared. At the community level, Citizen Corps enables volunteers to contribute to homeland security efforts by educating, training, and coordinating local activities that help make us safer, better prepared, and more responsive during emergencies. I encourage all Americans to visit Ready.gov and CitizenCorps.gov for more information and resources on emergency preparedness, including how to prepare a family emergency plan, create an emergency supply kit, and get involved in community preparedness efforts.

My Administration has made emergency and disaster preparedness a top priority, and is dedicated to a comprehensive approach that relies upon the responsiveness and cooperation of government at all levels, the private and nonprofit sectors, and individual citizens. I also encourage Americans to get involved with the thousands of organizations in the National Preparedness Month Coalition, which will share preparedness information and hold preparedness events and activities across the United States. By strengthening citizen preparedness now, we can be ready when disaster strikes.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim September 2010 as National Preparedness Month. I encourage all Americans to recognize the importance of preparedness and observe this month by working together to enhance our national security, resilience, and readiness.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-seventh day of August, in the year of our Lord two thousand ten, and of the Independence of the United States of America the two hundred and thirty-fifth.

[FR Doc. 2010–21976
Filed 8–31–10; 8:45 am]
Billing code 3195–W0–P

# Rules and Regulations

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

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

## DEPARTMENT OF AGRICULTURE

### Office of the Secretary

### 7 CFR Part 6

### Adjustment of Appendices to the Dairy Tariff-Rate Import Quota Licensing Regulation for the 2010 Tariff-Rate Quota Year

**AGENCY:** Office of the Secretary, USDA.

**ACTION:** Final rule.

**SUMMARY:** This document sets forth the revised appendices to the Dairy Tariff-Rate Import Quota Licensing Regulation for the 2010 quota year reflecting the cumulative annual transfers from Appendix 1 to Appendix 2 for certain dairy product import licenses permanently surrendered by licensees or revoked by the Licensing Authority.

**DATES:** Effective September 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** Abdelsalam El-Farra, Dairy Import Licensing Program, Import Policies and Export Reporting Division, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Stop 1021, Washington, DC 20250–1021; or by telephone at (202) 720–9439; or by e-mail at: *abdelsalam.el-farra@fas.usda.gov.*

**SUPPLEMENTARY INFORMATION:** The Foreign Agricultural Service, under a delegation of authority from the Secretary of Agriculture, administers the Dairy Tariff-Rate Import Quota Licensing Regulation codified at 7 CFR 6.20–6.37 that provides for the issuance of licenses to import certain dairy articles under tariff-rate quotas (TRQs) as set forth in the Harmonized Tariff Schedule of the United States. These dairy articles may only be entered into the United States at the low-tier tariff by or for the account of a person or firm to whom such licenses have been issued and only in accordance with the terms and conditions of the regulation.

Licenses are issued on a calendar year basis, and each license authorizes the license holder to import a specified quantity and type of dairy article from a specified country of origin. The Import Policies and Export Reporting Division, Foreign Agricultural Service, U.S. Department of Agriculture, issues these licenses and, in conjunction with U.S. Customs and Border Protection, U.S. Department of Homeland Security, monitors their use.

The regulation at 7 CFR 6.34(a) states: ''Whenever a historical license (Appendix 1) is not issued to an applicant pursuant to the provisions of § 6.23, is permanently surrendered or is revoked by the Licensing Authority, the amount of such license will be transferred to Appendix 2.'' Section 6.34(b) provides that the cumulative annual transfers will be published in the **Federal Register**. Accordingly, this document sets forth the revised Appendices for the 2010 tariff-rate quota year.

### List of Subjects in 7 CFR Part 6

Agricultural commodities, Cheese, Dairy products, Imports, Reporting and recordkeeping requirements.

Issued at Washington, DC, on August 11, 2010.

**Ronald Lord,**

*Licensing Authority.*

■ Accordingly, 7 CFR part 6 is amended as follows:

## PART 6—IMPORT QUOTAS AND FEES

■ 1. The authority citation for Part 6, Subpart—Dairy Tariff-Rate Import Quota Licensing continues to read as follows:

**Authority:** Additional U.S. Notes 6, 7, 8, 12, 14, 16–23 and 25 to Chapter 4 and General Note 15 of the Harmonized Tariff Schedule of the United States (19 U.S.C. 1202), Pub. L. 97–258, 96 Stat. 1051, as amended (31 U.S.C. 9701), and secs. 103 and 404, Pub. L. 103–465, 108 Stat. 4819 (19 U.S.C. 3513 and 3601).

■ 2. Appendices 1, 2 and 3 to Subpart—Dairy Tariff-Rate Import Quota Licensing are revised to read as follows:

### Appendices 1, 2 and 3 to Subpart—Dairy Tariff-Rate Import Quota Licensing

ARTICLES SUBJECT TO: APPENDIX 1, HISTORICAL LICENSES; APPENDIX 2, NONHISTORICAL LICENSES; AND APPENDIX 3, DESIGNATED IMPORTER LICENSES FOR QUOTA YEAR 2010

[Quantities in kilograms]

| Article by Additional U.S. Note Number and Country of Origin | Appendix 1 | Appendix 2 | Appendix 3 | |
|---|---|---|---|---|
| | | | Tokyo Round | Uruguay Round |
| **NON-CHEESE ARTICLES** | | | | |
| BUTTER (NOTE 6) | 5,217,229 | 1,759,771 | | |
| EU–25 | 75,000 | 21,161 | | |
| New Zealand | 111,671 | 38,922 | | |
| Other Countries | 49,246 | 24,689 | | |
| Any Country | 4,981,312 | 1,674,999 | | |
| DRIED SKIM MILK (NOTE 7) | | 5,261,000 | | |
| Australia | | 600,076 | | |
| Canada | | 219,565 | | |
| Any Country | | 4,441,359 | | |
| DRIED WHOLE MILK (NOTE 8) | 3,175 | 3,318,125 | | |
| New Zealand | 3,175 | | | |
| Any Country | | 3,318,125 | | |
| DRIED BUTTERMILK/WHEY (NOTE 12) | 11,000 | 213,981 | | |

ARTICLES SUBJECT TO: APPENDIX 1, HISTORICAL LICENSES; APPENDIX 2, NONHISTORICAL LICENSES; AND APPENDIX 3, DESIGNATED IMPORTER LICENSES FOR QUOTA YEAR 2010—Continued

[Quantities in kilograms]

| Article by Additional U.S. Note Number and Country of Origin | Appendix 1 | Appendix 2 | Appendix 3 | |
|---|---|---|---|---|
| | | | Tokyo Round | Uruguay Round |
| Canada | ..... | 161,161 | ..... | ..... |
| New Zealand | 11,000 | 52,820 | ..... | ..... |
| BUTTER SUBSTITUTES CONTAINING OVER 45 PERCENT OF BUTTERFAT AND/OR BUTTER OIL (NOTE 14) | ..... | 6,080,500 | ..... | ..... |
| Any Country | ..... | 6,080,500 | ..... | ..... |
| TOTAL: NON-CHEESE ARTICLES | 5,231,404 | 16,633,377 | ..... | ..... |
| **CHEESE ARTICLES** | | | | |
| CHEESE AND SUBSTITUTES FOR CHEESE (EXCEPT: SOFT RIPENED COW'S MILK CHEESE; CHEESE NOT CONTAINING COW'S MILK; CHEESE (EXCEPT COTTAGE CHEESE) CONTAINING 0.5 PERCENT OR LESS BY WEIGHT OF BUTTERFAT; AND, ARTICLES WITHIN THE SCOPE OF OTHER IMPORT QUOTAS PROVIDED FOR IN THIS SUBCHAPTER) (NOTE 16) | 22,649,216 | 8,820,515 | 9,661,128 | 7,496,000 |
| Argentina | 7,690 | ..... | 92,310 | ..... |
| Australia | 535,628 | 5,542 | 758,830 | 1,750,000 |
| Canada | 1,013,777 | 127,223 | ..... | ..... |
| Costa Rica | ..... | ..... | ..... | 1,550,000 |
| EU–25 | 15,509,492 | 7,758,164 | 1,132,568 | 3,446,000 |
| Of which Portugal is | 65,838 | 63,471 | 223,691 | ..... |
| Israel | 79,696 | ..... | 593,304 | ..... |
| Iceland | 294,000 | ..... | 29,000 | ..... |
| New Zealand | 4,389,093 | 426,379 | 6,506,528 | ..... |
| Norway | 124,982 | 25,018 | ..... | ..... |
| Switzerland | 593,952 | 77,460 | 548,588 | 500,000 |
| Uruguay | ..... | ..... | ..... | 250,000 |
| Other Countries | 100,906 | 100,729 | ..... | ..... |
| Any Country | ..... | 300,000 | ..... | ..... |
| BLUE-MOLD CHEESE (EXCEPT STILTON PRODUCED IN THE UNITED KINGDOM) AND CHEESE AND SUBSTITUTES FOR CHEESE CONTAINING, OR PROCESSED FROM, BLUE-MOLD CHEESE (NOTE 17) | 2,283,647 | 197,354 | ..... | 430,000 |
| Argentina | 2,000 | ..... | ..... | ..... |
| EU–25 | 2,281,646 | 197,354 | ..... | 350,000 |
| Chile | ..... | ..... | ..... | 80,000 |
| Other Countries | 1 | ..... | ..... | ..... |
| CHEDDAR CHEESE, AND CHEESE AND SUBSTITUTES FOR CHEESE CONTAINING, OR PROCESSED FROM, CHEDDAR CHEESE (NOTE 18) | 3,566,716 | 717,140 | 519,033 | 7,620,000 |
| Australia | 893,583 | 90,916 | 215,501 | 1,250,000 |
| Chile | ..... | ..... | ..... | 220,000 |
| EU–25 | 52,404 | 210,596 | ..... | 1,050,000 |
| New Zealand | 2,520,800 | 275,668 | 303,532 | 5,100,000 |
| Other Countries | 99,929 | 39,960 | ..... | ..... |
| Any Country | ..... | 100,000 | ..... | ..... |
| AMERICAN-TYPE CHEESE, INCLUDING COLBY, WASHED CURD AND GRANULAR CHEESE (BUT NOT INCLUDING CHEDDAR) AND CHEESE AND SUBSTITUTES FOR CHEESE CONTAINING OR PROCESSED FROM SUCH AMERICAN-TYPE CHEESE (NOTE 19) | 2,625,401 | 540,152 | 357,003 | ..... |
| Australia | 771,134 | 109,864 | 119,002 | ..... |
| EU–25 | 64,077 | 289,923 | ..... | ..... |
| New Zealand | 1,639,549 | 122,450 | 238,001 | ..... |
| Other Countries | 150,641 | 17,915 | ..... | ..... |
| EDAM AND GOUDA CHEESE, AND CHEESE AND SUBSTITUTES FOR CHEESE CONTAINING, OR PROCESSED FROM, EDAM AND GOUDA CHEESE (NOTE 20) | 5,104,403 | 501,999 | ..... | 1,210,000 |
| Argentina | 110,495 | 14,505 | ..... | 110,000 |
| EU–25 | 4,878,638 | 410,362 | ..... | 1,100,000 |
| Norway | 114,318 | 52,682 | ..... | ..... |
| Other Countries | 952 | 24,450 | ..... | ..... |

ARTICLES SUBJECT TO: APPENDIX 1, HISTORICAL LICENSES; APPENDIX 2, NONHISTORICAL LICENSES; AND APPENDIX 3, DESIGNATED IMPORTER LICENSES FOR QUOTA YEAR 2010—Continued

[Quantities in kilograms]

| Article by Additional U.S. Note Number and Country of Origin | Appendix 1 | Appendix 2 | Appendix 3 | |
|---|---|---|---|---|
| | | | Tokyo Round | Uruguay Round |
| ITALIAN-TYPE CHEESES, MADE FROM COW'S MILK, (ROMANO MADE FROM COW'S MILK, REGGIANO, PARMESAN, PROVOLONE, PROVOLETTI, SBRINZ, AND GOYA—NOT IN ORIGINAL LOAVES) AND CHEESE AND SUBSTITUTES FOR CHEESE CONTAINING, OR PROCESSED FROM, SUCH ITALIAN-TYPE CHEESES, WHETHER OR NOT IN ORIGINAL LOAVES (NOTE 21) | 6,411,744 | 1,108,803 | 795,517 | 5,165,000 |
| Argentina | 3,915,276 | 210,207 | 367,517 | 1,890,000 |
| EU–25 | 2,496,468 | 885,532 | ..... | 2,025,000 |
| Romania | ..... | ..... | ..... | 500,000 |
| Uruguay | ..... | ..... | 428,000 | 750,000 |
| Other Countries | ..... | 13,064 | ..... | ..... |
| SWISS OR EMMENTHALER CHEESE OTHER THAN WITH EYE FORMATION, GRUYERE-PROCESS CHEESE AND CHEESE AND SUBSTITUTES FOR CHEESE CONTAINING, OR PROCESSED FROM, SUCH CHEESES (NOTE 22) | 5,322,872 | 1,328,442 | 823,519 | 380,000 |
| EU–25 | 4,053,682 | 1,098,312 | 393,006 | 380,000 |
| Switzerland | 1,235,692 | 183,795 | 430,513 | ..... |
| Other Countries | 33,498 | 46,335 | ..... | ..... |
| CHEESE AND SUBSTITUTES FOR CHEESE, CONTAINING 0.5 PERCENT OR LESS BY WEIGHT OF BUTTERFAT (EXCEPT ARTICLES WITHIN THE SCOPE OF OTHER TARIFF-RATE QUOTAS PROVIDED FOR IN THIS SUBCHAPTER), AND MARGARINE CHEESE (NOTE 23) | 1,134,195 | 3,290,723 | 1,050,000 | ..... |
| EU–25 | 1,134,194 | 3,290,723 | ..... | ..... |
| Israel | ..... | ..... | 50,000 | ..... |
| New Zealand | ..... | ..... | 1,000,000 | ..... |
| Other Countries | 1 | ..... | ..... | ..... |
| SWISS OR EMMENTHALER CHEESE WITH EYE FORMATION (NOTE 25) | 15,953,229 | 6,344,102 | 9,557,945 | 2,620,000 |
| Argentina | ..... | 9,115 | 70,885 | ..... |
| Australia | 209,698 | ..... | 290,302 | ..... |
| Canada | ..... | ..... | 70,000 | ..... |
| EU–25 | 11,160,390 | 5,316,438 | 4,003,172 | 2,420,000 |
| Iceland | 149,999 | ..... | 150,001 | ..... |
| Israel | 27,000 | ..... | ..... | ..... |
| Norway | 3,181,685 | 473,625 | 3,227,690 | ..... |
| Switzerland | 1,178,377 | 505,728 | 1,745,895 | 200,000 |
| Other Countries | 46,080 | 39,196 | ..... | ..... |
| TOTAL: CHEESE ARTICLES | 65,051,423 | 22,849,230 | 22,764,145 | 24,921,000 |
| TOTAL: NON–CHEESE ARTICLES | 5,231,404 | 16,633,377 | ..... | ..... |
| TOTAL: CHEESE ARTICLES & NON–CHEESE ARTICLES | 70,282,827 | 39,482,607 | ..... | ..... |

[FR Doc. 2010–21777 Filed 8–31–10; 8:45 am]

BILLING CODE 3410–10–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 15 CFR Part 922

**[Docket No. 0908201245–0217–01]**

**RIN 0648–AY20**

## Gulf of the Farallones, Monterey Bay and Cordell Bank National Marine Sanctuaries Technical Corrections

**AGENCY:** Office of National Marine Sanctuaries (ONMS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

**ACTION:** Final rule; technical correction.

**SUMMARY:** On November 20, 2008, the National Oceanic and Atmospheric Administration (NOAA) published a final rule in the **Federal Register** for the Gulf of the Farallones, Monterey Bay and Cordell Bank national marine sanctuaries (referred to jointly as the joint management plan review or JMPR). Some sets of coordinates in that final rule contained technical errors or omissions that need to be corrected for the zones to be properly mapped. Other

minor corrections are also included in this rule.

**DATES:** *Effective Date:* This final rule is effective on September 1, 2010.

*Implementation Dates:* With regard to the corrections to the coordinate tables, implementation of this final rule begins on October 1, 2010. With regard to the other corrections, implementation of this final rule begins September 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** John Armor, Office of National Marine Sanctuaries, 1305 East-West Highway, Silver Spring, MD 20910, or by phone at 301–713–3125.

**SUPPLEMENTARY INFORMATION:**

## I. Background

NOAA established the Gulf of the Farallones National Marine Sanctuary (GFNMS) in 1981 to protect and preserve a unique and fragile ecological community, including the largest seabird colony in the contiguous United States, and diverse and abundant marine mammals. The GFNMS lies off the coast of California, to the west and north of San Francisco, and is composed of 1,279 square statute miles (966 square nautical miles) of offshore waters, and the submerged lands thereunder, extending out to and around the Farallon Islands and nearshore waters (up to the mean high tide line) from Bodega Head to Rocky Point in Marin. For more information about the GFNMS, see *http://farallones.noaa.gov.*

NOAA established the Monterey Bay National Marine Sanctuary (MBNMS) in 1992 for the purposes of protecting and managing the conservation, ecological, recreational, research, educational, historical, and esthetic resources and qualities of the area. The MBNMS is located offshore of California's central coast, adjacent to and south of the GFNMS. It encompasses a shoreline length of approximately 276 statute miles (240 nmi) between Rocky Pt. in Marin County and Cambria in San Luis Obispo County. The sanctuary spans approximately 6,094 square statute miles (4,602 square nautical miles) of ocean and coastal waters, and the submerged lands thereunder, extending an average distance of 30 statute miles (26 nmi) from shore. The distant Davidson Seamount is also part of the sanctuary, though it does not share a contiguous boundary. Supporting some of the world's most diverse marine ecosystems, the MBNMS is home to numerous mammals, seabirds, fishes, invertebrates, sea turtles and plants in a remarkably productive coastal environment. For more information about the MBNMS, please see *http://montereybay.noaa.gov.*

NOAA established the Cordell Bank National Marine Sanctuary (CBNMS) in 1989 to protect and preserve the extraordinary ecosystem, including marine birds, mammals, and other natural resources of Cordell Bank and its surrounding waters. The CBNMS protects an area of 529 square statute miles (399 square nautical miles) of marine waters, and the submerged lands thereunder, off the northern California coast. The main feature of the sanctuary is Cordell Bank, an offshore granite bank located on the edge of the continental shelf, about 23 statute miles (20 nmi) west of the Point Reyes lighthouse. The CBNMS is entirely offshore and shares its southern and eastern boundary with the GFNMS. The western boundary is the 1000 fathom isobath on the edge of the continental slope. The CBNMS is located in one of the world's four major coastal upwelling systems. The combination of oceanic conditions and undersea topography provides for a highly productive environment in a discrete, well-defined area. For more information about the CBNMS, please see *http://cordellbank.noaa.gov.*

Pursuant to section 304(e) of the National Marine Sanctuaries Act (16 U.S.C. 1434 *et seq.*) (NMSA), the Office of National Marine Sanctuaries (ONMS) conducted a joint review of the management plans for the Gulf of the Farallones, Monterey Bay and Cordell Bank national marine sanctuaries between 2001 and 2008. This review resulted in revised management plans, regulations, and terms of designation for all three sanctuaries. On November 20, 2008, NOAA published the associated final rule and terms of designation (73 FR 70488) and released the revised management plans.

## II. Technical Corrections

In the November 20, 2008 **Federal Register** notice, NOAA published the coordinates for the outer boundary of GFNMS and certain zones within the outer boundary. Both sets of coordinates contained technical omissions that need to be corrected so that the digital representation of these boundaries on a map would more accurately represent the boundaries as they are described in the language of the rule.

The outer boundary coordinate table for GFNMS (Appendix A) published on November 20, 2008 did not contain the final coordinate of the shoreward point. Through this action, NOAA is making a technical correction by reprinting the outer boundary table in Appendix A in its entirety, with the omitted coordinate, point 32. With this correction, from Point 31, the boundary follows the MBNMS boundary northeastward in a geodetic line towards Point 32 (37.88225N and 122.62753W) until it intersects the mean high water line (MHWL). Because the southern boundary of the GFNMS is the same as the northern boundary for the MBNMS, NOAA is also reprinting the boundary coordinates for the MBNMS (Appendix A for part M of section 922) with this same point (point 32) replacing the existing Point 1 with the same coordinate listed above (37.88225N and 122.62753W). Additional points were changed to correct for a non-stationary intersection of the transient MHWL and the lines connecting offshore and onshore points, and therefore required several points to be moved shoreward, including: Point 35 (35.55483N and 121.10399W), Point 36 (37.59421N and 122.52001W), and Point 39 (37.81777N and 122.53008W). These corrections do not alter the existing boundaries of either sanctuary, but rather provide data points that facilitate the correct depiction of the boundaries as defined by the rule when the points are mapped.

The November 20, 2008 final rule also included a provision to prohibit vessels from anchoring in designated seagrass protection zones in Tomales Bay (with an exception for mariculture operations conducted pursuant to a valid lease, permit, or license). This prohibition was designed to protect the important and fragile seagrass found in several areas of Tomales Bay from the effects of vessel anchor damage. In publishing the boundary coordinates for two of the seven seagrass protection zones, NOAA omitted points that made accurate mapping difficult. NOAA erroneously omitted one point in the table for Zone 2 and one coordinate in the table for Zone 4. As such, NOAA is republishing the coordinate tables for zones 2 and 4 to allow accurate GPS plotting. Inclusion of these previously missing data points does not change the boundaries of either protection zone established in the final rule but rather allows the boundaries of these zones to be correctly delineated on a map.

The final rule in 2008 also inadvertently failed to expressly except from the discharge requirements applicable to cruise ships "vessel engine or generator exhaust" emitted in order to operate the ship. Through this rule, NOAA is correcting this omission by explicitly excepting from the discharge requirements for cruise ships vessel engine or generator exhaust.

This action does not change the intent of the final rule. Historically, cruise ships have regularly transited through the sanctuaries. Given their means of propulsion, cruise ships must discharge vessel engine and generator exhaust to

operate. In recognition of this, regulations in place prior to this rule-making specifically authorized the discharge of vessel exhaust from all types of vessels, including cruise ships. As is evident from the 2006 proposed rules, the 2008 final rule and Final Environmental Impact Statement (FEIS) associated with the rule-making, NOAA's intent was to allow the continued operation of cruise ships within sanctuaries, but subject to greater limitations on certain discharges or deposits, particularly sewage and graywater. Indeed, both the proposed and final rules specifically allow cruise ships to discharge clean engine cooling water, which is produced incidental to vessel operations. Absent an exception for engine and generator exhaust, which under the final rule remains expressly permissible to all other vessels that operate within the sanctuaries, the rule would inadvertently ban all cruise ships from operating in the sanctuaries.

The final rule in 2008 contained an erroneous and possibly confusing duplication in the description of Appendix B to Subpart M for the MBNMS Overflight Restriction Zones. The description as it is currently written in paragraphs 1 and 2 includes both the words "heading" and "bearing." NOAA is correcting this error by eliminating the word "heading" from each description. The revised Appendix B to Subpart M is printed with the corrections in the regulatory text below.

Last, the final rule contained the redundant use of the word "true" in the Mavericks motorized personal watercraft (MPWC) zone description in Appendix E to Subpart M for the MBNMS—Motorized Personal Watercraft Zones and Access Routes Within the Sanctuary. NOAA is correcting this error and removing the redundant words in paragraphs 2 and 5 under this heading. The revised Appendix E to Subpart M is printed with the corrections in the regulatory text below.

## III. Classification

*A. Administrative Procedure Act*

The Acting Assistant Administrator finds good cause pursuant to 5 U.S.C. 553(b)(B) and (d)(3), respectively, to waive the requirements of public notice and comment and 30-day delay in effectiveness because they are unnecessary. This rule makes technical non-substantive corrections to errors in the regulations of November 20, 2008 to clarify the intent of that rule. The intent of the final rule published in 2008 is not affected by these corrections. With regard to the corrections to the coordinate tables, implementation of this final rule will not begin until October 1, 2010 in order to give the public reasonable time to take note of the mapping refinements.

*B. National Environmental Policy Act*

NOAA prepared a final environmental impact statement (FEIS) to evaluate the regulatory changes for the JMPR. This rule does not change that assessment, as this rule contains strictly technical corrections and does not change the intent of the original regulations.

*C. Executive Order 12866: Regulatory Impact*

This regulatory action has been determined to be not significant within the meaning of Executive Order 12866.

*D. Executive Order 13132: Federalism Assessment*

NOAA has concluded that this regulatory action does not fall within the definition of "policies that have federalism implications" within the meaning of Executive Order 13132. The changes will not preempt State law.

*E. Regulatory Flexibility Act*

Because notice and opportunity for comment are not required for this action pursuant to 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis is not required and has not been prepared.

*F. Paperwork Reduction Act*

This correction amendment does not contain information collections that are subject to the requirements of the Paperwork Reduction Act. 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.

**List of Subjects in 15 CFR Part 922**

Administrative practice and procedure, Boundary coordinates, Harbors, Motorized personal watercraft (MPWC), Recreation and recreation areas, Research, Seagrass protection, Water resources, Wildlife, Zones.

Dated: August 19, 2010.

**Holly Bamford,**

*Acting Deputy Assistant Administrator for Ocean Services and Coastal Zone Management.*

■ Accordingly, for the reasons set forth above, 15 CFR part 922 is amended as follows:

## PART 922—NATIONAL MARINE SANCTUARY PROGRAM REGULATIONS

■ 1. The authority citation for part 922 continues to read as follows:

**Authority:** 16 U.S.C. 1431 *et seq.*

■ 2. Amend section 922.82 by revising paragraph (a)(3) to read as follows:

**§ 922.82 Prohibited or otherwise regulated activities.**

(a) * * *

(3) Discharging or depositing from within or into the Sanctuary any material or other matter from a cruise ship except clean vessel engine cooling water, clean vessel generator cooling water, vessel engine or generator exhaust, clean bilge water, or anchor wash.

* * * * *

■ 3. Appendix A to Subpart H of Part 922 is revised to read as follows:

**Appendix A to Subpart H of Part 922—Gulf of the Farallones National Marine Sanctuary Boundary Coordinates**

Coordinates listed in this Appendix are unprojected (Geographic) and based on the North American Datum of 1983.

| Point ID No. Sanctuary Boundary | Latitude | Longitude |
|---|---|---|
| 1 | 38.29896 | −123.05989 |
| 2 | 38.26390 | −123.18138 |
| 3 | 38.21001 | −123.11913 |
| 4 | 38.16576 | −123.09207 |
| 5 | 38.14072 | −123.08237 |
| 6 | 38.12829 | −123.08742 |
| 7 | 38.10215 | −123.09804 |
| 8 | 38.09069 | −123.10387 |
| 9 | 38.07898 | −123.10924 |
| 10 | 38.06505 | −123.11711 |
| 11 | 38.05202 | −123.12827 |
| 12 | 37.99227 | −123.14137 |
| 13 | 37.98947 | −123.23615 |
| 14 | 37.95880 | −123.32312 |
| 15 | 37.90464 | −123.38958 |
| 16 | 37.83480 | −123.42579 |
| 17 | 37.76687 | −123.42694 |
| 18 | 37.75932 | −123.42686 |
| 19 | 37.68892 | −123.39274 |
| 20 | 37.63356 | −123.32819 |
| 21 | 37.60123 | −123.24292 |
| 22 | 37.59165 | −123.22641 |
| 23 | 37.56305 | −123.19859 |
| 24 | 37.52001 | −123.12879 |
| 25 | 37.50819 | −123.09617 |
| 26 | 37.49418 | −123.00770 |
| 27 | 37.50948 | −122.90614 |
| 28 | 37.52988 | −122.85988 |
| 29 | 37.57147 | −122.80399 |
| 30 | 37.61622 | −122.76937 |
| 31 | 37.66641 | −122.75105 |
| 32 | 37.88225 | −122.62753 |

■ 4. Table C–2 and table C–4 in Appendix C to Subpart H of Part 922 are revised and Appendix C is republished

in its entirety, with the aforementioned revisions, to read as follows:

### Appendix C to Subpart H of Part 922—No-Anchoring Seagrass Protection Zones in Tomales Bay

Coordinates listed in this appendix are unprojected (Geographic) and based on the North American Datum of 1983.

Table C–1: Zone 1:

Zone 1 is an area of approximately 39.9 hectares offshore south of Millerton Point. The eastern boundary is a straight line that connects points 1 and 2 listed in the coordinate table below. The southern boundary is a straight line that connects points 2 and 3, the western boundary is a straight line that connects points 3 and 4 and the northern boundary is a straight line that connects point 4 to point 5. All coordinates are in the Geographic Coordinate System relative to the North American Datum of 1983.

| Zone 1 Point ID | Latitude | Longitude |
|---|---|---|
| 1 | 38.10571 | −122.84565 |
| 2 | 38.09888 | −122.83603 |
| 3 | 38.09878 | −122.84431 |
| 4 | 38.10514 | −122.84904 |
| 5 | Same as 1. | Same as 1. |

Table C–2: Zone 2:

Zone 2 is an area of approximately 50.3 hectares that begins just south of Marconi and extends approximately 3 kilometers south along the eastern shore of Tomales Bay. The eastern boundary is the mean high water (MHW) line from point 1 to point 2 listed in the coordinate table below. The southern boundary is a straight line that connects point 2 to point 3. The western boundary is a series of straight lines that connect points 3 through 7 in sequence and then connects point 7 to point 8. All coordinates are in the Geographic Coordinate System relative to the North American Datum of 1983.

| Zone 2 Point ID | Latitude | Longitude |
|---|---|---|
| 1 | 38.14071 | −122.87440 |
| 2 | 38.11601 | −122.85820 |
| 3 | 38.11386 | −122.85851 |
| 4 | 38.11899 | −122.86731 |
| 5 | 38.12563 | −122.86480 |
| 6 | 38.12724 | −122.86488 |
| 7 | 38.13326 | −122.87178 |
| 8 | Same as 1. | Same as 1. |

Table C–3: Zone 3:

Zone 3 is an area of approximately 4.6 hectares that begins just south of Marshall and extends approximately 1 kilometer south along the eastern shore of Tomales Bay. The eastern boundary is the mean high water (MHW) line from point 1 to point 2 listed in the coordinate table below. The southern boundary is a straight line that connects point 2 to point 3, the western boundary is a straight line that connects point 3 to point 4, and the northern boundary is a straight line that connects point 4 to point 5. All coordinates are in the Geographic Coordinate System relative to the North American Datum of 1983.

| Zone 3 Point ID | Latitude | Longitude |
|---|---|---|
| 1 | 38.16031 | −122.89442 |
| 2 | 38.15285 | −122.88991 |
| 3 | 38.15250 | −122.89042 |
| 4 | 38.15956 | −122.89573 |
| 5 | Same as 1. | Same as 1. |

Table C–4: Zone 4:

Zone 4 is an area of approximately 61.8 hectares that begins just north of Nicks Cove and extends approximately 5 kilometers south along the eastern shore of Tomales Bay to just south of Cypress Grove. The eastern boundary is the mean high water (MHW) line from point 1 to point 2 listed in the coordinate table below. The southern boundary is a straight line that connects point 2 to point 3. The western boundary is a series of straight lines that connect points 3 through 10 in sequence. The northern boundary is a straight line that connects point 10 to point 11. All coordinates are in the Geographic Coordinate System relative to the North American Datum of 1983.

| Zone 4 Point ID | Latitude | Longitude |
|---|---|---|
| 1 | 38.20073 | −122.92181 |
| 2 | 38.16259 | −122.89627 |
| 3 | 38.16227 | −122.89650 |
| 4 | 38.16535 | −122.90308 |
| 5 | 38.16869 | −122.90475 |
| 6 | 38.17450 | −122.90545 |
| 7 | 38.17919 | −122.91021 |
| 8 | 38.18651 | −122.91404 |
| 9 | 38.18881 | −122.91740 |
| 10 | 38.20004 | −122.92315 |
| 11 | Same as 1. | Same as 1. |

Table C–5: Zone 5:

Zone 5 is an area of approximately 461.4 hectares that begins east of Lawsons Landing and extends approximately 5 kilometers east and south along the eastern shore of Tomales Bay but excludes areas adjacent (approximately 600 meters) to the mouth of Walker Creek. The boundary follows the mean high water (MHW) mark from point 1 and trends in a southeast direction to point 2 listed in the coordinate table below. From point 2 the boundary trends westward in a straight line to point 3, then trends southward in a straight line to point 4 and then trends eastward in a straight line to point 5. The boundary follows the mean high water line from point 5 southward to point 6. The southern boundary is a straight line that connects point 6 to point 7. The eastern boundary is a series of straight lines that connect points 7 to 9 in sequence and then connects point 9 to point 10. All coordinates are in the Geographic Coordinate System relative to the North American Datum of 1983.

| Zone 5 Point ID | Latitude | Longitude |
|---|---|---|
| 1 | 38.23122 | −122.96300 |
| 2 | 38.21599 | −122.93749 |
| 3 | 38.20938 | −122.94153 |
| 4 | 38.20366 | −122.93246 |
| 5 | 38.20515 | −122.92453 |
| 6 | 38.20073 | −122.92181 |
| 7 | 38.19405 | −122.93477 |
| 8 | 38.20436 | −122.94305 |
| 9 | 38.21727 | −122.96225 |
| 10 | Same as 1. | Same as 1. |

Table C–6: Zone 6:

Zone 6 is an area of approximately 3.94 hectares in the vicinity of Indian Beach along the western shore of Tomales Bay. The western boundary follows the mean high water (MHW) line from point 1 northward to point 2 listed in the coordinate table below. The northern boundary is a straight line that connects point 2 to point 3. The eastern boundary is a straight line that connects point 3 to point 4. The southern boundary is a straight line that connects point 4 to point 5. All coordinates are in the Geographic Coordinate System relative to the North American Datum of 1983.

| Zone 6 Point ID | Latitude | Longitude |
|---|---|---|
| 1 | 38.13811 | −122.89603 |
| 2 | 38.14040 | −122.89676 |
| 3 | 38.14103 | −122.89537 |
| 4 | 38.13919 | −122.89391 |
| 5 | Same as 1. | Same as 1. |

Table C–7: Zone 7:

Zone 7 is an area of approximately 32.16 hectares that begins just south of Pebble Beach and extends approximately 3 kilometers south along the western shore of Tomales Bay. The western boundary is the mean high water (MHW) line from point 1 to point 2 listed in the coordinate table below. The northern boundary is a straight line that connects point 2 to point 3. The eastern boundary is a series of straight lines that connect points 3 through 7 in sequence. The southern boundary is a straight line that connects point 7 to point 8. All coordinates are in the Geographic Coordinate System relative to the North American Datum of 1983.

| Zone 7 Point ID | Latitude | Longitude |
|---|---|---|
| 1 | 38.11034 | −122.86544 |
| 2 | 38.13008 | −122.88742 |
| 3 | 38.13067 | −122.88620 |
| 4 | 38.12362 | −122.87984 |
| 5 | 38.11916 | −122.87491 |
| 6 | 38.11486 | −122.86896 |
| 7 | 38.11096 | −122.86468 |
| 8 | Same as 1. | Same as 1. |

■ 5. Amend section 922.112 by revisng paragraph (a)(1)(ii) to read as follows:

**§ 922.112 Prohibited or otherwise regulated activities.**

(a) * * *

(1) * * *

(ii) Discharging or depositing from within or into the Sanctuary any material or other matter from a cruise ship except clean vessel engine cooling water, clean vessel generator cooling water, vessel engine or generator exhaust, clean bilge water, or anchor wash.

* * * * *

■ 6. Amend section 922.132 by revising paragraph (a)(2)(ii) to read as follows:

**§ 922.132 Prohibited or otherwise regulated activities.**

(a) * * *

(2) * * *

(ii) Discharging or depositing from within or into the Sanctuary any material or other matter from a cruise ship except clean vessel engine cooling water, clean vessel generator cooling water, vessel engine or generator exhaust, clean bilge water, or anchor wash.

* * * * *

■ 7. Appendix A to Subpart M of Part 922 is revised to read as follows:

**Appendix A to Subpart M of Part 922—Monterey Bay National Marine Sanctuary Boundary Coordinates**

Coordinates listed in this Appendix are unprojected (Geographic) and based on the North American Datum of 1983.

| Point ID No. | Latitude | Longitude |
|---|---|---|
| **Seaward Boundary** | | |
| 1 | 37.88225 | −122.62753 |
| 2 | 37.66641 | −122.75105 |
| 3 | 37.61622 | −122.76937 |
| 4 | 37.57147 | −122.80399 |
| 5 | 37.52988 | −122.85988 |
| 6 | 37.50948 | −122.90614 |
| 7 | 37.49418 | −123.00770 |
| 8 | 37.50819 | −123.09617 |
| 9 | 37.52001 | −123.12879 |
| 10 | 37.45304 | −123.14009 |
| 11 | 37.34316 | −123.13170 |
| 12 | 37.23062 | −123.10431 |
| 13 | 37.13021 | −123.02864 |
| 14 | 37.06295 | −122.91261 |
| 15 | 37.03509 | −122.77639 |
| 16 | 36.92155 | −122.80595 |
| 17 | 36.80632 | −122.81564 |
| 18 | 36.69192 | −122.80539 |
| 19 | 36.57938 | −122.77416 |
| 20 | 36.47338 | −122.72568 |
| 21 | 36.37242 | −122.65789 |
| 22 | 36.27887 | −122.57410 |
| 23 | 36.19571 | −122.47699 |
| 24 | 36.12414 | −122.36527 |
| 25 | 36.06864 | −122.24438 |
| 26 | 36.02451 | −122.11672 |
| 27 | 35.99596 | −121.98232 |
| 28 | 35.98309 | −121.84069 |
| 29 | 35.98157 | −121.75634 |
| 30 | 35.92933 | −121.71119 |
| 31 | 35.83773 | −121.71922 |
| 32 | 35.72063 | −121.71216 |
| 33 | 35.59497 | −121.69030 |
| 34 | 35.55327 | −121.63048 |
| 35 | 35.55483 | −121.10399 |
| 36 | 37.59421 | −122.52001 |
| 37 | 37.61367 | −122.61673 |
| 38 | 37.76694 | −122.65011 |
| 39 | 37.81777 | −122.53008 |
| **Harbor Exclusions** | | |
| 40 | 37.49414 | −122.48483 |
| 41 | 37.49540 | −122.48576 |
| 42 | 36.96082 | −122.00175 |
| 43 | 36.96143 | −122.00112 |
| 44 | 36.80684 | −121.79145 |
| 45 | 36.80133 | −121.79047 |
| 46 | 36.60837 | −121.88970 |
| 47 | 36.60580 | −121.88965 |

■ 8. Appendix B to Subpart M of Part 922 is revised to read as follows:

**Appendix B to Subpart M of Part 922—Zones Within the Sanctuary Where Overflights Below 1000 Feet Are Prohibited**

The four zones are:

(1) From mean high water to 3 nautical miles (nmi) offshore between a line extending from Point Santa Cruz on a southwesterly bearing of 220° true and a line extending from 2.0 nmi north of Pescadero Point on a southwesterly bearing of 240° true;

(2) From mean high water to 3 nmi offshore between a line extending from the Carmel River mouth on a westerly bearing of 270° true and a line extending due west along latitude parallel 35.55488 N off of Cambria;

(3) From mean high water and within a 5 nmi seaward arc drawn from a center point of 36.80129 N, 121.79034 W (the end of the Moss Landing ocean pier as it appeared on the most current NOAA nautical charts as of January 1, 1993); and

(4) Over the Sanctuary's jurisdictional waters of Elkhorn Slough east of the Highway One bridge to Elkhorn Road.

■ 9. Appendix E to Subpart M of Part 922 is revised to read as follows:

**Appendix E to Subpart M of Part 922—Motorized Personal Watercraft Zones and Access Routes Within the Sanctuary**

[Coordinates in this appendix are unprojected (Geographic Coordinate System) and are calculated using the North American Datum of 1983]

The five zones and access routes are:

(1) The approximately one [1.0] nmi² area off Pillar Point Harbor from harbor launch ramps, through the harbor entrance to the northern boundary of Zone One:

| Point ID No. | Latitude | Longitude |
|---|---|---|
| 1 (flashing 5-second breakwater entrance light and horn located at the seaward end of the outer west breakwater). | 37.49395 | −122.48477 |
| 2 (bell buoy) | 37.48167 | −122.48333 |
| 3 | 37.48000 | −122.46667 |
| 4 | 37.49333 | −122.46667 |

(2) The approximately five [5.0] nmi² area off of Santa Cruz Small Craft Harbor from harbor launch ramps, through the harbor entrance, and then along a 100-yard wide access route southwest along a bearing of approximately 196° true (180° magnetic) to the red and white whistle buoy at 36.93833 N, 122.01000 W. Zone Two is bounded by:

| Point ID No. | Latitude | Longitude |
|---|---|---|
| 1 | 36.91667 | −122.03333 |
| 2 | 36.91667 | −121.96667 |
| 3 | 36.94167 | −121.96667 |
| 4 | 36.94167 | −122.03333 |

(3) The approximately six [6.0] nmi² area off of Moss Landing Harbor from harbor launch ramps, through harbor entrance, and then along a 100-yard wide access route southwest along a bearing of approximately 230° true (215° magnetic) to the red and white bell buoy at the eastern boundary of Zone Three bounded by:

| Point ID No. | Latitude | Longitude |
|---|---|---|
| 1 | 36.83333 | −121.82167 |
| 2 | 36.83333 | −121.84667 |
| 3 | 36.77833 | −121.84667 |
| 4 | 36.77833 | −121.81667 |
| 5 (red and white bell buoy). | 36.79833 | −121.80167 |
| 6 | 36.81500 | −121.80333 |

(4) The approximately five [5.0] nmi² area off of Monterey Harbor from harbor launch ramps to the seaward end of the U.S. Coast Guard Pier, and then along a 100-yard wide access route northeast along a bearing of approximately 15° true (0° magnetic) to the southern boundary of Zone Four bounded by:

| Point ID No. | Latitude | Longitude |
|---|---|---|
| 1 | 36.64500 | −121.92333 |
| 2 | 36.61500 | −121.87500 |
| 3 | 36.63833 | −121.85500 |
| 4 | 36.66667 | −121.90667 |

(5) The approximately one-tenth [0.10] nmi² area near Pillar Point from the Pillar Point Harbor entrance along a 100-yard wide access route southeast along a bearing of approximately 174° true (159° magnetic) to the green bell buoy (identified as "Buoy 3") at 37.48154 N, 122.48156 W and then along a 100-yard wide access route northwest along

a bearing of approximately 284° true (269° magnetic) to the green gong buoy (identified as "Buoy 1") at 37.48625 N, 122.50603 W, the southwest boundary of Zone Five. Zone Five exists only when a High Surf Warning has been issued by the National Weather Service and is in effect for San Mateo County and only during December, January, and February. Zone Five is bounded by:

| Point ID No. | Latitude | Longitude |
|---|---|---|
| 1 (gong buoy identified as "Buoy 1"). | 37.48625 | −122.50603 |
| 2 ..... | 37.49305 | −122.50603 |
| 3 (Sail Rock) ... | 37.49305 | −122.50105 |
| 4 ..... | 37.48625 | −122.50105 |

[FR Doc. 2010–21878 Filed 8–31–10; 8:45 am]

**BILLING CODE 3510–NK–P**

## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 165

**[Docket No. USCG–2010–0799]**

**RIN 1625–AA00**

## Safety Zone; Olympia Harbor Days Tug Boat Races, Budd Inlet, WA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone within the navigation channel in Budd Inlet, WA during Olympia Harbor Days tug boat races. This safety zone is necessary to restrict vessel movement during racing activity in order to ensure the safety of participants, spectators, and the maritime public. This action is intended to restrict vessel traffic movement on specified waters of the Budd Inlet, WA during Olympia Harbor Days tug boat races.

**DATES:** This rule is effective from 8 a.m. until 8 p.m. on September 5th, 2010.

**ADDRESSES:** Documents indicated in this preamble as being available in the docket are part of docket USCG–2010–0799 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–0799 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 or e-mail LTJG Ashley M. Wanzer, Sector Puget Sound, Waterways Management Division, Coast Guard; telephone 206–217–6175, e-mail *SectorSeattleWWM@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 it is contrary to the public interest to delay the effective date of this rule. Delaying the effective date by first publishing an NPRM would be contrary to the safety zone's intended objectives because immediate action is needed to restrict vessel movement during racing activity in order to ensure the safety of participants, spectators, and the maritime public.

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**. Due to the need for immediate action, the restriction of vessel traffic is necessary to protect life and property; therefore, a 30-day notice is impracticable. Delaying the effective date would be contrary to the safety zone's intended objectives of protecting persons and vessels involved in the event, and enhancing public and maritime safety.

### Basis and Purpose

This temporary rule addresses safety concerns associated with the Olympia Harbor Days tugboat races. Tugboat races result in vessel and spectator congestion in the proximity of the race course. Additionally, the draft of these vessels creates a large wake when accelerating at fast speeds during races. This safety zone is necessary to ensure spectators remain an adequate distance from the race course and to provide unencumbered access for emergency response craft in the event of a race-related emergency. This safety zone will do so by prohibiting persons and vessel operators from entering, transiting or remaining within this safety zone while enforced.

### Discussion of Rule

Olympia Harbor Days is an annual tugboat race in Budd Inlet, WA involving three classes of tugboat races. Each class of vessel will compete in a heat which will take place in the navigation channel. This safety zone restricts vessel movement in the navigation channel during each heat of racing. This rule is effective from 8 a.m. until 8 p.m. on September 5th, 2010. The safety zone will encompass all waters of Budd Inlet, WA the width of the navigation channel south of a line connecting the following points: 47°05′34″ N 122°55′53″ W and 47°05′34″ N 122°55′28″ W, until reaching the northernmost end of the navigation channel at a line connecting the following points 47°05′06″ N 122°55′28″ W and 47°05′03″ N, 122°55′44″ W then southeasterly until reaching the southernmost entrance of the navigation channel at a line connecting the following points 47°04′00″ N 122°54′28″ N 122°54′35″ W. Access to the zone will be restricted during the specified date and time. Entry into, transit through, mooring or anchoring within this zone is prohibited unless authorized by the Captain of the Port, Puget Sound or Designated Representative.

### 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 because it is short in duration and vessels will be able to transit the navigation channel between heats of racing.

### 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 rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit this zone during periods of enforcement. This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons. This rule will be enforced for a short duration and vessels will be able to navigate the channel between heats with the permission of the patrolling event committee crafts.

**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 (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. This rule involves the establishment of a safety zone. An environmental analysis checklist and a categorical exclusion determination will be made 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. Chapters 701, 3306, 3703; 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 temporary § 33 CFR 165.T13–159 to read as follows:

**§ 165.T13–159 Safety Zone; Olympia Harbor Days Tug Boat Races, Budd Inlet, WA.**

(a) *Safety Zones.* The following area is designated as a safety zone:

1. *Location.* All waters of Budd Inlet, WA the width of the navigation channel south of a line connecting the following points: 47°05′34″ N 122°55′53″ W and 47°05′34″ N 122°55′28″ W until reaching the northernmost end of the navigation channel at a line connecting the following points 47°05′06″ N 122°55′28″ W and 47°05′03″ N 122°55′44″ W then southeasterly until reaching the southernmost entrance of the navigation channel at a line connecting the following points 47°04′00″ N 122°54′28″ N 122°54′35″ W.

(b) *Effective Period.* This regulation is effective from 8 a.m. until 8 p.m. on September 5th, 2010.

(c) *Regulations.* In accordance with the general regulations in 33 CFR Part 165, Subpart C, no person or vessel may enter, transit, moor, or anchor within this safety zone unless authorized by the Captain of the Port or Designated Representative.

(d) *Authorization.* All persons or vessels who desire to enter the safety zone created in this section must obtain permission from the Captain of the Port or Designated Representative by contacting either the event sponsor on VHF Ch 06, the on-scene patrol craft on VHF Ch 13 or Ch 16 or the Coast Guard Sector Puget Sound Joint Harbor Operations Center (JHOC) via telephone at 206–217–6002.

Dated: August 17, 2010.

**S.W. Bornemann,**

*Captain, U.S. Coast Guard, Captain of the Port, Puget Sound.*

[FR Doc. 2010–21779 Filed 8–31–10; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[Docket No. USCG–2010–0776]**

**RIN 1625–AA00**

## Safety Zone; Fireworks Displays, Potomac River, National Harbor, MD

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary interim rule with request for comments.

**SUMMARY:** The Coast Guard is establishing a safety zone upon specified waters of the Potomac River. This action is necessary to provide for the safety of life on navigable waters during five fireworks displays launched from a discharge barge located at National Harbor, in Prince Georges County, Maryland. This safety zone is intended to protect the maritime public in a portion of the Potomac River.

**DATES:** This rule is effective from September 1, 2010 through November 19, 2010. Comments and related material must reach the Coast Guard on or before October 1, 2010.

**ADDRESSES:** You may submit comments identified by docket number USCG–2010–0776 using any one of the following methods:

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

(2) *Fax:* 202–493–2251.

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

(4) *Hand Delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary interim rule, call or e-mail Ronald L. Houck, Sector Baltimore Waterways Management Division, Coast Guard; telephone 410–576–2674, e-mail *Ronald.L.Houck@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:**

### Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided.

*Submitting Comments:*

If you submit a comment, please include the docket number for this rulemaking (USCG–2010–0776), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via *http://www.regulations.gov*) or by fax, mail or hand delivery, but please use only one of these means. If you submit a comment online via *http://www.regulations.gov*, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand delivery, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an e-mail address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov*, click on the "submit a comment" box, which will then become highlighted in blue. In the "Document Type" drop down menu select "Proposed Rule" and insert "USCG–2010–0776" in the "Keyword" box. Click "Search" then click on the balloon shape in the "Actions" column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change this rule based on your comments.

*Viewing Comments and Documents:*

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*, click on the "read comments" box, which will then become highlighted in blue. In the "Keyword" box insert "USCG–2010–0776" and click "Search." Click the "Open Docket Folder" in the "Actions" column. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

*Privacy Act:*

Anyone can search the electronic form of 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 a Privacy Act notice regarding our public dockets in the January 17, 2008 issue of the **Federal Register** (73 FR 3316).

*Public Meeting:*

We do not now plan to hold a public meeting. But you may submit a request for one using one of the four methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

**Regulatory Information**

The Coast Guard is issuing this temporary interim 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 it is contrary to public interest to delay the effective date of this rule. Delaying the effective date by first publishing an NPRM would be contrary to the safety zone's intended objectives since immediate action is necessary to protect persons and vessels against the hazards associated with a fireworks display on navigable waters. Such hazards include premature detonations, dangerous projectiles and falling or burning debris.

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**. Due to the need for immediate action, the restriction of vessel traffic is necessary to protect life, property and the environment. Therefore, a 30-day notice is impracticable. Delaying the effective date would be contrary to the safety zone's intended objectives of protecting persons and vessels involved in the event, and enhancing public and maritime safety.

**Basis and Purpose**

Fireworks displays are frequently held from locations on or near the navigable waters of the United States. The potential hazards associated with fireworks displays are a safety concern during such events. The purpose of this rule is to promote public and maritime safety during five fireworks displays, and to protect mariners transiting the area from the potential hazards associated with a fireworks display, such as the accidental discharge of fireworks, dangerous projectiles, and falling hot embers or other debris. This rule is needed to ensure safety on the waterway during the scheduled events.

**Discussion of Rule**

Pyrotecnico, of New Castle, Pennsylvania, will conduct five separate fireworks displays launched from a barge located in the Potomac River at National Harbor, Maryland scheduled on September 1, 2010 at 9:30 p.m., September 21, 2010 at 9:30 p.m., October 1, 2010 at 9:30 p.m., October 9, 2010 at 9:30 p.m. and November 18, 2010 at 6:45 p.m., and if necessary due to inclement weather, on November 19, 2010 at 6:45 p.m.

The Coast Guard is establishing a temporary safety zone on certain waters of the Potomac River, within an area bounded by a line drawn from the following points: Latitude 38°47′18″ N, longitude 077°01′01″ W; thence to latitude 38°47′11″ N, longitude 077°01′26″ W; thence to latitude 38°47′25″ N, longitude 077°01′33″ W; thence to latitude 38°47′32″ N, longitude 077°01′08″ W; thence to the point of origin, located at National Harbor, Maryland (NAD 1983). The temporary safety zone will be enforced from 6 p.m. through 11 p.m. on September 1, 2010, September 21, 2010, October 1, 2010, October 9, 2010 and November 18, 2010, and if necessary due to inclement weather, from 6 p.m. through 11 p.m. on November 19, 2010. The effect of this temporary safety zone will be to restrict navigation in the regulated area during the fireworks displays. No person or vessel may enter or remain in the safety zone. Vessels will be allowed to transit the waters of the Potomac River outside the safety zone. Notification of the temporary safety zone will be provided to the public via marine information broadcasts.

**Regulatory Analyses**

We developed this interim 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 safety zone will restrict some vessel traffic, there is little vessel traffic associated with commercial fishing in the area, and recreational boating in the area can transit waters outside the safety zone. In addition, the effect of this rule will not be significant because the safety zone is of limited duration and limited size. For the above reasons, the Coast Guard does not anticipate any significant economic 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. This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to operate, transit, or anchor in a portion of the Potomac River, located at National Harbor, MD, from 6 p.m. through 11 p.m. on September 1, 2010, September 21, 2010, October 1, 2010, October 9, 2010 and November 18, 2010, and if necessary due to inclement weather, from 6 p.m. through 11 p.m. on November 19, 2010. This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons. The safety zone is of limited size and duration. In addition, before the effective periods, the Coast Guard will issue maritime advisories widely available to users of the waterway to allow mariners to make alternative plans for transiting the affected area.

**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 (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. This rule involves establishing a temporary 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, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T05–0776 to read as follows:

**§ 165.T05–0776 Safety Zone; Fireworks Displays, Potomac River, National Harbor, MD.**

(a) *Regulated area.* The following area is a safety zone: All waters in the Potomac River, within an area bounded by a line drawn from the following points: Latitude 38°47′18″ N, longitude 077°01′01″ W; thence to latitude 38°47′11″ N, longitude 077°01′26″ W; thence to latitude 38°47′25″ N, longitude 077°01′33″ W; thence to latitude 38°47′32″ N, longitude 077°01′08″ W; thence to the point of origin, located at National Harbor, Maryland (NAD 1983).

(b) *Regulations.* The general safety zone regulations found in 33 CFR 165.23 apply to the safety zone created by this temporary section, § 165.T05–0776.

(1) All vessels and persons are prohibited from entering this zone, except as authorized by the Coast Guard Captain of the Port Baltimore.

(2) Persons or vessels requiring entry into or passage within the zone must request authorization from the Captain of the Port or his designated representative by telephone at 410–576–2693 or on VHF–FM marine band radio channel 16.

(3) All Coast Guard assets enforcing this safety zone can be contacted on

VHF–FM marine band radio channels 13 and 16.

(4) The operator of any vessel within or in the immediate vicinity of this safety zone shall:

(i) Stop the vessel immediately upon being directed to do so by any commissioned, warrant or petty officer on board a vessel displaying a Coast Guard Ensign, and

(ii) Proceed as directed by any commissioned, warrant or petty officer on board a vessel displaying a Coast Guard Ensign.

(c) *Definitions. Captain of the Port Baltimore* means the Commander, Coast Guard Sector Baltimore or any Coast Guard commissioned, warrant or petty officer who has been authorized by the Captain of the Port to act on his behalf.

*Designated representative* means any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port Baltimore to assist in enforcing the safety zone described in paragraph (a) of this section.

(d) *Enforcement.* The U.S. Coast Guard may be assisted by Federal, State and local agencies in the patrol and enforcement of the zone.

(e) *Enforcement periods.* This section will be enforced from 6 p.m. through 11 p.m. on September 1, 2010, September 21, 2010, October 1, 2010, October 9, 2010 and November 18, 2010, and if necessary due to inclement weather, from 6 p.m. through 11 p.m. on November 19, 2010.

Dated: August 16, 2010.

**Mark P. O'Malley,**

*Captain, U.S. Coast Guard, Captain of the Port Baltimore.*

[FR Doc. 2010–21781 Filed 8–31–10; 8:45 am]

**BILLING CODE 9110–04–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 180

**[EPA–HQ–OPP–2010–0233; FRL–8841–6]**

## Choline hydroxide; Exemption from the Requirement of a Tolerance

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes an exemption from the requirement of a tolerance for residues of choline hydroxide (CAS Reg. No. 123–41–1) when used as an inert ingredient that acts as a neutralizer in food use, acidic, preharvest herbicide products. The Dow AgroSciences, LLC, has submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting establishment of an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of choline hydroxide.

**DATES:** This regulation is effective September 1, 2010. Objections and requests for hearings must be received on or before November 1, 2010, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

**ADDRESSES:** EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2010–0233. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** Mark Dow, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5533; e-mail address: *dow.mark@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this Action Apply to Me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

*B. How Can I Get Electronic Access to Other Related Information?*

You may access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.gpoaccess.gov/ecfr*.

*C. How Can I File an Objection or Hearing Request?*

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2010–0233 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before November 1, 2010. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2010–0233, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One

Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

**II. Petition for Exemption**

In the **Federal Register** of May 19, 2010 (75 FR 28009)(FRL–9153–1), EPA issued a notice pursuant to section 408 of FFDCA, 21 U.S.C. 346a, announcing the filing of a pesticide petition (PP 0E7686)(75 FR 28012) by Dow AgroSciences, LLC, 9330 Zionsville Road, Indianapolis, IN, 46268. The petition requested that 40 CFR 180.920 be amended by establishing an exemption from the requirement of a tolerance for residues of choline hydroxide (CAS Reg. No. 123–41–1) when used as an inert ingredient (a neutralizer) in acidic herbicide formulations applied preharvest. That notice referenced a summary of the petition prepared by Dow AgroSciences, the petitioner, which is available in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has modified the exemption requested to pesticide formulations rather than herbicide formulations.

**III. Inert Ingredient Definition**

Inert ingredients are all ingredients that are not active ingredients as defined in 40 CFR 153.125 and include, but are not limited to, the following types of ingredients (except when they have a pesticidal efficacy of their own): Solvents such as alcohols and hydrocarbons; surfactants such as polyoxyethylene polymers and fatty acids; carriers such as clay and diatomaceous earth; thickeners such as carrageenan and modified cellulose; wetting, spreading, and dispersing agents; propellants in aerosol dispensers; microencapsulating agents; and emulsifiers. The term "inert" is not intended to imply nontoxicity; the ingredient may or may not be chemically active. Generally, EPA has exempted inert ingredients from the requirement of a tolerance based on the low toxicity of the individual inert ingredients.

**IV. Aggregate Risk Assessment and Determination of Safety**

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) of FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue...."

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be clearly demonstrated that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no appreciable risks to human health. In order to determine the risks from aggregate exposure to pesticide inert ingredients, the Agency considers the toxicity of the inert in conjunction with possible exposure to residues of the inert ingredient through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings. If EPA is able to determine that a finite tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established.

Consistent with section 408(c)(2)(A) of FFDCA, and the factors specified in FFDCA section 408(c)(2)(B), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for choline hydroxide including exposure resulting from the exemption established by this action. EPA's assessment of exposures and risks associated with choline hydroxide follows.

*A. Toxicological Profile*

EPA has evaluated the available toxicity data and considered their validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. Specific information on the studies received and the nature of the adverse effects caused by choline hydroxide as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies are discussed in this unit.

No toxicity data are available for choline hydroxide. Upon contact with water, choline hydroxide is expected to dissociate into the cationic form (choline) and the anionic form (hydroxide ions). Choline hydroxide added to an acidic herbicide, forms an herbicide-choline salt product which will be sold in concentrate form. When the concentrate is mixed with water prior to application, the salt dissociates to the cationic form (choline). Choline cation therefore, is the moiety of interest. Since no toxicological studies are available in the literature, studies on choline chloride and other salts were used for evaluating the risk from exposure to choline hydroxide.

According to the Organisation for Economic Co-operation and Development (OECD) due to its caustic nature (pH 14), acute toxicity testing of choline hydroxide would not be appropriate (OECD Guidelines for the Testing of Chemicals, Procedure 404 (2002); OECD Guideline for testing of Chemicals, Procedure, 405, 2002). Choline hydroxide is known as a skin, eye and respiratory irritant. It should be noted here that there will be essentially no contact with choline hydroxide in an end-use product.

As was discussed above, the hydroxy moiety dissociates and essentially ceases to exist upon mixing with water in preparation for application and in the body. The choline cation is what is left to be considered. The Agency has extensively assessed the effects of choline upon human systems and the environment. A summary of the Agency's findings are recorded in: Final Rule, Choline Chloride; Exemption from the Requirement of a Tolerance, EPA–HQ–OPP–2008–0671; FRL–8802–4 (75 FR 760, January 6, 2010). Details of the Agency's assessment are found in: Decision Document for Petition Number 8E7387; Choline Chloride, CAS Reg. No 67–48–1; Memorandum, D. Sunderland, RD/OPP, 16 OCT 2009.

Choline is an essential component of the human diet and acts as a precursor to acetylcholine, phospholipids, and the methyl donor betaine. It is important for the structural integrity of cell membranes, cholinergic

neurotransmission, transmembrane signaling, methyl metabolism, and lipid and cholesterol transport and metabolism.

Choline was officially made an "essential nutrient" in 1998 and adequate intake (AI) levels were established (women - 425 milligrams/day (mg/day), pregnant women - 450 mg/day, men and lactating women - 550 mg/day). The Daily Upper Intake Level for choline is 3.5 grams (g) for adults. Research indicates that many individuals are not getting enough choline, with daily intake levels far below the AI.

One study in mice evaluated the impact of 200 milligram/kilogram/day (mg/kg/day) choline chloride given orally or intranasally for 28 days. No adverse effects were observed with regards to body weight, food and water consumption, hematology, clinical biochemistry, or histopathology of various organs (lung, heart, liver, spleen, and kidney). Results from intranasal exposure to choline chloride were comparable with their respective controls and to other treatment groups. The no-observed-adverse-effect-level (NOAEL) for oral and intranasally administered choline chloride is ≥ 200 mg/kg/day.

A 72–week feeding study was conducted in rats administered 500 mg/kg/day of choline chloride; the animals were observed for 30 weeks post exposure. There were no significant differences between the control and treated group in relation to body weights, relative liver weight, survival rates, and the number of neoplastic liver nodules, hepatocellular carcinomas, lung tumors, leukemia, or other tumors. This study resulted in a NOAEL of 500 mg/kg/day (the highest dose tested).

Choline is a precursor to the vital neurotransmitter acetylcholine. Studies show that choline has beneficial effects on the nervous system and memory. Choline is necessary to promote proper development in the fetus and infant and prevent cognitive problems. Choline chloride is not expected to cause neurotoxicity and it is not a known endocrine disruptor nor are its metabolites related to any class of known endocrine disruptors. Based on the results of the *in vitro* and *in vivo* studies the Agency concluded that choline chloride is not expected to be carcinogenic or mutagenic.

Since the 1930's choline chloride has been used as a widespread nutrient in animal feed without adverse effects reported on fertility or teratogenicity. The Food and Drug Administration (FDA) requires choline be added to non-milk based infant formulas at a minimum concentration of 7 mg for every 100 kilocalories (21 CFR 107.100). Although one study did show developmental effects, they were only seen at very high doses (≥ 4,160 mg/kg/day) and only in the presence of maternal toxicity. There were no observed adverse effects for both mothers and pups exposed to 1,250 mg/kg/day. Based on this information the Agency concluded that choline chloride, when used as an inert ingredient, will not cause reproductive or developmental toxicity and therefore, does not anticipate an increased risk to infants and children.

*B. Toxicological Points of Departure/Levels of Concern*

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which the NOAEL and the LOAEL of concern are identified. Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level – generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD) – and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm*.

No toxicological endpoints have been identified in the available toxicological database. Considering the low toxicity of choline chloride, its natural occurrence, the body's ability to synthesize the nutrient, and the relatively small amount in the formulation, it is not necessary to conduct a quantitative risk assessment.

*C. Exposure Assessment*

1. *Dietary exposure from food and feed uses*. In evaluating dietary exposure to choline hydroxide, EPA considered exposure under the proposed exemption from the requirement of a tolerance. EPA assessed dietary exposures from choline hydroxide in food as follows:

Choline is a natural component of a variety of commonly consumed foods (e.g. (per 100 g food) - eggs (251 mg), wheat germ (152 mg), bacon (125 mg), dried soybeans (116 mg), pork (103 mg), cod (83 mg), beef (80 mg), chicken (70 mg), and salmon (65 mg)) United States Department of Agriculture (USDA, 2004). It has been added as a supplement to infant formula in the United States for decades (Politizer Shronts, 1997). In addition to dietary consumption, choline is made endogenously in the human body.

Humans are currently exposed to choline on a daily basis through commonly eaten foods (both naturally occurring and when added as a nutrient) and through the bodies natural ability to synthesize the nutrient. It is unlikely that the exposure from choline chloride, when used as an inert ingredient applied preharvest to food commodities, will significantly increase the natural concentration of choline present in foods. Because of its high water solubility it is expected that most of the inert will be washed from the plant prior to consumption. Once in water, it will be broken into in a quaternary hydroxyl alkylammonium ion and a chloride ion.

2. *Dietary exposure from drinking water*. A quantitative drinking water assessment was not performed because it is expected that upon contact with water choline chloride will be broken into a quaternary hydroxyl alkylammonium ion and a chloride ion. Therefore, direct contact with choline hydroxide is not expected through drinking water.

3. *From non-dietary exposure*. The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (e.g., textiles (clothing and diapers), carpets, swimming pools, and hard surface disinfection on walls, floors, tables).

Occupational exposure to choline chloride is expected via dermal and inhalation routes of exposure. Since an endpoint for risk assessment was not identified, a quantitative occupational and residential exposure assessment for choline hydroxide was not conducted. Residential (dermal and inhalation) exposures from home garden uses are possible.

4. *Cumulative effects from substances with a common mechanism of toxicity*. Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the

cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity."

EPA has not found choline hydroxide to share a common mechanism of toxicity with any other substances, and choline hydroxide does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that choline hydroxide does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative*.

*D. Safety Factor for Infants and Children*

There is no evidence of increased susceptibility in the available developmental toxicity study in mice. Choline is a natural component of a variety of commonly consumed foods. It has been added as a supplement to infant formula in the United States for decades. In addition to dietary consumption of choline, choline is made endogenously in the human body. Choline is a precursor to the vital neurotransmitter acetylcholine. Studies show that choline has beneficial effects on the nervous system and memory. Choline is necessary to promote proper development in the fetus and infant and prevent cognitive problems. Choline hydroxide is not expected to cause neurotoxicity. Exposure to choline hydroxide is not expected to significantly increase the pre-existing levels found in commonly eaten foods. Due to the negligible anticipated crop residues and subsequent exposure, the low toxicity of the chemical and its metabolites, and the body's need for choline from a dietary source, EPA has determined that a quantitative risk assessment using safety factors is unnecessary. For the same reason, no additional safety factor for the protection of infants and children is needed.

*E. Aggregate Risks and Determination of Safety*

Taking into consideration all available information on choline hydroxide, EPA has determined that there is a reasonable certainty that no harm to any population subgroup will result from aggregate exposure to choline hydroxide under reasonably foreseeable circumstances.

In addition to its low toxicity, exposure to choline hydroxide will be limited. The expected exposure pathway is via the oral and the dermal routes. Humans are currently exposed to choline on a daily basis through commonly eaten foods (both naturally occurring and when added as a nutrient) and through the bodies natural ability to synthesize the nutrient. It is unlikely that the exposure from choline hydroxide, when used as an inert ingredient applied preharvest to food commodities, will significantly increase the natural concentration of choline and chloride in foods. Choline is also found naturally in the environment.

Taking into consideration all available information on choline hydroxide, it has been determined that there is a reasonable certainty that no harm to any population subgroup, including infants and children, will result from aggregate exposure to this chemical. Therefore, the establishment of an exemption from tolerance under 40 CFR 180.920 for residues of choline hydroxide when used as an inert ingredient in pesticide formulations applied to preharvest applications of pesticides, is safe under FFDCA section 408.

## V. Other Considerations

*A. Analytical Enforcement Methodology*

An analytical method is not required for enforcement purposes since the Agency is establishing an exemption from the requirement of a tolerance without any numerical limitation.

*B. International Residue Limits*

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint U.N. Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established a MRL for choline hydroxide.

## VI. Conclusions

Therefore, an exemption from the requirement of a tolerance is established under 40 CFR 180.920 for choline hydroxide (CAS Reg. No. 123–41–1) when used as an inert ingredient (in acidic herbicides to act as a neutralizer]) in pesticide formulations applied to preharvest applications.

## VII. Statutory and Executive Order Reviews

This final rule establishes a tolerance under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR

67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

### VIII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a "major rule" as defined by 5 U.S.C. 804(2).

### List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: August 20, 2010.

**Lois Rossi,**

*Director, Registration Division, Office of Pesticide Programs.*

■ Therefore, 40 CFR part 180 is amended as follows:

## PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

**Authority:** 21 U.S.C. 321(q), 346a and 371.

■ 2. In §180.920 add alphabetically the following inert ingredient to the table to read as follows:

**§ 180.920 Inert ingredients used pre-harvest; exemptions from the requirement of a tolerance.**

| Inert ingredients | Limits | Uses |
|---|---|---|
| * * * | * * * * | |
| Choline hydroxide (CAS Reg No. 123–41–1) | Without limitation | Neutralizer |
| * * * | * * * * | |

[FR Doc. 2010–21544 Filed 8–31–10; 8:45 am]

**BILLING CODE 6560–50–S**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 180

**[EPA–HQ–OPP–2009–0682; FRL–8841–9]**

## Spiromesifen; Pesticide Tolerances

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes tolerances for residues of spiromesifen in or on leaf petioles subgroup 4B, dry pea seed, spearmint tops, and peppermint tops. The Interregional Research Project Number 4 (IR-4) and Bayer CropScience requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

**DATES:** This regulation is effective September 1, 2010. Objections and requests for hearings must be received on or before November 1, 2010, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

**ADDRESSES:** EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–0682. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** Andrew Ertman, Registration Division, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9367; e-mail address: *ertman.andrew@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this Action Apply to Me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to those engaged in the following activities:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

*B. How Can I Get Electronic Access to Other Related Information?*

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.gpoaccess.gov/ecfr*.

*C. How Can I File an Objection or Hearing Request?*

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must

identify docket ID number EPA–HQ–OPP–2009–0682 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before November 1, 2010. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2009–0682, by one of the following methods:

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

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

## II. Summary of Petitioned-For Tolerance

In the **Federal Register** of March 24, 2010 (75 FR 14156) (FRL–8815–6), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP) 0E7684 by IR-4, 500 College Road East, Suite 201 W, Princeton, NJ 08540 and PP 9F7602 by Bayer CropScience, 2 T.W. Alexander Drive, P.O. Box 12014, Research Triangle Park, NC 27709. The petitions requested that 40 CFR 180.607 be amended by establishing tolerances for residues of the insecticide spiromesifen, 2-oxo-3-(2,4,6-trimethylphenyl)-1-oxaspiro[4.4]non-3-en-4-yl 3,3-dimethylbutanoate, and its enol metabolite, 4-hydroxy-3-(2,4,6-trimethylphenyl)-1-oxaspiro[4.4]non-3-en-2-one, calculated as parent compound equivalents, in or on pea, dry, seed at 0.15 parts per million (ppm); spearmint, tops at 25 ppm; and peppermint, tops at 25 ppm (PP 0E7684) and vegetable, leafy petiole, crop subgroup 4B at 6.0 ppm (PP 9F7602). The notice referenced summaries of the petitions prepared by Bayer CropScience, the registrant, which is available in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has recommended for tolerances levels different from those proposed in the petitions for dry pea seed, spearmint tops, and peppermint tops. The reason for these changes are explained in Unit IV.D.

## III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) of FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue...."

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for spiromesifen including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with spiromesifen follows.

### *A. Toxicological Profile*

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Spiromesifen shows low acute toxicity via the oral, dermal and inhalation routes of exposure. It was neither an eye nor dermal irritant, but showed moderate potential as a contact sensitizer. In short- and long-term animal toxicity tests, the critical effects observed were loss of body weight, adrenal effects (discoloration, decrease in fine vesiculation, and the presence of cytoplasmic eosinophilia in zona fasciculata cells), thyroid effects (increased thyroid stimulating hormone, increased thyroxine binding capacity, decreased T3 and T4 levels, colloidal alteration and thyroid follicular cell hypertrophy), liver effects (increased alkaline phosphatase, ALT and decreased cholesterol, triglycerides), and spleen effects (atrophy, decreased spleen cell count, and increased macrophages). Spiromesifen shows no significant developmental or reproductive effects, is not likely to be carcinogenic based on bioassays in rats and mice, and lacks *in vivo* and *in vitro* mutagenic effects. Spiromesifen is not considered a neurotoxic chemical based on the chemical's mode of action and the available data from multiple studies, including acute and subchronic neurotoxicity studies.

Specific information on the studies received and the nature of the adverse effects caused by spiromesifen as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in the document titled "Spiromesifen: Human-Health Risk Assessment for Proposed Section 3 Uses on Leaf Petioles Subgroup 4B; Pea, Dry, Seed; Spearmint, Tops; and Peppermint, Tops" on pages 22 to 26 in docket ID number EPA–HQ–OPP–2009–0682.

### *B. Toxicological Points of Departure/Levels of Concern*

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern

are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level – generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD) – and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm*.

A summary of the toxicological endpoints for spiromesifen used for human risk assessment is shown in the Table of this unit.

TABLE —SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR SPIROMESIFEN FOR USE IN HUMAN HEALTH RISK ASSESSMENT

| Exposure/Scenario | Point of Departure and Uncertainty/Safety Factors | RfD, PAD, LOC for Risk Assessment | Study and Toxicological Effects |
|---|---|---|---|
| Acute dietary (general population and all population subgroups | An endpoint of concern attributable to a single dose was not identified. An aRfD was not established. | | |
| Chronic dietary (All populations) | NOAEL= 2.2 mg/kg/day $UF_A$ = 10x $UF_H$ = 10x FQPA SF = 1x | Chronic RfD = 0.022 mg/kg/day cPAD = 0.022 mg/kg/day | 2-generation reproduction study in rats. The parental systemic LOAEL: 13.2 mg/kgbw/day based on significantly decreased spleen weight (absolute and relative in parental females and $F_1$ males) and significantly decreased growing ovarian follicles in females. |
| Cancer (Oral, dermal, inhalation) | Spiromesifen has been classified as "not likely to be carcinogenic to humans." | | |

$UF_A$ = extrapolation from animal to human (interspecies). $UF_H$ = potential variation in sensitivity among members of the human population (intraspecies). $UF_L$ = use of a LOAEL to extrapolate a NOAEL. $UF_S$ = use of a short-term study for long-term risk assessment. $UF_{DB}$ = to account for the absence of data or other data deficiency. FQPA SF = Food Quality Protection Act Safety Factor. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. MOE = margin of exposure. LOC = level of concern.

*C. Exposure Assessment*

1. *Dietary exposure from food and feed uses*. In evaluating dietary exposure to spiromesifen, EPA considered exposure under the petitioned-for tolerances as well as all existing spiromesifen tolerances in 40 CFR 180.607. EPA assessed dietary exposures from spiromesifen in food as follows:

i. *Acute exposure*. Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1–day or single exposure. No such effects were identified in the toxicological studies for spiromesifen; therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure*. In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994-1996 and 1998 Cummulative Survey of Food Intake by Individuals. As to residue levels in food, EPA assumed tolerance-level residues for all commodities except for the leafy-greens and leafy Brassica greens subgroups (4A and 5B). The tolerance values for leafy vegetables and spearmint and peppermint tops and oil were adjusted upward to account for the metabolite BSN 2060-4-hydroxymethyl (free and conjugated), which is a residue of concern in leafy vegetables for risk assessment purposes only. EPA used data from the lettuce metabolism studies to create a tolerance-equivalent value for the parent spiromesifen and the BSN 2060-4-hydroxymethyl metabolite to estimate residues in leafy crops. Dietary Exposure Evaluation Model (DEEM) 7.81 default processing factors and 100 percent crop treated were assumed for all commodities.

iii. *Cancer*. Based on the data summarized in Unit III.A., EPA has concluded that spiromesifen does not pose a cancer risk to humans. Therefore, a dietary exposure assessment for the purpose of assessing cancer risk is unnecessary.

iv. *Anticipated residue and percent crop treated (PCT) information*. EPA did not use anticipated residue and/or PCT information in the dietary assessment for spiromesifen. As discussed above, for the leafy-greens and leafy Brassica greens subgroups (4A and 5B) and spearmint and peppermint tops and oil, the residue values were adjusted upward to account for the metabolite BSN 2060-4-hydroxymethyl (free and conjugated).

2. *Dietary exposure from drinking water*. The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for spiromesifen in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of spiromesifen. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm*.

Based on the Pesticide Root Zone Model /Exposure Analysis Modeling System (PRZM/EXAMS) and Screening Concentration in Ground Water (SCI-GROW) models the estimated drinking water concentrations (EDWCs) of spiromesifen for chronic exposures for non-cancer assessments are estimated to

be 188 ppb for surface water and 86 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For chronic dietary risk assessment, the water concentration of value 188 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure*. The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Spiromesifen is not registered for any specific use patterns that would result in residential exposure.

4. *Cumulative effects from substances with a common mechanism of toxicity*. Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity."

EPA has not found spiromesifen to share a common mechanism of toxicity with any other substances, and spiromesifen does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that spiromesifen does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative*.

*D. Safety Factor for Infants and Children*

1. *In general*. Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity*. There is no evidence of increased susceptibility of rats or rabbits to *in utero* and/or postnatal exposure to spiromesifen. In the prenatal developmental toxicity studies in rats and rabbits and in the 2-generation reproduction study in rats, developmental toxicity to the offspring occurred at equivalent or higher doses than parental toxicity.

3. *Conclusion*. EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for spiromesifen is complete and no additional immunotoxicity or neurotoxicty testing is required. The rationale is described below:

a. Because spleen effects were seen in several toxicity studies, the registrant pursued specialized immunotoxicity studies in rats and mice that were both negative. These studies satisfy the revised 40 CFR part 158 requirement for immunotoxicity testing. In addition, the endpoints selected for the risk assessment are considered protective of any possible immunotoxic effects.

b. There is no concern for neurotoxicity resulting from exposure to spiromesifen. Neurotoxic effects such as reduced motility, spastic gait, increased reactivity, tremors, clonic-tonic convulsions, reduced activity, labored breathing, vocalization, avoidance reaction, piloerection, limp, cyanosis, squatted posture, and salivation were observed in two studies (5–day inhalation and subchronic oral rat) at high doses (134 and 536 milligrams/kilogram/day (mg/kg/day), respectively). These effects were neither reflected in neurohistopathology nor in other studies. Because these effects were not observed in the acute and subchronic neurotoxicity studies, they were not considered reproducible. Thus, based on the chemical's mode of action and the available data from multiple studies, the chemical is not considered neurotoxic.

ii. There is no evidence that spiromesifen results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2-generation reproduction study. A developmental neurotoxicity study is not required.

iii. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100 PCT and tolerance-level residues. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to spiromesifen in drinking water. These assessments will not underestimate the exposure and risks posed by spiromesifen.

*E. Aggregate Risks and Determination of Safety*

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk*. An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. No adverse effect resulting from a single oral exposure was identified and no acute dietary endpoint was selected. Therefore, spiromesifen is not expected to pose an acute risk.

2. *Chronic risk*. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to spiromesifen from food and water will utilize 78% of the cPAD for all infants <1 year old, the population group receiving the greatest exposure. There are no residential uses for spiromesifen.

3. *Short- and intermediate-term risk*. Short-term and intermediate-term aggregate exposure takes into account short-term and intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

A short-term and intermediate-term adverse effect was identified; however, spiromesifen is not registered for any use patterns that would result in short-term or intermediate-term residential exposure. Short-term and intermediate-term risk is assessed based on short-term and intermediate-term residential exposure plus chronic dietary exposure. Because there is no short-term or intermediate-term residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess short-term and intermediate-term risk), no further assessment of short-term or intermediate-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating short-term and intermediate-term risk for spiromesifen.

4. *Aggregate cancer risk for U.S. population*. Based on the lack of evidence of carcinogenicity in two

adequate rodent carcinogenicity studies, spiromesifen is not expected to pose a cancer risk to humans.

5. *Determination of safety*. Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to spiromesifen residues.

## IV. Other Considerations

### *A. Analytical Enforcement Methodology*

Adequate enforcement methodology (high-performance liquid chromatography/mass spectroscopy (HPLC/MS/MS)/Method 00631/M001 and Method 110333) is available to enforce the tolerance expression. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov*.

### *B. International Residue Limits*

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint U.N. Food and Agriculture Organization/ World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

No Codex or Canadian MRLs have been established for spiromesifen in/on leaf petioles subgroup 4B; pea, dry, seed; spearmint, tops; and peppermint, tops.

### *C. Revisions to Petitioned-For Tolerances*

*Pea, dry, seed*: The Agency is modifying the tolerance from the proposed level of 0.15 to 0.20. The adjusted field trial data for dry peas were evaluated using the Agency's maximum-likelihood estimation (MLE) spreadsheet and then the Agency's maximum-residue limit (MRL) tolerance spreadsheet as described in the Guidance for Setting Pesticide Tolerances Based on Field Trial Data SOP to determine the appropriate tolerance level. The tolerance spreadsheet recommended a tolerance of 0.20 ppm for total residues of spiromesifen in/on dry peas.

*Spearmint, tops and peppermint, tops*: The Agency is modifying the tolerances from the proposed level of 25 ppm to 45 ppm. The adjusted field trial data for mint were evaluated using the Agency's MRL tolerance spreadsheet as described in the Guidance for Setting Pesticide Tolerances Based on Field Trial Data SOP to determine the appropriate tolerance level. The tolerance spreadsheet recommended a tolerance of 45 ppm for total residues of spiromesifen for both spearmint and peppermint tops.

Finally, EPA has revised the tolerance expression to clarify:

1. That, as provided in FFDCA section 408(a)(3), the tolerance covers metabolites and degradates of spiromesifen not specifically mentioned; and

2. That compliance with the specified tolerance levels is to be determined by measuring only the specific compounds mentioned in the tolerance expression.

## V. Conclusion

Therefore, tolerances are established for residues of the insecticide/miticide spiromesifen, including its metabolites and degradates, determined by measuring only the sum of spiromesifen [2-oxo-3-(2,4,6-trimethylphenyl)-1-oxaspiro[4.4]non-3-en-4-yl 3,3-dimethylbutanoate], its enol metabolite (4-hydroxy-3-(2,4,6-trimethylphenyl)-1-oxaspiro[4.4]non-3-en-2-one), calculated as the stoichiometric equivalent of spiromesifen, in or on pea, dry, seed at 0.20 ppm; spearmint, tops at 45 ppm; peppermint, tops at 45 ppm; and leaf petiole subgroup 4B at 6.0 ppm.

## VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

## VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of

Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a "major rule" as defined by 5 U.S.C. 804(2).

**List of Subjects in 40 CFR Part 180**

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: August 20, 2010.

**Lois Rossi,**

*Director, Registration Division, Office of Pesticide Program.*

■ Therefore, 40 CFR chapter I is amended as follows:

## PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

**Authority:** 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.607 is amended by alphabetically adding the following commodities to the table in paragraph (a)(1) and revising paragraphs (a)(1) introductory text, (a)(2) introductory text, (b) introductory text, and (d) introductory text to read as follows:

**§ 180.607 Spiromesifen; tolerances for residues.**

(a) *General.* (1) Tolerances are established for residues of the insecticide/miticide spiromesifen, including its metabolites and degradates, in or on the commodities listed below. Compliance with the tolerance levels specified below is to be determined by measuring only the sum of spiromesifen [2-oxo-3-(2,4,6-trimethylphenyl)-1-oxaspiro[4.4]non-3-en-4-yl 3,3-dimethylbutanoate] and 4-hydroxy-3-(2,4,6-trimethylphenyl)-1-oxaspiro[4.4]non-3-en-2-one, calculated as the stoichiometric equivalent of spiromesifen, in or on the following primary crop commodities:

| Commodity | Parts per million |
|---|---|
| * * * * * | |
| Leaf petiole subgroup 4B ..... | 6.0 |
| * * * * * | |
| Pea, dry, seed ..... | 0.20 |
| Peppermint, tops .. | 45 |
| Spearmint, tops .... | 45 |
| * * * * * | |

(2) Tolerances are established for residues of the insecticide/miticide spiromesifen, including its metabolites and degradates, in or on the commodities listed below. Compliance with the tolerance levels specified below is to be determined by measuring only the sum of spiromesifen [2-oxo-3-(2,4,6-trimethylphenyl)-1-oxaspiro[4.4]non-3-en-4-yl 3,3-dimethylbutanoate] and its metabolites containing the 4-hydroxy-3-(2,4,6-trimethylphenyl)-1-oxaspiro[4.4]non-3-en-2-one and 4-hydroxy-3-[4-(hydroxymethyl)-2,6-dimethylphenyl]-1-oxaspiro[4.4]non-3-en-2-one moieties, calculated as the stoichiometric equivalent of spiromesifen, in the following livestock commodities:

* * * * *

(b) *Section 18 emergency exemptions.* Time-limited tolerances specified in the following table are established for residues of the insecticide/miticide spiromesifen, including its metabolites and degradates, in or on the commodities listed below. Compliance with the tolerance levels specified below is to be determined by measuring only the sum of spiromesifen [2-oxo-3-(2,4,6-trimethylphenyl)-1-oxaspiro[4.4]non-3-en-4-yl 3,3-dimethylbutanoate] and 4-hydroxy-3-(2,4,6-trimethylphenyl)-1-oxaspiro[4.4]non-3-en-2-one, calculated as the stoichiometric equivalent of spiromesifen, in or on the specified agricultural commodities, resulting from use of the pesticide pursuant to FIFRA section 18 emergency exemptions. The tolerances expire and are revoked on the date specified in the table.

* * * * *

(d) *Indirect or inadvertent residues.* Tolerances are established for the inadvertent or indirect residues of the insecticide/miticide spiromesifen, including its metabolites and degradates, in or on the commodities listed below. Compliance with the tolerance levels specified below is to be determined by measuring only the sum of spiromesifen [2-oxo-3-(2,4,6-trimethylphenyl)-1-oxaspiro[4.4]non-3-en-4-yl 3,3-dimethylbutanoate], 4-hydroxy-3-(2,4,6-trimethylphenyl)-1-oxaspiro[4.4]non-3-en-2-one, and its metabolites containing the 4-hydroxy-3-[4-(hydroxymethyl)-2,6-dimethylphenyl]-1-oxaspiro[4.4]non-3-en-2-one moiety, calculated as the stoichiometric equivalent of spiromesifen, in the following rotational crop commodities:

* * * * *

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**BILLING CODE 6560–50–S**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 180

**[EPA–HQ–OPP–2009–0890; FRL–8840–9]**

### Bifenazate; Pesticide Tolerances

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes tolerances for residues of bifenazate in or on multiple commodities which are identified and discussed later in this document. Interregional Research Project #4 (IR-4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA). This regulation additionally deletes the time-limited tolerance for potato, as the tolerance expired on December 31, 2006, and deletes the time-limited tolerances for tart cherry, soybean hulls, soybean meal, soybean refined oil, and soybean seed, as the tolerances expired on December 31, 2009.

**DATES:** This regulation is effective September 1, 2010. Objections and requests for hearings must be received on or before November 1, 2010, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

**ADDRESSES:** EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–0890. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** Andrew Ertman, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington,

DC 20460–0001; telephone number: (703) 308–9367; e-mail address: *ertman.andrew@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this Action Apply to Me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to those engaged in the following activities:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

### *B. How Can I Get Electronic Access to Other Related Information?*

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.gpoaccess.gov/ecfr*.

### *C. How Can I File an Objection or Hearing Request?*

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2009–0890 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before November 1, 2010. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2009–0890, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

## II. Summary of Petitioned-For Tolerance

In the **Federal Register** of February 4, 2010 (75 FR 5790) (FRL–8807–5), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 9E7642) by Interregional Research Project #4 (IR-4), 500 College Road East, Suite 201W, Princeton, NJ 08540. The petition requested that 40 CFR 180.572 be amended by establishing tolerances for residues of the the insecticide bifenazate, (1-methylethyl 2-(4-methoxy[1,1′-biphenyl]-3-yl)hydrazinecarboxylate) and diazinecarboxylic acid, 2-(4-methoxy-[1,1′-biphenyl]-3-yl), 1-methylethyl ester (expressed as bifenazate), in or on sugar apple, cherimoya, atemoya, custard apple, ilama, soursop, and biriba at 1.5 parts per million (ppm); avocado at 7.0 ppm; fruit, small, vine climbing subgroup 13–07F, except fuzzy kiwi fruit at 0.75 ppm; and berry, low growing, subgroup 13–07G at 1.5 ppm. That notice referenced a summary of the petition prepared by Chemtura Corporation, the registrant, which is available in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has changed the tolerances for sugar apple, cherimoya, atemoya, custard apple, ilama, soursop, and biriba from the proposed level of 1.5 ppm to 1.6 ppm and for fruit, small, vine climbing subgroup 13–07F, except fuzzy kiwi tolerance from the proposed level of .75 ppm to 1.0 ppm. The reason for these changes is explained in Unit IV.D.

## III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) of FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue...."

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for bifenazate including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with bifenazate follows.

### *A. Toxicological Profile*

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Bifenazate is not acutely toxic by the oral, inhalation, or dermal routes of exposure. It is minimally irritating to the eye and slightly-irritating to the skin. Bifenazate is a dermal sensitizer by the Magnusson/Kligman method, but not the Buehler method. Subchronic

and chronic studies in rats and dogs indicate that the liver and hematopoietic system (spleen and/or bone marrow with associated hematological findings) are the primary target organs in these species, with additional toxicity in the kidney (chronic dog) and adrenal gland (male rats) also identified. Similarly, the hematopoietic system (spleen) was the primary target organ in the repeat-dose dermal toxicity study. Also associated with this toxicity in several studies were decreased body weight, body-weight gain, and food consumption. No evidence of carcinogenicity was seen in the rat and mouse studies and the Agency has classified bifenazate as "not likely" to be a human carcinogen by any relevant route of exposure. A full battery of mutagenicity studies were negative for mutagenic or clastogenic activity. The developmental studies in rats and rabbits did not demonstrate increased sensitivity of fetuses to bifenazate. Similarly, increased qualitative or quantitative susceptibility to offspring were not observed with bifenazate during pre- or postnatal development in the reproduction study. There was no evidence of neurotoxicity (clinical signs or neuropathology) in any of the toxicology studies conducted with bifenazate. Therefore, a bifenazate developmental neurotoxicity (DNT) study was not required by the Agency.

Specific information on the studies received and the nature of the adverse effects caused by bifenazate as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in the document titled "Bifenazate (000586); Petition to Add New Uses on: Avocado, Tropical Fruits (Sugar Apple, Cherimoya, Atemoya, Custard Apple, Ilama, Soursop, and Biriba), Small Vine Climbing Fruit (Subgroup 13–07F), and Low-Growing Berry (Subgroup 13–07G). HED Human-Health Risk Assessment," pp. 26–27 in docket ID number EPA–HQ–OPP–2009–0890.

*B. Toxicological Points of Departure/Levels of Concern*

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern (LOC) to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which the NOAEL and the LOAEL of concern are identified. Uncertainty/safety factors (U/SF) are used in conjunction with the POD to calculate a safe exposure level – generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD) – and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm*.

A summary of the toxicological endpoints for bifenazate used for human risk assessment is shown in the Table of this unit.

TABLE—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR BIFENAZATE FOR USE IN HUMAN HEALTH RISK ASSESSMENT

| Exposure/Scenario | Point of Departure and Uncertainty/Safety Factors | RfD, PAD, LOC for Risk Assessment | Study and Toxicological Effects |
|---|---|---|---|
| Acute dietary (all populations) | An acute dietary endpoint was not selected based on the absence of an appropriate endpoint attributed to a single dose. | | |
| Chronic dietary (All populations) | NOAEL= 1.0 milligrams/kilogram/day (mg/kg/day) $UF_A$ = 10x<br>$UF_H$ = 10x<br>FQPA SF = 1x | Chronic RfD = 0.01 mg/kg/day<br>cPAD = 0.01 mg/kg/day | Chronic Toxicity in Dogs<br>LOAEL = 8.9/10.4 mg/kg/day Male/Female (M/F) based on changes in hematological and clinical chemistry parameters, and histopathology in bone marrow, liver, and kidney in the 1–year dog feeding study. |
| Incidental oral short-term (1 to 30 days) | NOAEL= 10 mg/kg/day $UF_A$ = 10x<br>$UF_H$ = 10x<br>FQPA SF = 1x | LOC for MOE ≤100 | Prenatal Developmental in Rats<br>Maternal LOAEL = 100 mg/kg/day based on clinical signs, decreased body weight and food consumption during the dosing period in the rat developmental study. |
| Incidental oral intermediate-term (1 to 6 months) | NOAEL= 0.9 mg/kg/day $UF_A$= 10x<br>$UF_H$= 10x<br>FQPA SF = 1x | LOC for MOE ≤100 | 90–Day Oral Toxicity non-Rodents-Dog<br>LOAEL = 10.4/10.7 mg/kg/day (M/F) based on changes in hematologic parameters in the 90–day subchronic dog study. |

TABLE—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR BIFENAZATE FOR USE IN HUMAN HEALTH RISK ASSESSMENT—Continued

| Exposure/Scenario | Point of Departure and Uncertainty/ Safety Factors | RfD, PAD, LOC for Risk Assessment | Study and Toxicological Effects |
|---|---|---|---|
| Short-, Intermediate- and Long-Term Dermal (1–30 days, 30 days– 6 months, and 6 months to lifetime) | Dermal study NOAEL = 80 mg/kg/day $UF_A$ = 10x<br>$UF_H$ = 10x<br>FQPA SF = 1x | LOC for MOE ≤100 | 21–Day Dermal Toxicity-Rat<br>LOAEL = 400 mg/kg/day based on decreased body weight and food consumption, hematologic effects, increased spleen weight and extramedullary hemapoiesis in the spleen in the 21–day dermal toxicity study in rats. |
| Inhalation short-term (1 to 30 days) | Oral study NOAEL= 10 mg/kg/day (inhalation absorption rate = 100%)<br>$UF_A$ = 10x<br>$UF_H$ = 10x<br>FQPA SF = 1x | LOC for MOE ≤100 | Prenatal Developmental in Rats<br>Maternal LOAEL = 100 mg/kg/day based on clinical signs, decreased body weight and food consumption during the dosing period in the rat developmental study. |
| Cancer (Oral, dermal, inhalation) | Bifenazate is classified as "not likely" to be a human carcinogen. | | |

$UF_A$ = extrapolation from animal to human (interspecies). $UF_H$ = potential variation in sensitivity among members of the human population (intraspecies). $UF_L$ = use of a LOAEL to extrapolate a NOAEL. $UF_S$ = use of a short-term study for long-term risk assessment. $UF_{DB}$ = to account for the absence of data or other data deficiency. FQPA SF = Food Quality Protection Act Safety Factor.

*C. Exposure Assessment*

1. *Dietary exposure from food and feed uses*. In evaluating dietary exposure to bifenazate, EPA considered exposure under the petitioned-for tolerances as well as all existing bifenazate tolerances in 40 CFR 180.572. EPA assessed dietary exposures from bifenazate in food as follows:

i. *Acute exposure*. Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1–day or single exposure. No such effects were identified in the toxicological studies for bifenazate; therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure*. In conducting the chronic dietary exposure assessment EPA used the food consumption data from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Continuing Survey of Food Intake by Individuals (CSFII). As to residue levels in food, EPA assumed that all commodities, except squash, peach, tomato and milk, contained tolerance-level residues. For squash, peach and tomato, EPA assumed residues were present at average field trial levels. For milk, the tolerance level was adjusted upward to account for all of the residues of concern for risk assessment. Default processing factors were assumed for all commodities except apple juice, grape juice, wine/sherry, tomato paste, and tomato puree. The processing factors for these commodities were based on data from processing studies. The chronic analysis also incorporated average percent crop treated (PCT) information for some registered commodities but assumed 100 PCT for the new uses.

iii. *Cancer*. Based on the data summarized in Unit III.A., EPA has concluded that bifenazate does not pose a cancer risk to humans. Therefore, a dietary exposure assessment for the purpose of assessing cancer risk is unnecessary.

Bifenazate contains hydrazine as part of its chemical structure. This side chain is structurally similar to unsymmetrical dimethyl hydrazine (UDMH), a category B2 animal carcinogen and possible human carcinogen. However, EPA has concluded that formation of free biphenyl hydrazine or other hydrazines is unlikely based on the results of submitted metabolism studies. The rat, livestock, and plant metabolism studies indicate that metabolism of bifenazate proceeds via oxidation of the hydrazine moiety of bifenazate to form D3598 (diazene). The D3598 is then metabolized to D1989 (methoxy biphenyl) and to bound residues by reaction with natural products. A radish metabolism study which specifically monitored for the formation of biphenyl hydrazine found none. Based on the results of the metabolism studies, especially the absence of biphenyl hydrazine in the radish metabolism study or in the excreta of rats in the rat metabolism study, EPA concluded that the formation of free hydrazines is unlikely. This conclusion is further supported by the lack of carcinogenic effects in the bifenazate carcinogenicity studies.

iv. *Anticipated residue and PCT information*. Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

- Condition a: The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain the pesticide residue.
- Condition b: The exposure estimate does not underestimate exposure for any significant subpopulation group.

• Condition c: Data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area.

In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by FFDCA section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

The Agency estimated the PCT for existing uses as follows:

Almond 5%; apple 5%; apricot 1%; cherry 1%; cucumber 1%; grape 5%; nectarine 5%; peach 10%; pear 10%; pecan 1%; pepper 1%; pistachio 1%; plum 5%; strawberry 30%; tomato 1%; walnut 1%; and watermelon 1%. One hundred PCT was assumed for all new uses and the remaining currently registered uses.

In most cases, EPA uses available data from USDA/National Agricultural Statistics Service (USDA/NASS), proprietary market surveys, and the National Pesticide Use Database for the chemical/crop combination for the most recent 6–7 years. EPA uses an average PCT for chronic dietary risk analysis. The average PCT figure for each existing use is derived by combining available public and private market survey data for that use, averaging across all observations, and rounding to the nearest 5%, except for those situations in which the average PCT is less than one. In those cases, 1% is used as the average PCT and 2.5% is used as the maximum PCT. EPA uses a maximum PCT for acute dietary risk analysis. The maximum PCT figure is the highest observed maximum value reported within the recent 6 years of available public and private market survey data for the existing use and rounded up to the nearest multiple of 5%.

The Agency believes that the three conditions discussed in Unit III.C.1.iv. have been met. With respect to Condition a, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimation. As to Conditions b and c, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available reliable information on the regional consumption of food to which bifenazate may be applied in a particular area.

2. *Dietary exposure from drinking water*. The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for bifenazate in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of bifenazate. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm*.

Based on the First Index Reservoir Screening Tool (FIRST) and Screening Concentration in Ground Water (SCI-GROW) models, the estimated drinking water concentrations (EDWCs) of bifenazate for chronic exposures for non-cancer assessments are estimated to be 11.2 parts per billion (ppb) for surface water and 0.044 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For chronic dietary risk assessment, the water concentration of value 11.2 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure*. The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Bifenazate is currently registered for the following residential non-dietary sites: Ornamental plants, including bedding plants, flowering plants, foliage plants, bulb crops, perennials, trees, and shrubs. There is a potential for short-term dermal and inhalation exposure of homeowners applying bifenazate on these sites. However, post-application exposures of adults and children from this use are expected to be negligible. Therefore, EPA assessed only short-term dermal and inhalation residential handler exposures for adults. Handler exposures were estimated assuming applications would be made using hose-end sprayers, since this application method is expected to result in higher exposures than other application methods, such as pump sprayers or similar devices. Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www.epa.gov/pesticides/trac/science/trac6a05.pdf*.

4. *Cumulative effects from substances with a common mechanism of toxicity*. Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity."

EPA has not found bifenazate to share a common mechanism of toxicity with any other substances, and bifenazate does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that bifenazate does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative*.

### *D. Safety Factor for Infants and Children*

1. *In general*. Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA SF. In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity*. The prenatal and postnatal toxicology database for bifenazate includes rat and rabbit developmental toxicity studies and a 2–generation reproduction toxicity study in rats. There was no quantitative or qualitative evidence of increased susceptibility of rats or rabbit fetuses to *in utero* exposure in the developmental studies, nor of rats following prenatal/postnatal exposure in the 2–generation reproduction study.

3. *Conclusion*. EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF

were reduced to 1X. That decision is based on the following findings:

• There are no residual uncertainties in the toxicity database. The bifenazate toxicological database is complete with the exception of an inhalation study, acute and subchronic neurotoxicity studies and an immunotoxicity study. The immunotoxicity and acute and subchronic neurotoxicity studies are now required as a part of new data requirements in the 40 CFR part 158 for conventional pesticide registration and a 28–day inhalation study has not been submitted. However, the Agency does not believe that conducting these studies will result in a lower POD than that currently used for overall risk assessment, and therefore, a database uncertainty factor (UFDB) is not needed to account for lack of these studies for the following reasons:

i. The toxicology database for bifenazate does not indicate that the immune system is the primary target organ. The observed effects on the immune system have been well characterized and were seen at dose(s) that produce evidence of overt systemic toxicity. These effects included increased spleen weight in females and histopathological changes in the spleen in males in a 90–day oral rat toxicity study, extramedullary hematopoiesis in the both sexes in a 21–day dermal toxicity study in rats, and changes in hematological parameters, clinical chemistry parameters in both sexes and histopathological effects in bone marrow (compensatory hyperplasia) in both sexes in a 1–year chronic toxicity study.

ii. The overall weight of evidence suggests that bifenazate does not directly target the immune system, and these findings may be due to secondary effect of overt systemic toxicity. Further, there is no evidence of neurotoxicity or neuropathology in the bifenazate database.

iii. A 28–day inhalation study is not available; however, the EPA has determined that the additional FQPA SF is not needed. Residential inhalation risk was estimated by calculating exposure using the Agency's Residential Standard Operational Procedure (SOPs). For chemicals with low vapor pressure ($7.5 \times 10^{-5}$ mmHg or below for outdoor uses at 20–30°C) these standard assumptions are expected to overestimate the exposure via the inhalation route. Bifenazate is such a compound and exposure through the inhalation route is expected to be minimal. Therefore, the risk estimate is conservative and is considered protective and the additional FQPA SF is not needed.

Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www.epa.gov/pesticides/trac/science/trac6a05.pdf.*

• There is no quantitative or qualitative evidence of increased susceptibility of rats or rabbit fetuses to *in utero* exposure in developmental studies, nor following prenatal/postnatal exposure to rats in the 2–generation reproduction study.

• A DNT is not required because there is no evidence of neurotoxicity or neuropathology in the bifenazate database.

• The dietary food and drinking water exposure assessments will not underestimate the potential exposures for infants and children; and the residential use (ornamentals) is not expected to result in post-application exposure to infants and children.

### *E. Aggregate Risks and Determination of Safety*

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the aPAD and cPAD. For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. No adverse effect resulting from a single oral exposure was identified and no acute dietary endpoint was selected. Therefore, bifenazate is not expected to pose an acute risk.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to bifenazate from food and water will utilize 81% of the cPAD for children 1 to 2 years old, the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of bifenazate is not expected.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Bifenazate is currently registered for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to bifenazate.

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded that food, water, and residential exposures aggregated result in aggregate MOEs greater than or equal to 1,800 for the U.S. population. The aggregate MOEs for adults take into consideration food and drinking water exposures as well as dermal and inhalation exposures of adults applying bifenazate to ornamentals in residential areas. Since residential exposure of infants and children is not expected, short-term aggregate risk for infants and children is the sum of the risk from food and water, which does not exceed the Agency's LOC.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

An intermediate-term adverse effect was identified; however, bifenazate is not registered for any use patterns that would result in intermediate-term residential exposure. Intermediate-term risk is assessed based on intermediate-term residential exposure plus chronic dietary exposure. Because there is no intermediate-term residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess intermediate-term risk), no further assessment of intermediate-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating intermediate-term risk for bifenazate.

5. *Aggregate cancer risk for U.S. population.* Based on the lack of evidence of carcinogenicity in two adequate rodent carcinogenicity studies, bifenazate is not expected to pose a cancer risk to humans.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to bifenazate residues.

## IV. Other Considerations

### *A. Analytical Enforcement Methodology*

Adequate enforcement methodology is available to enforce the tolerance expression. High-performance liquid chromatography (HPLC) Method UCC-D2341 is available as a primary enforcement method for determination

of the combined residues of bifenazate and its metabolite, diazinecarboxylic acid, 2-(4-methoxy-[1,1′-biphenyl]-3-yl), 1-methylethyl ester (expressed as bifenazate), in/on crop matrices. The method has undergone a successful validation and has been forwarded to the Food and Drug Administration (FDA) for inclusion in the Pesticide Analytical Manual (PAM) Volume II. In addition, a method utilizing a liquid chromatographic system with tandem mass spectrometers (LC/MS/MS) was recently submitted as a confirmatory method (Method NCL ME 245) and has been forwarded to FDA. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov*.

*B. International Residue Limits*

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

There are currently no established Codex or Mexican MRLs for bifenazate on the commodities included in the subject petition; however, Canadian MRLs are established for residues of bifenazate and its metabolite diazinecarboxylic acid, 2-(4-methoxy-[1,1′-biphenyl]-3-yl, 1-methylethyl ester in or on strawberry at 1.5 ppm, grapes at 1.0 ppm and raisins at 1.2 ppm. Thus, the tolerance expression is harmonized; and the MRL/tolerance levels for residues in strawberry, raisins and grapes are harmonized.

*C. Revisions to Petitioned-For Tolerances*

The residue data for sugar apple were entered into the Agency's tolerance spreadsheet using the Guidance for Setting Pesticide Tolerances Based on Field Trial Data SOP to determine an appropriate tolerance level. The results of this determination indicate that a tolerance level of 1.6 ppm is adequate for residues of bifenazate and its metabolite (expressed as bifenazate) in/on sugar apple rather than 1.5 ppm as originally proposed. This determination is translated to cherimoya, atemoya, custard apple, ilama, soursop, and biriba for tolerance setting purposes.

**V. Conclusion**

Therefore, tolerances are established for residues of bifenazate, (1-methylethyl 2-(4-methoxy[1,1′-biphenyl]-3-yl)hydrazinecarboxylate) and diazinecarboxylic acid, 2-(4-methoxy-[1,1′-biphenyl]-3-yl), 1-methylethyl ester (expressed as bifenazate), in or on sugar apple, cherimoya, atemoya, custard apple, ilama, soursop, and biriba at 1.6 ppm; avocado at 7.0 ppm; fruit, small, vine climbing subgroup 13–07F, except fuzzy kiwi fruit at 1.0 ppm; and berry, low growing, subgroup 13–07G at 1.5 ppm.

**VI. Statutory and Executive Order Reviews**

This final rule establishes tolerances under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

**VII. Congressional Review Act**

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a "major rule" as defined by 5 U.S.C. 804(2).

**List of Subjects in 40 CFR Part 180**

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: August 20, 2010.

**Lois Rossi,**

*Director, Registration Division, Office of Pesticide Programs.*

■ Therefore, 40 CFR chapter I is amended as follows:

## PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

**Authority:** 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.572 is amended by:

■ i. Alphabetically adding commodities to the table in paragraph (a)(1), and

■ ii. Revising the table in paragraph (b), so the amendments to paragraphs (a)(1) and (b) read as follows:

**§ 180.572 Bifenazate; tolerance for residues.**

(a)(1) * * *

| Commodity | Parts per million |
|---|---|
| * * * * * | |
| Atemoya | 1.6 |
| Avocado | 7.0 |
| * * * * * | |
| Berry, low-growing subgroup 13–07G | 1.5 |
| Biriba | 1.6 |
| * * * * * | |
| Cherimoya | 1.6 |
| * * * * * | |
| Custard apple | 1.6 |
| * * * * * | |
| Fruit, small, vine climbing subgroup 13–07F, except fuzzy kiwifruit | 1.0 |
| * * * * * | |
| Ilama | 1.6 |
| * * * * * | |
| Soursop | 1.6 |
| * * * * * | |
| Sugar apple | 1.6 |
| * * * * * | |

(b) * * *

| Commodity | Parts per million | Expiration/Revocation Date |
|---|---|---|
| Timothy, forage | 50 | 12/31/10 |
| Timothy, hay | 150 | 12/31/10 |

[FR Doc. 2010–21719 Filed 8–31–10; 8:45 am]

BILLING CODE 6560–50–S

## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

### 49 CFR Parts 107, 171, 172, 173, 176, 177, 179, and 180

**[Docket No. PHMSA–2010–0195 (HM–244C)]**

**RIN 2137–AE61**

### Hazardous Materials: Minor Editorial Corrections and Clarifications

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This final rule corrects editorial errors, makes minor regulatory changes and, in response to requests for clarification, improves the clarity of certain provisions in the Hazardous Materials Regulations. The intended effect of this rule is to enhance the accuracy and reduce misunderstandings of the regulations. The amendments contained in this rule are non-substantive changes and do not impose new requirements.

**DATES:** *Effective Date:* October 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** Deborah Boothe, Office of Hazardous Materials Standards, 202–366–8553, PHMSA, East Building, PHH–10, 1200 New Jersey Avenue, SE., Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:**

### I. Background

The Pipeline and Hazardous Materials Safety Administration (PHMSA) annually reviews the Hazardous Materials Regulations (HMR; 49 CFR parts 171–180) to identify typographical and other errors, outdated addresses or other contact information, and similar errors. In this final rule, we are correcting typographical errors, incorrect CFR references and citations, inconsistent use of terminology, misstatements of certain regulatory requirements and inadvertent omissions of information. Because these amendments do not impose new requirements, notice and public comment procedures are unnecessary. By making these amendments effective without the customary 30-day delay following publication, the changes will appear in the next revision of the 49 CFR.

### II. Section by Section Review

The following is a summary by section of the minor editorial corrections and clarifications made in this final rule. The summary does not include minor editorial corrections such as punctuation errors or similar minor revisions.

*Part 107*

Section 107.117

This section sets forth conditions and procedures for emergency processing for an application for a special permit. The daytime telephone number for the Federal Motor Carrier Administration in paragraph (d)(3) is no longer correct. Accordingly, we are revising this contact number.

Section 107.329

This section sets forth the maximum and minimum civil penalties for violations of the Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.,* and violations of regulations issued pursuant to that law. Those maximum and minimum penalties were most recently adjusted on December 29, 2009 (74 FR 68701) to consider the effects of inflation since reauthorization of the Federal hazardous material transportation law in August 2005. We found that the inflation adjustment in the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. 2461 note) (the Act)—the change in the CPI–U over the prescribed period—was 12.5%, but that the Act limited the adjustment of the maximum and minimum civil penalties to 10%. These adjusted maximum and minimum civil penalties apply to any violation occurring on or after January 1, 2010.

More recently, it has been called to our attention that we did not apply the "rounding" requirement in Section 5 of the Act in making adjustments to the minimum civil penalty amounts. Applying the 12.5% increase in the CPI–U to the $450 minimum penalty for a violation related to training produces an increase of $56.25, which would be rounded to $100—except for the limitation in the Act that the initial adjustment may not exceed 10%. Thus, the adjusted minimum penalty of $495 for a violation related to training was correct. However, when the $250 minimum penalty amount for other violations is increased by 12.5%, the result would be an increase of $31.25, which must be rounded to the nearest $100—or $0. Thus, we should have left the minimum civil penalty for other violations at $250. Accordingly, we are correcting this error in both § 107.329 and § 171.1(g). PHMSA does not believe that the improper $275 civil penalty amount has been used in any enforcement case arising out of

violations that occurred on or after January 1, 2010, and we will continue to use the proper $250 amount in such enforcement cases that have arisen since that date.

*Part 171*

Section 171.6

Section 171.6 consolidates and displays the control numbers assigned to the HMR collections of information by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. This section complies with the requirements of 5 CFR 1320.7(f), 1320.12, 1320.13 and 1320.14 (OMB regulations implementing the Paperwork Reduction Act of 1995) for the display of control numbers assigned by OMB to collections of information of the HMR. In paragraph (b)(2), the table of OMB control numbers is revised to update affected sections for OMB control numbers 2137–0022 and 2137–0572.

Section 171.7

Paragraph (b) of § 171.7 lists materials that are "informational materials not requiring incorporation by reference" into the HMR. In the preamble to the HM–244A final rule published in the **Federal Register** on October 1, 2008 (73 FR 57001), we stated that the Compressed Gas Association's (CGA) publication CGA C–1.1, Personnel Training and Certification Guidelines for Cylinder Requalification By the Volumetric Expansion Method, could be used as guidance material to assist cylinder requalifiers in setting up their training procedures and was not to be considered as a stand alone tool for training persons on how to perform requalification of cylinders using the volumetric expansion test method. In that final rule, we also stated we were removing the entries in §§ 171.7(b) and 180.205(g)(6) that refer to the publication. However, due to an oversight, the amendatory language was inadvertently omitted. Therefore, in this final rule, we are removing the entry for CGA C–1.1 from § 171.7(b) and paragraph (g)(6) from § 180.205.

*Part 172*

Section 172.101

This section contains the Hazardous Materials Table (HMT) and explanatory text for each of the columns in the table. Some of the information for the entry "Helium, compressed, UN1046" in the HMT was reported under the incorrect columns. In this final rule, we are revising the entry "Helium, compressed, UN1046" by correcting the information reported in columns 5, 6, 7, 8a, 8b, and 9a.

Section 172.604

This section prescribes requirements for providing the emergency response telephone number on hazardous materials shipping papers. As amended in the final rule, "Revision of Requirements for Emergency Response Telephone Numbers," HM–206F, published October 19, 2009 (74 FR 53413), we are correcting § 172.604(b)(1) by adding the word "information" to the phrase "emergency response provider" so that it reads "emergency response information provider (ERI provider)." In the October 19, 2009 final rule, the word "information" was inadvertently omitted during the printing of the regulatory text.

In paragraphs (b)(1) and (b)(2), we are clarifying the term "contract number" by adding the wording "or other unique identifier assigned by the ERI provider" to clarify that the term "contract number" identifies the registrant to the ERI provider. This clarification should serve to avoid confusion when an ERI provider may be using the term "contract number" for another purpose.

In paragraph (b)(2), we are also clarifying that the person who is registered with the emergency response provider must be identified by name or contract number on the shipping paper immediately before, after, above, or below the emergency response telephone number in a prominent, readily identifiable, and clearly visible manner that allows the information to be easily and quickly found unless the name or identifier is entered elsewhere in a prominent manner in accordance with paragraph (b)(1).

Section 172.800

This section prescribes hazardous materials security plan requirements. In a final rule, "Risk-Based Adjustment of Transportation Security Plan Requirements," HM–232F, published March 9, 2010 (75 FR 10974), there were three drafting errors. First, we indicated that "the security planning requirement will apply, as it does now, to all Division 1.4 explosives transported in quantities that require placarding under Subpart F of Part 172 of the HMR." However, in the regulatory text to the final rule we referenced § 172.504(c) in place of Subpart F of Part 172. As a result, the changes may be interpreted to require placards for certain Division 1.4S materials that fall under § 172.504(f)(6). This was not our intent. Second, we indicated, in the final rule, that the security planning requirement for desensitized explosives in Class 3 and Division 4.1 would apply to quantities that require placarding under § 172.504(c). This reference is not clear and is inconsistent with previous references to "quantities that require placarding under the provisions of Subpart F of Part 172." Therefore, to clarify the first two errors, we are revising § 172.800(b)(2) and (b)(7) to remove the reference to "§ 172.504(c)" and replacing it to read "subpart F of this part."

The third error is closely related to the first two errors. We indicated, in the final rule, that the security planning requirements for Division 4.3 materials would continue to require security plans for "any quantity" of Division 4.3 materials. Again, this reference is not clear and is inconsistent with previous references to "quantities that require placarding under the provisions of Subpart F of Part 172." Therefore, to correct this error we are revising § 172.800(b)(9) to read "any quantity of a Division 4.3 material requiring placarding in accordance with subpart F of this part," as intended in the final rule to HM–232F.

*Part 173*

Section 173.27

This section specifies general requirements for packaging hazardous materials for transportation by aircraft. The reference to § 171.11 in paragraph (f) is no longer valid. Therefore, PHMSA is correcting this error by revising paragraph (f) to remove the reference to § 171.11 and replacing it with a reference to § 171.22.

Section 173.171

This section prescribes requirements for smokeless powder for small arms. The entry "Smokeless powder for small arms (100 pounds or less)," NA3178 is only applicable to U.S. transportation as indicated by the "D" in column 1 of the HMT. Therefore, in § 173.171, the introductory text is revised to clarify that the provisions of this section applies to domestic transportation only.

Section 173.314

This section prescribes requirements for transporting compressed gases in tank cars and multi-unit tank cars. For the entry "Chlorine," column 2 of the table entitled "Outage and filling limits" refers to "Note 13". There is no "Note 13." To correct this error, the reference to "Note 13" in column 2 of the table, is removed. In addition, for the entries "Hydrogen Sulphide" and "Hydrogen sulphide, liquefied" column 1 of the table reflects the international spelling while the proper shipping name entries

in the § 172.101 HMT reflect the domestic spelling of "Hydrogen sulfide." Both spellings are authorized in accordance with § 172.101(c)(1). However, we are revising the entries in the § 173.314 table to read "Hydrogen Sulfide" and "Hydrogen sulfide, liquefied" to be consistent with the spelling in the § 172.101 HMT.

*Part 176*

Section 176.54

This section prescribes requirements for repairs involving welding, burning, and power-actuated tools and appliances. We are revising paragraph (b)(1) to correct the reference to 33 CFR 126.15(c) to read 33 CFR 126.30.

*Part 177*

Section 177.843

This section prescribes requirements for surveying for contamination on motor vehicles used to transport Class 7 radioactive materials under exclusive use conditions. We are revising paragraph (a) to correct the reference to "§ 173.427(b)(3) or (c) or § 173.443(c)" to read "§ 173.427(b)(4) or (c) or § 173.443(c)" to correct a typographical error.

*Part 179*

Appendix B

49 CFR part 179, appendix B prescribes procedure for the "Simulated Pool and Torch Fire Test." PHMSA is correcting an error in the pool and torch fire test requirements. The conversion that was used to establish the tolerances for the flame temperatures was incorrect. A temperature conversion was made. However, a factor of 1.8 should have been used to convert between degrees Fahrenheit and degrees Celsius. The temperature requirements should read 871 °C (1600 °F) +/− 55.6 °C (132.08 °F).

*Part 180*

Section 180.213

This section prescribes requirements for requalification markings for cylinders.

We are revising paragraph (d)(2) to correct the reference to § 173.301(l) to read § 171.23(a)(4).

## III. Regulatory Analyses and Notices

*A. Statutory Authority*

This final rule is published under authority of 49 U.S.C. 5103(b), which authorizes the Secretary of Transportation to prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce. The purpose of this final rule is to remove unnecessary cross references to the hazardous materials table, correct mailing addresses, grammatical and typographical errors, and, in response to requests for clarification, improve the clarity of certain provisions in the Hazardous Materials Regulations.

*B. Executive Order 12866 and DOT Regulatory Policies and Procedures*

This final rule is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget. This rule is not significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034). This final rule does not impose new or revised requirements for hazardous materials shippers or carriers; therefore, it is not necessary to prepare a regulatory impact analysis.

*C. Executive Order 13132*

This final rule has been analyzed in accordance with the principles and criteria in Executive Order 13132 ("Federalism"). This final rule does not adopt any regulation that: (1) Has substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government; or (2) imposes substantial direct compliance costs on State and local governments. PHMSA is not aware of any State, local, or Indian Tribe requirements that would be preempted by correcting editorial errors and making minor regulatory changes. This final rule does not have sufficient federalism impacts to warrant the preparation of a federalism assessment.

*D. Executive Order 13175*

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"). Because this final rule does not have Tribal implications, does not impose substantial direct compliance costs on Indian Tribal governments, and does not preempt Tribal law, the funding and consultation requirements of Executive Order 13175 do not apply, and a Tribal summary impact statement is not required.

*E. Regulatory Flexibility Act, Executive Order 13272, and DOT Procedures and Policies*

I certify that this final rule will not have a significant economic impact on a substantial number of small entities. This rule makes minor editorial changes which will not impose any new requirements on persons subject to the HMR; thus, there are no direct or indirect adverse economic impacts for small units of government, businesses, or other organizations.

*F. Unfunded Mandates Reform Act of 1995*

This rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of $141.3 million or more to either State, local, or Tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objectives of the rule.

*G. Paperwork Reduction Act*

There are no new information collection requirements in this final rule.

*H. Environmental Impact Analysis*

There are no environmental impacts associated with this final rule.

*I. Regulation Identifier Number (RIN)*

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

**List of Subjects**

*49 CFR Part 107*

Administrative practice and procedure, Hazardous materials transportation, Penalties, Reporting and recordkeeping requirements.

*49 CFR Part 171*

Exports, Hazardous materials transportation, Hazardous waste, Imports, Reporting and recordkeeping requirements.

*49 CFR Part 172*

Education, Hazardous materials transportation, Hazardous waste, Labeling, Packaging and containers, Reporting and recordkeeping requirements.

*49 CFR Part 173*

Hazardous materials transportation, Packaging and containers, Radioactive materials, Reporting and recordkeeping requirements, Uranium.

*49 CFR Part 176*

Hazardous materials transportation, Segregation, Handling and stowage, Maritime carriers.

*49 CFR Part 177*

Hazardous materials transportation, Loading and unloading, Segregation and separation.

*49 CFR Part 179*

Hazardous materials transportation, Rail car specifications.

*49 CFR Part 180*

Hazardous materials transportation, Motor carriers, Motor vehicle safety, Packaging and containers, Railroad safety, Reporting and recordkeeping requirements.

■ In consideration of the foregoing, 49 CFR chapter I is amended as follows:

## PART 107–HAZARDOUS MATERIALS PROGRAM PROCEDURES

■ 1. The authority citation for part 107 continues to read as follows:

**Authority:** 49 U.S.C. 5101–5129, 44701; 49 CFR 1.45 and 1.53; Pub. L. 101–410 section 4 (28 U.S.C. 2461 note), Pub. L. 104–134 section 31001.

### § 107.117 [Amended]

■ 2. In § 107.117, in paragraph (d)(3), the phone number "202–366–6121" is removed and the phone number "202–385–2400" is added in its place.

### § 107.329 [Amended]

■ 3. In § 107.329, in paragraphs (a) and (b), the figure "$275" is removed and the figure "$250" is added in its place.

## PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

■ 4. The authority citation for part 171 continues to read as follows:

**Authority:** 49 U.S.C. 5101–5128, 44701; 49 CFR 1.45 and 1.53; Pub. L. 101–410 section 4 (28 U.S.C. 2461 note); Pub. L. 104–134 section 31001.

### § 171.1 [Amended]

■ 5. In § 171.1, in paragraph (g), the wording "$275" is removed and the wording "$250" is added.

■ 6. In § 171.6, the table in paragraph (b)(2) is amended by revising the entries for "2137–0022" and "2137–0572" to read as follows:

### § 171.6 Control numbers under the Paperwork Reduction Act.

* * * * *

(b) * * *

(2) Table.

| Current OMB control No. | Title | Title 49 CFR part or section where identified and described |
|---|---|---|
| * | * | * |
| 2137–0022 | Testing, Inspection, and Marking Requirements for Cylinders. | §§ 173.5b, 173.302a, 173.303, 173.304, 173.309, 178.2, 178.3, 178.35, 178.44, 178.45, 178.46, 178.57, 178.59, 178.60, 178.61, 178.68, 180.205, 180.207, 180.209, 180.211, 180.213, 180.215, 180.217, Appendix C to Part 180. |
| * | * | * |
| 2137–0572 | Testing requirements for non-bulk packages. | §§ 173.168, 178.2, 178.601, Appendix C to Part 178, Appendix D to Part 178. |

### § 171.7 [Amended]

■ 7. In the table in paragraph (b) of § 171.7, the entry "Compressed Gas Association, Inc., 4221 Walney Road, 5th Floor, Chantilly, Virginia 20151, CGA C–1.1, Personnel Training and Certification Guidelines for Cylinder Requalification By the Volumetric Expansion Method, 2004, First Edition" is removed.

## PART 172—HAZARDOUS MATERIALS TABLE, SPECIAL PROVISIONS, HAZARDOUS MATERIALS COMMUNICATIONS, EMERGENCY RESPONSE INFORMATION, TRAINING REQUIREMENTS, AND SECURITY PLANS

■ 8. The authority citation for part 172 continues to read as follows:

**Authority:** 49 U.S.C. 5101–5128; 44701; 49 CFR 1.53.

■ 9. In § 172.101, in the Hazardous Materials Table, the entry for "Helium, compressed" is revised to read as follows.

* * * * *

| Symbols | Hazardous materials descriptions and proper shipping names | Hazard class or division | Identification Nos. | PG | Label codes | Special provisions (§ 172.102) | (8) Packaging (§ 173.***) | | | (9) Quantity limitations (see §§ 173.27 and 175.75) | | (10) Vessel stowage | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | Exceptions | Non-bulk | Bulk | Passenger aircraft/rail | Cargo aircraft only | Location | Other |
| (1) | (2) | (3) | (4) | (5) | (6) | (7) | (8A) | (8B) | (8C) | (9A) | (9B) | (10A) | (10B) |
| * | * | * | * | * | | * | * | | | * | * | | |
| | *Helium, compressed.* | 2.2 | UN1046 .. | ..... | 2.2 ..... | ..... | 306 | 302 | 302, 314 | 75 kg ..... | 150 kg ..... | A ..... | 85 |
| * | * | * | * | * | | * | * | | | * | * | | |

* * * * *

■ 10. In § 172.604, as amended October 19, 2009, at 74 FR 53422, effective November 18, 2009, and delayed until October 1, 2010, at 74 FR 54489, October 22, 2009, paragraphs (b)(1) and (b)(2) are revised to read as follows:

### § 172.604 Emergency response telephone number.

* * * * *

(b) * * *

(1) The number of the person offering the hazardous material for transportation when that person is also the emergency response information provider (ERI provider). The name of

the person, or contract number or other unique identifier assigned by an ERI provider, identified with the emergency response telephone number must be entered on the shipping paper immediately before, after, above, or below the emergency response telephone number unless the name is entered elsewhere on the shipping paper in a prominent, readily identifiable, and clearly visible manner that allows the information to be easily and quickly found; or

(2) The number of an agency or organization capable of, and accepting responsibility for, providing the detailed information required by paragraph (a)(2) of this section. The person who is registered with the ERI provider must ensure that the agency or organization has received current information on the material before it is offered for transportation. The person who is registered with the ERI provider must be identified by name, or contract number or other unique identifier assigned by the ERI provider, on the shipping paper immediately before, after, above, or below the emergency response telephone number in a prominent, readily identifiable, and clearly visible manner that allows the information to be easily and quickly found, unless the name or identifier is entered elsewhere in a prominent manner as provided in paragraph (b)(1) of this section.

* * * * *

■ 11. In § 172.800, paragraphs (b)(2), (7), and (9), as amended March 9, 2010, at 75 FR 10988, effective October 1, 2010, are revised to read as follows:

**§ 172.800 Purpose and applicability.**

* * * * *

(b) * * *

(2) A quantity of a Division 1.4, 1.5, or 1.6 material requiring placarding in accordance with subpart F of this part;

* * * * *

(7) A quantity of desensitized explosives meeting the definition of Division 4.1 or Class 3 material requiring placarding in accordance with subpart F of this part;

* * * * *

(9) A quantity of a Division 4.3 material requiring placarding in accordance with subpart F of this part;

* * * * *

## PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

■ 12. The authority citation for part 173 continues to read as follows:

**Authority:** 49 U.S.C. 5101–5128, 44701; 49 CFR 1.45, 1.53.

■ 13. In § 173.27, paragraph (f) introductory text is revised to read as follows:

**§ 173.27 General requirements for transportation by aircraft.**

* * * * *

(f) *Combination packaging.* Unless otherwise specified in this part, or in § 171.22 of this subchapter, when combination packaging are offered for transportation aboard aircraft, inner packaging must conform to the quantity limitations set forth in table 1 of this paragraph for transport aboard passenger-carrying aircraft and table 2 of this paragraph for transport aboard cargo aircraft only, as follows:

* * * * *

■ 14. In § 173.171, the introductory text is revised to read as follows:

**§ 173.171 Smokeless powder for small arms.**

Smokeless powder for small arms which has been classed in Division 1.3 may be reclassed in Division 4.1, for domestic transportation by motor vehicle, rail car, vessel, or cargo-only aircraft, subject to the following conditions:

* * * * *

**§ 173.314 [Amended]**

■ 15. In § 173.314, in the table in paragraph (c), in column 1, the entries for "Hydrogen Sulphide" and "Hydrogen sulphide, liquefied" are removed and "Hydrogen sulfide" and "Hydrogen sulfide, liquefied" are added in their place; and in column 2 of the table, for the entry "Chlorine", the reference to "Notes 6, 13" is removed and the reference "Note 6" is added in its place.

## PART 176—CARRIAGE BY VESSEL

■ 16. The authority citation for part 176 continues to read as follows:

**Authority:** 49 U.S.C. 5101–5128; 49 CFR part 1.53.

**§ 176.54 [Amended]**

■ 17. In § 176.54, in paragraph (b)(1), the reference "33 CFR 126.15(c)" is removed and the reference "33 CFR 126.30" is added.

## PART 177—CARRIAGE BY PUBLIC HIGHWAY

■ 18. The authority citation for part 177 continues to read as follows:

**Authority:** 49 U.S.C. 5101–5127; 49 CFR part 1.53.

■ 19. In § 177.843, paragraph (a) is revised to read as follows:

**§ 177.843 Contamination of vehicles.**

(a) Each motor vehicle used for transporting Class 7 (radioactive) materials under exclusive use conditions in accordance with § 173.427(b)(4) or (c) or § 173.443(c) of this subchapter must be surveyed with radiation detection instruments after each use. A vehicle may not be returned to service until the radiation dose rate at every accessible surface is 0.005 mSv per hour (0.5 mrem per hour) or less and the removable (non-fixed) radioactive surface contamination is not greater than the level prescribed in § 173.443(a) of this subchapter.

* * * * *

## PART 179—SPECIFICATIONS FOR TANK CARS

■ 20. The authority citation for part 179 continues to read as follows:

**Authority:** 49 U.S.C. 5101–5127; 49 CFR part 1.53.

■ 21. In Appendix B to Part 179, paragraph 2. a. (1) is revised to read as follows:

**Appendix B to Part 179, Procedures for Simulated Pool and Torch Fire Testing**

* * * * *

2. *Simulated pool fire test.*

a. * * *

(1) The source of the simulated pool fire must be hydrocarbon fuel with a flame temperature of 871 °C (1600 °F) plus-or-minus 55.6 °C (132.08 °F), throughout the duration of the test.

## PART 180—CONTINUING QUALIFICATION AND MAINTENANCE OF PACKAGINGS

■ 22. The authority citation for part 180 continues to read as follows:

**Authority:** 49 U.S.C. 5101–5128; 49 CFR 1.53.

■ 23. In § 180.205, paragraph (g)(6) is revised to read as follows:

**§ 180.205 General requirements for requalification of specification cylinders.**

* * * * *

(g) * * *

(6) Training materials may be used for training persons who requalify cylinders using the volumetric expansion test method.

* * * * *

■ 24. In § 180.213, paragraph (d)(2) is revised to read as follows:

**§ 180.213 Requalification markings.**

* * * * *

(d) * * *

(2) Exception. A cylinder subject to the requirements of § 171.23(a)(4) of this

subchapter may not be marked with a RIN.

* * * * *

Issued in Washington, DC, on August 26, 2010 under authority delegated in 49 CFR part 1.

**Cynthia L. Quarterman,**

*Administrator, Pipeline and Hazardous Materials Safety Administration.*

[FR Doc. 2010–21759 Filed 8–31–10; 8:45 am]

**BILLING CODE 4910–60–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### 50 CFR Part 17

**[Docket No. FWS–R6–ES–2009–0027; 92220–1113–0000; ABC Code: C3]**

**RIN 1018–AW27**

## Endangered and Threatened Wildlife and Plants; Threatened Status for Shovelnose Sturgeon Under the Similarity of Appearance Provisions of the Endangered Species Act

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, determine it necessary to treat shovelnose sturgeon (*Scaphirhynchus platorynchus*) as threatened due to similarity of appearance to the endangered pallid sturgeon (*Scaphirhynchus albus*) under the similarity of appearance provisions of the Endangered Species Act of 1973, as amended. The shovelnose sturgeon and the endangered pallid sturgeon are difficult to differentiate in the wild and inhabit overlapping portions of the Missouri and Mississippi River basins. Commercial harvest of shovelnose sturgeon has resulted in the documented take of pallid sturgeon where the two species coexist and is a threat to the pallid sturgeon. This determination to treat shovelnose sturgeon due to similarity of appearance will substantially facilitate law enforcement actions to protect and conserve pallid sturgeon. This rule extends take prohibitions to shovelnose sturgeon, shovelnose-pallid sturgeon hybrids, and their roe when associated with a commercial fishing activity in areas where pallid sturgeon and shovelnose sturgeon commonly coexist. Accidental or incidental capture of pallid or shovelnose sturgeon, or shovelnose-pallid sturgeon hybrids, in commercial fishing gear will not be considered take provided the sturgeon are immediately released to the wild at the point where taken with roe intact.

**DATES:** This rule becomes effective on October 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** George Jordan, Pallid Sturgeon Recovery Coordinator, 2900 4th Avenue North, Room 301, Billings, Montana 59101 (telephone (406) 247–7365; facsimile (406) 247–7364). Public comments and literature referenced in association with this rule are available at *http://www.regulations.gov* at Docket No. FWS–R6–ES–2009–0027 and at the above office, by appointment, during normal business hours. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800/877–8339, 24 hours a day, 7 days a week.

**SUPPLEMENTARY INFORMATION:**

### Background

In 1990, the U.S. Fish and Wildlife Service (Service) listed the pallid sturgeon (*Scaphirhynchus albus*) as endangered under the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*) (55 FR 36641, September 6, 1990). The pallid sturgeon has a flattened, shovel-shaped snout, possesses a long and slender and completely armored caudal peduncle, and lacks a spiracle and belly scutes (Forbes and Richardson 1905, pp. 38–41). The pallid sturgeon is a bottom-oriented species found only in portions of the Missouri and Mississippi River basins (Kallemeyn 1983, p. 4). The species can be long-lived (40 plus years), with females reaching sexual maturity later than males (Keenlyne and Jenkins 1993, pp. 393, 395). Pallid sturgeon at the northern end of their range can attain sizes (both length and weight) much larger than pallid sturgeon at the southern end of their range (Service 1993, p. 3). Current known threats to the pallid sturgeon include habitat modification, small population size, limited natural reproduction, hybridization, pollution and contamination, entrainment, and commercial harvest (Service 2007, pp. 38–59).

The pallid sturgeon and the shovelnose sturgeon are both members of the genus *Scaphirhynchus.* These sturgeon can be difficult to differentiate in the wild and inhabit overlapping portions of the Missouri and Mississippi River basins. Within these areas of overlap, four States continue to allow commercial harvest of shovelnose sturgeon. Take of the endangered pallid sturgeon has been documented to occur where this commercial fishery is allowed (Sheehan *et al.* 1997, p. 3; Service 2007, pp. 45–48; Bettoli *et al.* 2009, p. 3). Incidental and illegal harvest of pallid sturgeon is a significant impediment to the survival and recovery of this species in some parts of its range (Service 2007, p. 45). Our recent 5-year status review recommended that we identify and implement measures to eliminate or significantly reduce illegal and accidental harvest of pallid sturgeon (Service 2007, p. 59).

### Previous Federal Actions

On September 6, 1990, the pallid sturgeon was listed as endangered under the Act (55 FR 36641). At the time of listing, the primary threats and vulnerabilities for pallid sturgeon were curtailment of range, habitat destruction and modification, low population size, lack of recruitment, commercial harvest, pollution and contaminants, and hybridization (55 FR 36641, September 6, 1990; Service 1993, pp. 10–15). Since listing, we worked cooperatively with State partners to address the threat posed by commercial harvest. A recent status review found that restrictions imposed through State fishing regulations had helped, but that incidental and illegal take during commercial harvest of shovelnose sturgeon was still having a substantial and detrimental effect on the pallid sturgeon (Service 2007, pp. 45–48). To address this issue, on September 22, 2009, we published in the **Federal Register** a proposed rule to treat the shovelnose sturgeon as a threatened species due to its similarity of appearance to the endangered pallid sturgeon (74 FR 48215).

### Public Comments Solicited

As part of the September 22, 2009, proposed rule (74 FR 48215), we requested interested parties to provide comments and materials concerning the proposed rule during a 60-day public comment period. We contacted all appropriate State and Federal agencies, county governments, elected officials, scientific organizations, and other interested parties and invited them to comment. During the public comment period, we received several requests for a public hearing. On January 14, 2010, we published a **Federal Register** notice announcing a 21-day reopening of the comment period and an informational meeting and public hearing on January 28, 2010, in Cape Girardeau, Missouri (75 FR 2102).

### Peer Review

In accordance with our policy for peer review (59 FR 34270, July 1, 1994), and

the Office of Management and Budget's (OMB) Final Information Quality Bulletin for Peer Review, dated December 16, 2004, we solicited review of the science in this rule from five independent specialists. That review process was conducted to ensure the use of the best scientific and commercial information available and to ensure and maximize the quality, objectivity, utility, and integrity of the information upon which this action is based. We received written responses from three of the peer reviewers. All three reviewers indicated: (1) The data presented were relevant and accurate; (2) the conclusions in the proposed rule were logically supported by the data presented; (3) necessary and pertinent information was included; and (4) the action will help conserve pallid sturgeon. Specific issues raised are discussed below.

**Summary of Public Comments**

During the comment periods, we received approximately 40 comments (written and oral) representing 8 State agencies, 1 Federal agency, and 20 individuals representing themselves or their businesses and/or organizations, as well as responses from three peer reviewers. All comments are now available for inspection at *http://www.regulations.gov* in Docket No. FWS–R6–ES–2009–0027.

We reviewed and considered all comments in this final decision. Written comments and oral statements presented at the public hearing and received during the comment periods are addressed in the following summary or incorporated directly into this final rule. Comments of a similar nature are grouped together under subject headings in a series of "Issues" and "Responses."

*Issue 1:* Several commenters indicated that treating shovelnose sturgeon as threatened due to similarity of appearance to pallid sturgeon will close commercial sturgeon fishing resulting in a negative economic impact on those engaged in this activity.

*Response:* We recognize that treating shovelnose sturgeon as threatened due to similarity of appearance with pallid sturgeon will close commercial harvest of shovelnose sturgeon from waters commonly occupied by pallid sturgeon. Under section 4(e), the Act allows us to regulate commerce and take to the extent advisable when it is considered necessary to protect a listed species. In order to comply with the Act and reduce potential negative economic impacts, this rule covers the minimal geographic extent necessary to effectively conserve pallid sturgeon. This rule will not affect commercial shovelnose sturgeon harvest, where permitted by the States or tribes, in waters where pallid sturgeon do not commonly occur (*i.e.,* those areas not identified under § 17.44, Special rules—fishes, in this rule).

*Issue 2:* A few commenters felt the methods used to estimate mortality of both pallid and shovelnose sturgeon in the proposed rule (74 FR 48215, September 22, 2009) were flawed because the methods of both Killgore *et al.* (2007) and Colombo *et al.* (2007) used a catch curve to estimate mortality. Specifically, the commenters asserted that the assumption that there is consistent reproduction and recruitment among years is not consistent with the life-history characteristics of shovelnose and pallid sturgeon.

*Response:* In both the Killgore *et al.* (2007) and Colombo *et al.* (2007) peer-reviewed publications, the authors describe their methods to account for inconsistent reproduction and recruitment. Killgore *et al.* (2007, p. 453) pooled their data among years and examined their data for variability among year-classes. Colombo *et al.* (2007, p. 445) also pooled their data by age class among years. Pooling annual data from successive sample years is an acceptable method to account for moderate and random fluctuations in recruitment when employing catch curves to estimate survival (Ricker 1975, p. 36). We believe these studies present the best available data and use accepted methodologies.

*Issue 3:* One commenter believed that existing harvest length regulations are protective of gravid female pallid sturgeon. These regulations set a maximum harvest limit for shovelnose sturgeon on the Mississippi River in Missouri and Illinois at 81.3 centimeters (cm) (32.0 inches (in.)) fork length. The commenter had never observed a gravid pallid sturgeon smaller than this limit and thought gravid female pallid sturgeon should be readily identifiable based on length.

*Response:* Since 1992, 11 wild-caught female pallid sturgeon were spawned in captivity at Missouri's Blind Pony State Fish Hatchery (Drecktrah 2009). Of these, five were less than 81.3 cm (32.0 in.) fork length, one measured 81.5 cm (32.1 in.) fork length, and five were longer than 98.8 cm (38.9 in.) (Drecktrah 2009). The two smallest gravid female pallid sturgeon spawned were 77.5 cm (30.5 in.) fork length. In 2009, at Neosho National Fish Hatchery, one gravid female pallid sturgeon was spawned that was 75.7 cm (29.8 in.) (Herzog 2010). These data illustrate the fact that that size alone cannot be used to identify species and current maximum harvest size limits for shovelnose sturgeon on the Mississippi River (81.3 cm (32 in.)) and the Missouri River (76.2 cm (30 in.)) are inadequate to protect all gravid female pallid sturgeon.

*Issue 4:* Several commenters indicated that protection for shovelnose-pallid sturgeon hybrids was unwarranted and that allowing harvest of hybrid sturgeon would be a benefit to pallid sturgeon.

*Response:* The evolutionary relationship between pallid and shovelnose sturgeon is poorly understood and additional data and analyses are necessary to fully understand the relationship between putative hybrids and pallid and shovelnose sturgeon (Service 2007, pp. 25–26). In one study, morphometric-only indices assigned study specimens to the pallid sturgeon, shovelnose sturgeon, and putative hybrid groups (Murphy *et al.* 2007, p. 319). However, sheared principal component analysis of the same study specimens resulted in some putative hybrid specimens clustering with the pallid sturgeon group and other hybrid specimens clustering with the shovelnose sturgeon group (Murphy *et al.* 2007, p. 319). In another study, genetic identification revealed that pallid sturgeon identified using the character index (CI) and morphometric character index (mCI) were miscategorized (Schrey 2007, pp. 74–75, 120). Thus, some sturgeon that appear intermediate in character based on the CI or the mCI (presumed hybrids) may actually be pallid sturgeon. Given these uncertainties, law enforcement personnel would have substantial difficulty enforcing regulations allowing harvest of shovelnose-pallid sturgeon hybrids. Thus, extending protections to shovelnose sturgeon and to shovelnose-pallid sturgeon hybrids is the only way to ensure that pallid sturgeon are not inadvertently harvested from areas where these two species co-occur.

*Issue 5:* Several commenters indicated that treating shovelnose sturgeon as threatened due to similarity of appearance to pallid sturgeon is not warranted. These commenters referenced recent regulation changes implemented by the Illinois Department of Natural Resources and a study of the new regulation's effectiveness sanctioned by the Mississippi Interstate Cooperative Resources Association (Maher *et al.* 2009). These commenters state that in this study 946 sturgeon carcasses were collected from commercial fishermen, and none were determined by genetic analysis to be pallid sturgeon. Based on those data, commenters contend that differentiation between pallid and shovelnose sturgeon could occur with a 100 percent level of

accuracy with proper training and implementation.

*Response:* In 2007, the Illinois Department of Natural Resources instituted additional protective State regulations intended to eliminate pallid sturgeon harvest. These regulations prohibited take of or harm to pallid sturgeon and mandated their immediate release upon capture. These regulations also prohibited commercial harvest of shovelnose-pallid sturgeon hybrids downstream from Lock and Dam 26 on the Mississippi River. Specifically, these regulations prohibited take and mandated immediate release of any *Scaphirhynchus* that had any of the following: (1) Belly completely lacking in scales; (2) bases of outer barbels located slightly behind bases of inner barbels; or (3) length of inner barbels at least 6.3 times the length of head.

The new Illinois regulations as well as the existing Missouri and Kentucky regulations were evaluated to determine if they were effective in preventing bycatch of pallid sturgeon in the harvest of shovelnose sturgeon (Maher *et al.* 2009, p. 2). This study examined 946 carcasses from commercial fisherman including 513 collected in Illinois under their new regulations (Maher *et al.* 2009, pp. 3–4). Specimens were evaluated based on CI, mCI, barbel alignment, the presence or absence of belly scales, and the ratio of head length to barbel length (Maher *et al.* 2009, p. 3). Based on professional judgment, the authors did not believe any of the carcasses were pallid sturgeon (Maher *et al.* 2009, p. 4). However, the data were less clear.

The CI and mCI scores yielded different results when applied to the same carcasses. The CI scores indicated 4 of the carcasses were pallid sturgeon including 2 harvested by Illinois fishermen; 31 specimens were likely shovelnose-pallid sturgeon hybrids including 24 harvested by Illinois fishermen (Maher *et al.* 2009, pp. 4, 8–11). None of these 946 carcasses were deemed to be pallid sturgeon based on mCI scores, but 30 specimens were likely shovelnose-pallid sturgeon hybrids including 9 harvested by Illinois fishermen (Maher *et al.* 2009, pp. 4, 14–17). Genetic testing on 84 sturgeon (44 from Illinois, 20 from Kentucky, and 20 from Missouri) with the lowest CI values (most pallid sturgeon like) indicated that several of the carcasses were likely shovelnose-pallid sturgeon hybrids (Heist and Boley 2009, p. 3). Eighty-five of the specimens had barbel alignment consistent with pallid sturgeon including 78 in Illinois (Maher *et al.* 2009, pp. 4–5). None of the specimens had bellies that were absent scales consistent with pallid sturgeon, but 37 carcasses had partial or small scales on their bellies indicative of shovelnose-pallid sturgeon hybrids (Maher *et al.* 2009, pp. 4–5). Finally, none of the specimens' ratio of head length to barbel length were indicative of pallid sturgeon (Maher *et al.* 2009, pp. 4–5).

As these data demonstrate, field-level identification based solely on character indices is subjective and not without some uncertainty. This subjectivity and uncertainty is reflected in the 2007 Illinois regulations. These regulations indicate that it is illegal to harvest any sturgeon that has "bases of outer barbels located slightly farther behind bases of inner barbels." The word "slightly" is subjective and difficult to apply consistently among observers (Maher *et al.* 2009, p. 4). For instance, 28 of the 78 sturgeon caught in Illinois had barbel alignment consistent with pallid sturgeon; however, because the outer barbels inserted only "slightly" behind the inner barbels, the data were analyzed with and without the 28 specimens (Maher *et al.* 2009, p. 4). In this case, the word "slightly" introduced ambiguity into identification efforts.

In total, more than 10 percent of the specimens harvested in Illinois were harvested in violation of Illinois regulations as they showed characteristics intermediate between pallid and shovelnose sturgeon (Maher *et al.* 2009, pp. 5–6). Because some sturgeon that appear intermediate (*i.e.,* presumed hybrids) may actually be pallid sturgeon (Wills *et al.* 2002, pp. 255–256; Schrey 2007, pp. 74, 120), we remain concerned that even in a highly regulated arena, harvest of shovelnose sturgeon and their roe results in the take of pallid sturgeon where the two species are sympatric.

One of the requirements of treating any species as endangered or threatened under Section 4(e) of the Act is related to law enforcement difficulties with differentiating between a listed and unlisted species. The available data demonstrate that both fishermen and enforcement personnel are having and will continue to have substantial difficulty in differentiating between these species where they coexist.

*Issue 6:* A few commenters highlighted an error in Table 1 of the proposed rule (74 FR 48215, September 22, 2009). Specifically, we reported 3,808 kilograms (8,395 pounds) of roe being harvested in Illinois' Mississippi River below Melvin Price Lock and Dam (Lock and Dam 26) in 2005, when the actual number was 166 kilograms (365 pounds).

*Response:* This error has been corrected in Table 1 of this rule. Consideration of this error does not change our determination. The available data demonstrate a substantial level of commercial harvest of shovelnose, including both flesh and roe, is occurring in areas where both pallid and shovelnose sturgeon coexist. This harvest is resulting in incidental and illegal harvest of pallid sturgeon (Sheehan *et al.* 1997, p. 3; Bettoli *et al.* 2009, p. 3), which is a significant impediment to the survival and recovery of the pallid sturgeon.

*Issue 7:* One commenter was unable to find any evidence that we conducted an environmental impact study to determine the economic impact to fishermen and associated communities as a result of this decision.

*Response:* An Environmental Assessment or Environmental Impact Statement, as defined under the authority of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4331 *et seq.*), need not be prepared in connection with listing regulations adopted pursuant to section 4 of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). We determined that this rationale also applies to the associated section 4(d) rule.

*Issue 8:* Several States and one not-for-profit organization observed that closing commercial shovelnose sturgeon fishing in waters where they commonly coexist with pallid sturgeon could result in increased shovelnose sturgeon harvest pressures in waters that remain open. The concern raised is that this shift in pressure could result in overharvest of shovelnose sturgeon populations in areas outside the range of pallid sturgeon.

*Response:* Twenty-four States comprise the historical range of shovelnose sturgeon. Of these, eight allow for commercial harvest of shovelnose sturgeon; this action will halt commercial harvest of shovelnose sturgeon in four of these eight where shovelnose and pallid sturgeon coexist. Shovelnose sturgeon that occupy waters outside the areas regulated by this rule are subject to State commercial fishing regulations. Those States that acknowledged that a probable shift in harvest pressures is likely as a result of this rule indicated that their existing regulations are adequate to conserve shovelnose sturgeon. We believe that a combination of existing State regulations and the additional protections provided under this rule will facilitate conservation of both shovelnose and pallid sturgeon. However, we acknowledge this rule does not afford additional protections to

shovelnose sturgeon outside of its sympatric range of the pallid sturgeon. Thus, we will continue to work and cooperate with State resource agencies, the Mississippi Interstate Cooperative Resources Association and the Upper Mississippi River Conservation Committee, and other interested parties to help manage and monitor shovelnose sturgeon harvest where it occurs.

*Issue 9:* Several commenters highlighted other threats to pallid sturgeon, including non-native invasive species and habitat alteration. These comments imply we should focus on these other threat factors rather than the take issue being addressed by this rule.

*Response:* This rule is being undertaken to address documented take of an endangered species, the pallid sturgeon, due to similarity of appearance to shovelnose sturgeon. The take is occurring through commercial harvest of shovelnose sturgeon where allowed. Through the provisions of section 4(e) of the Act, we are employing a mechanism to help address this take, which is an identified threat to the pallid sturgeon (55 FR 36641; Service 2007, pp. 45–48, 57). We are not assessing the pallid sturgeon in this rule in accordance with section 4(a) of the Act. However, we concur with the commenter that habitat destruction or alteration is a threat to this species as we described in our 2007 5-year review (Service 2007, pp. 38–45, 56). We are actively working with State and Federal partners to implement restoration activities to address habitat issues throughout the range of the pallid sturgeon. Examples include the efforts of the Upper and Lower Mississippi River Conservation Committees and U.S. Army Corps of Engineers Missouri River Recovery Program. These partnerships and programs have restored side channel connectivity and modified existing in-channel structures (*i.e.,* dike notching) to increase habitat complexity. We are currently reviewing available data to better evaluate effects from invasive species. While these are important efforts, we also determined that the mortality of reproductive-condition female pallid sturgeon associated with commercial fishing must be addressed in order to conserve the species and achieve recovery.

*Issue 10:* The State of Wyoming identified potential confusion associated with the word "entire" found under the column heading "Vertebrate population where endangered or threatened" in § 17.11 Endangered and Threatened Wildlife. The confusion is associated with the rule treating shovelnose sturgeon as threatened due to similarity of appearance to pallid sturgeon in waters where both species commonly coexist. There are several States identified in this table that are not within the documented historical range of pallid sturgeon.

*Response:* The table in Part 17 delineates the historic range of the shovelnose sturgeon and identifies the population where treated as endangered or threatened is over the entire range of the species. However, section 4(e) allows for regulation of commerce and take as deemed advisable. The special rule described under § 17.44(aa) articulates the portions of the range in which take will be regulated under this rule. In this case, the shovelnose sturgeon's historic range occurs in 24 States; however, shovelnose and shovelnose–pallid sturgeon hybrid populations covered by this special rule occur in portions of 13 States. Therefore, Wyoming and several other States that historically or currently support shovelnose sturgeon populations but not pallid sturgeon are not identified in this rule and will not be regulated and subject to shovelnose sturgeon take prohibitions as a result of this rule.

*Issue 11:* One commenter encouraged us to conduct a review of shovelnose sturgeon to determine if threatened status is warranted for this species range-wide. This commenter provided references to several publications that suggest shovelnose sturgeon are being over-harvested in the middle and upper Mississippi Rivers (Colombo *et al.* 2007; Koch *et al.* 2007; Tripp *et al.* 2009). The commenter also recommended that if additional protections were not warranted, we should work with State agencies to implement strict size limits on commercial harvest to better protect shovelnose sturgeon where they are commercially harvested.

*Response:* This action was initiated to address documented take occurring of an existing listed species and provide for the conservation of that listed species—the endangered pallid sturgeon. We are not assessing the status of the shovelnose sturgeon in this rule. We have a separate petition process and our own internal candidate assessment process to elevate species for listing consideration. In the context of this regulation, we have considered this comment and believe that the combination of existing State regulations and the protections provided in this rule address many of the concerns highlighted in the cited literature (Colombo *et al.* 2007; Koch *et al.* 2007; Tripp *et al.* 2009). We also intend to continue working with the States and various committees to ensure adequate regulations exist where commercial shovelnose sturgeon harvest is permitted. Should future data indicate the shovelnose sturgeon meets the Act's definition of threatened or endangered, we would initiate a status review and propose listing the species if warranted.

**Similarity of Appearance Determination**

Section 4(e) of the Act and implementing regulations (50 CFR 17.50–17.52) authorize the Secretary of the Interior to treat a species as an endangered or threatened species even though it is not itself listed if: (a) The species so closely resembles in appearance a listed endangered or threatened species that law enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species; (b) the effect of this substantial difficulty is an additional threat to an endangered or threatened species; and (c) such treatment of an unlisted species will substantially facilitate the enforcement and further the purposes of the Act. With regard to shovelnose sturgeon, we believe all of these factors apply.

The shovelnose sturgeon (*Scaphirhynchus platorynchus*) is similar in appearance to the pallid sturgeon and inhabits overlapping portions of the Missouri and Mississippi River basins (Bailey and Cross 1954, pp. 175–190). Morphological characteristics (*i.e.,* body measurements) and meristic counts (i.e., number of fin rays) have been used to distinguish between the two *Scaphirhynchus* species. However, those characters were based on a limited number of pallid sturgeon (15) and of shovelnose sturgeon (16) specimens (Bailey and Cross 1954, pp. 177–179).

Two indices, CI and mCI, were developed to help differentiate between the species and account for putative hybrid individuals (Wills *et al.* 2002, pp. 249–258). The CI uses both morphometric ratios and meristic counts (number of fin rays in both the dorsal and anal fins); mCI is based only on the five morphometric ratios and was developed because the meristic counts can be difficult to accurately obtain from live specimens (Wills *et al.* 2002, p. 250). Both indices utilized five ratios of morphometric measurements based on careful length measurements of both the inner and outer barbels, the head length, the interrostrum length, and the mouth-to-inner-barbel distance. While both indices did a good job of properly classifying pallid sturgeon (Wills *et al.* 2002, p. 253), errors occurred when putative hybrids overlapped the parental forms (Wills *et al.* 2002, pp.

253–254). Both indices had an error rate of approximately 10 percent (Wills *et al.,* pp. 255–256). Thus, Wills *et al.* (2002, p. 257) recommended incorporating molecular genetic techniques to verify species delineations.

Genetic analysis of *Scaphirhynchus* specimens to test the performance of several character indices, including CI and mCI suggest that at least 1.9 percent of sampled individuals were misidentified (Schrey 2007, p. 75). Specifically, CI appeared to perform better than the other indices by not classifying genetic pallid sturgeon as shovelnose or shovelnose-pallid sturgeon hybrids, but did classify genetic shovelnose sturgeon as pallid sturgeon (Schrey 2007, pp. 75–76). Similarly, mCI did not classify genetic pallid sturgeon as shovelnose sturgeon, but did classify genetic shovelnose as pallid sturgeon (Schrey 2007, p. 75). However, mCI misclassified genetic pallid sturgeon as shovelnose-pallid sturgeon hybrids (Schrey 2007, p. 75). The CI performs better than the other indices because it relies on dorsal and anal fin ray counts. However, dorsal and anal fin ray counts can be difficult to obtain from live specimens (Wills *et al.* 2002, p. 250; Schrey 2007, p. 76); mCI was developed in recognition of this difficulty. In order to provide the greatest confidence in species identification, both genetic and morphological analyses are required (Schrey 2007, p. 80).

Other recent analyses confirm limited success applying character indices universally across the geographic range of the species (Kuhajda *et al.* 2007, pp. 344–346; Murphy *et al.* 2007, p. 322). Furthermore, available data indicate character indices do not work well on smaller sized specimens (Kuhajda *et al.* 2007, pp. 324, 344).

Currently, biologists use an approach requiring up to 13 morphometric body measurements, multivariate analysis, meristic counts (*i.e.,* the number of dorsal and anal fin rays), and genetic data to reliably differentiate between the 2 species. Many of these methods require data collection and analysis that are not easily implemented in field-level applications and are not immediately available to commercial fishermen at the time of harvest or to law enforcement personnel at the time of determining whether a violation has occurred.

Finally, while genetic tests can differentiate *Scaphirhynchus* eggs from those of other genera, at this time, processed roe cannot be differentiated as having been derived from shovelnose sturgeon, harvest of which may be legal, or pallid sturgeon, harvest of which is illegal (Curtis 2008). This similarity poses a problem for Federal and State law enforcement agents trying to address illegal trade in pallid sturgeon roe.

While harvest of pallid sturgeon is prohibited by section 9 of the Act and by State regulations throughout its range, commercial harvest of shovelnose sturgeon has resulted in the documented take of pallid sturgeon (Sheehan *et al.* 1997, p. 3; Bettoli *et al.* 2009, p. 3; Service 2007, pp. 45–48). Four States allow commercial harvest of shovelnose sturgeon from waters commonly occupied by pallid sturgeon (Service 1993, pp. 3–5). These are Tennessee (Tennessee 2008, pp. 4–5), Missouri (except on the Missouri River upstream of the Kansas River to the Iowa border) (Missouri 2008, pp. 10–11), Kentucky (Kentucky 2008, pp. 1–2), and Illinois (below Mel Price Locks and Dam) (Illinois 2007, pp. 3–5; Illinois 2008, p. 2). To protect pallid sturgeon, fishing seasons with maximum harvestable size limits for shovelnose sturgeon have been established (Bettoli *et al.* 2009, pp. 1–2). However, harvestable size limits for shovelnose sturgeon cannot protect pallid sturgeon that fall within the harvestable size limits if pallid sturgeon cannot be reliably differentiated from shovelnose sturgeon.

Along the Tennessee portion of the Mississippi River, commercial fishers misidentified 29 percent of the encountered pallid sturgeon (Bettoli *et al.* 2009, p. 3) and a minimum of 1.8 percent of total sturgeon harvest was endangered pallid sturgeon (Bettoli *et al.* 2009, p. 3). Applying this minimum harvest estimate to the 2005–2007 commercial shovelnose fishing seasons within Tennessee results in a minimum harvest estimate of 169 adult pallid sturgeon (Bettoli *et al.* 2009, p. 1). Extrapolating this minimum estimate of pallid sturgeon take across the four States that allow for commercial harvest of shovelnose sturgeon where the two species commonly coexist implies annual incidental take is a substantial source of pallid sturgeon mortality and a threat to the species' survival and recovery.

Furthermore, total annual pallid sturgeon mortality rates are higher where commercial harvest of shovelnose sturgeon occurs compared to areas without commercial harvest (30 percent versus 7–11 percent) (Killgore *et al.* 2007, pp. 454–455). Maximum identified ages of pallid sturgeon are substantially lower in commercially fished reaches of the Mississippi River (14 years) than in noncommercially fished reaches of the Mississippi River (21 years) (Killgore *et al.* 2007, p. 454). Harvested and protected populations should have considerably different mortality rates (and, therefore, corresponding different maximum ages); however, the endangered pallid sturgeon have similar mortality rates as the harvested shovelnose sturgeon in the middle Mississippi River (Colombo *et al.* 2007, p. 449). This information provides further evidence that illegal harvest of pallid sturgeon is occurring. Because female sturgeon do not begin egg development until ages 9–12 years, may not spawn until ages 15–20 years, and may not spawn every year (Keenlyne and Jenkins 1993, p. 395), mortality associated with commercial fishing activity is likely substantially lowering recruitment, negatively impacting population growth, and ultimately affecting recovery.

Much of the domestic sturgeon fishing pressure has been driven by international sturgeon supply and increasing price trends. International sturgeon catch declined from the record peak of 32,078 metric tons (70,719,884 pounds) in 1978 to 2,658 metric tons (5,859,886 pounds) in 2000 (FAO Fisheries Circular 2004, executive summary). This reduction in supply resulted in exponential increase in caviar prices subsequent to the 1978 peak (Bardi and Yaxley 2005, p. 2). Since 1998, international trade in all species of sturgeon has been regulated under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) owing to concerns over the impact of international trade on sturgeon populations in the wild. Recent CITES sturgeon quotas have further limited supply and exacerbated price pressures (CITES 2005, pp. 1–5, 8–9; CITES 2006, pp. 1, 5–6, 10–11; CITES 2007, pp. 1, 3–5, 8–9; CITES 2008, pp. 3, 7, 8, 11, 14). We expect commercial pressures on domestic sturgeon to remain constant or possibly increase due, in part, to current restrictions on importation of beluga sturgeon (*Huso huso*) caviar into the United States (70 FR 57316, September 30, 2005; 70 FR 62135, October 28, 2005) due to its status as a threatened species and the general trend toward reduced caviar exports from the Caspian Sea and Black Sea sturgeon stocks.

State commercial fishing data (Table 1) demonstrate a substantial level of commercial harvest of shovelnose sturgeon, including both flesh and roe, from areas where both shovelnose and pallid sturgeon coexist (Williamson 2003, pp. 118–120; Maher 2008; Scholten 2008a; Scholten 2008b; Travnichek 2008; Illinois DNR 2009).

TABLE 1—REPORTED COMMERCIAL HARVEST OF SHOVELNOSE STURGEON FLESH AND ROE IN POUNDS FROM 1995–2007 FROM THE PORTIONS OF ILLINOIS, KENTUCKY, MISSOURI, AND TENNESSEE WHERE BOTH SHOVELNOSE STURGEON AND PALLID STURGEON COEXIST

[Illinois DNR 2009; Scholten 2008a, 2008b; Travnichek 2008; Williamson 2003]

| | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Flesh** | | | | | | | | | | | | | |
| Illinois | 405 | 3,475 | 6,115 | 2,855 | 3,798 | 1,576 | 3,074 | 1,541 | 600 | 2,931 | 2,599 | * | * |
| Kentucky | * | * | * | * | 25 | 9,938 | 13,059 | 8,324 | 1,413 | 5,167 | 16,324 | 14,130 | 10,043 |
| Missouri | 6,201 | 10,142 | 8,231 | 9,089 | 19,655 | 23,394 | 77,498 | 43,211 | 23,956 | 28,818 | 10,002 | 6,526 | 5,220 |
| Tennessee | * | * | * | * | * | 4,178 | 2,178 | 3,519 | 5,759 | 4,005 | 17,297 | 12,926 | 7,812 |
| Total | 6,606 | 13,617 | 14,346 | 11,944 | 23,478 | 39,086 | 95,809 | 56,595 | 31,728 | 40,921 | 46,222 | 33,582 | 23,075 |
| **Roe** | | | | | | | | | | | | | |
| Illinois | 0 | 28 | 65 | 87 | 0 | 16 | 208 | 402 | 136 | 585 | 365 | 554 | * |
| Kentucky | * | * | * | * | * | 527 | 1,021 | 731 | 258 | 554 | 1,844 | 1,648 | 1,738 |
| Missouri | * | * | * | * | * | * | * | * | 4,490 | 3,504 | 2,356 | 1,907 | 1,420 |
| Tennessee | * | * | * | * | * | * | * | 660 | 1,001 | 665 | 2,290 | 2,027 | 1,366 |
| Total | 0 | 28 | 65 | 87 | 0 | 543 | 1,229 | 1,793 | 5,883 | 5,308 | 6,855 | 6,136 | 4,524 |

Illinois shovelnose harvest includes Mississippi River catch downstream of Mel Price Locks and Dam; Missouri shovelnose harvest includes both Mississippi River (downstream of Mel Price Locks and Dam) and Missouri River (except on the Missouri River upstream of the Kansas River to the Iowa border) catches; and Tennessee and Kentucky shovelnose harvest includes Mississippi River catch. Tennessee's flesh data were extrapolated using length-weight relationships from total fish harvested.

An asterisk (*) indicates no data reported or data otherwise unavailable.

Incidental, illegal harvest of pallid sturgeon is a significant impediment to the survival and recovery of this species in some portions of its range (Service 2007, p. 45). We recommended in our 2007 5-year status review that we should identify and implement measures to eliminate or significantly reduce illegal and accidental harvest of pallid sturgeon (Service 2007, p. 59).

Treating the shovelnose sturgeon as a threatened species, under section 4(e) of the Act, will result in termination of commercial harvest of shovelnose sturgeon and shovelnose-pallid sturgeon hybrids where they commonly coexist with pallid sturgeon. This action will facilitate the enforcement of take protections for pallid sturgeon and substantially reduce or eliminate take of pallid sturgeon associated with commercial harvest of shovelnose sturgeon and their roe. Reduction of take of pallid sturgeon will facilitate the species' survival, reproduction, and, ultimately, its recovery. For these reasons, we will treat the shovelnose sturgeon as threatened due to similarity of appearance to the pallid sturgeon in those areas where the two species commonly coexist, in accordance with section 4(e) of the Act.

**Section 4(d) "Special Rule" Regulating Take**

When a species is considered threatened under the Act, the Secretary may specify regulations that he deems necessary to provide for the conservation of that species under a rule authorized by section 4(d) of the Act. These rules, commonly referred to as "special rules," are found in part 17 of title 50 of the Code of Federal Regulations (CFR) in sections 17.40–17.48. This special rule for § 17.44, which deals with fishes, prohibits take of any shovelnose sturgeon, shovelnose-pallid sturgeon hybrids, or their roe when associated with or related to a commercial fishing activity in those portions of its range that commonly overlap with the range of the endangered pallid sturgeon. In this context, commercial fishing purposes is considered as any activity where shovelnose sturgeon and shovelnose-pallid sturgeon hybrid roe or flesh is attempted to be, or is intended to be, traded, sold, or exchanged for financial compensation, goods, or services. Capture of shovelnose sturgeon or shovelnose-pallid sturgeon hybrids in commercial fishing gear is not prohibited if it is accidental or incidental to otherwise legal commercial fishing activities, such as commercial fishing targeting nonsturgeon species, provided the animal is released immediately upon discovery, with all roe intact, at the point of capture. All otherwise legal activities involving shovelnose sturgeon and shovelnose-pallid sturgeon hybrids that are conducted in accordance with applicable State, Federal, tribal, and local laws and regulations are not considered to be take under this regulation.

**Effects of These Rules**

Treating the shovelnose sturgeon as threatened under the "similarity of appearance" provisions of the Act extends take prohibitions to shovelnose sturgeon, shovelnose-pallid sturgeon hybrids, and their roe when associated with a commercial fishing activity. Capture of shovelnose sturgeon or shovelnose-pallid sturgeon hybrids in commercial fishing gear is not prohibited if it is accidental or incidental to otherwise legal commercial fishing activities, such as commercial fishing targeting nonsturgeon species, provided the animal is released immediately upon discovery, with all roe intact, at the point of capture. All otherwise legal activities within the areas identified that may involve shovelnose sturgeon and shovelnose-pallid sturgeon hybrids and which are conducted in accordance with applicable State, Federal, tribal, and local laws and regulations will not be considered take under this regulation.

Under this special 4(d) rule, take is prohibited where shovelnose and pallid sturgeons' range commonly overlap (Service 1993, pp. 3–5, 16–17). Specifically, this includes: (1) The portion of the Missouri River in Iowa, Kansas, Missouri, Montana, North Dakota, Nebraska, and South Dakota; (2) the portion of the Mississippi River downstream from the Melvin Price Locks and Dam (Lock and Dam 26) in Arkansas, Illinois, Kentucky, Louisiana,

Missouri, Mississippi, and Tennessee; (3) the Platte River downstream of the Elkhorn River confluence in Nebraska; (4) the portion of the Kansas River downstream from the Bowersock Dam in Kansas; (5) the Yellowstone River downstream of the Bighorn River confluence in North Dakota and Montana; and (6) the Atchafalaya River in Louisiana. See the map in the rule portion of this document.

This designation of similarity of appearance under section 4(e) of the Act would not extend any other protections of the Act, such as the requirements to designate critical habitat, the recovery planning provisions under section 4(f), or consultation requirements for Federal agencies under section 7, to shovelnose sturgeon. Therefore, Federal agencies are not required to consult with us on activities they authorize, fund, or carry out that may affect shovelnose sturgeon.

**Paperwork Reduction Act**

The OMB regulations at 5 CFR part 1320 implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). The OMB regulations at 5 CFR 1320.3(c) define a "collection of information" as the obtaining of information by or for an agency by means of identical questions posed to, or identical reporting, recordkeeping, or disclosure requirements imposed on, 10 or more persons. Furthermore, 5 CFR 1320.3(c)(4) specifies that "10 or more persons" refers to the persons to whom a collection of information is addressed by the agency within any 12-month period. For purposes of this definition, employees of the Federal Government are not included. A Federal 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. This rule does not contain collections of information other than those permit application forms already approved under the Paperwork Reduction Act and assigned OMB control number 1018–0094.

**National Environmental Policy Act**

We have determined that an Environmental Assessment or Environmental Impact Statement, as defined under the authority of the NEPA, need not be prepared in connection with listing regulations adopted pursuant to section 4, including section 4(a), of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

**References Cited**

A complete list of references cited in this rule is available upon request from the Pallid Sturgeon Recovery Coordinator (see **FOR FURTHER INFORMATION CONTACT** section above).

**List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

**Regulation Promulgation**

■ Accordingly, we hereby amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

## PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Public Law 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.11(h) by adding an entry for "Sturgeon, shovelnose", in alphabetical order under "FISHES," to the List of Endangered and Threatened Wildlife to read as follows:

**§ 17.11 Endangered and threatened wildlife.**

* * * * *

(h) * * *

| Species | | Historic range | Vertebrate population where endangered or threatened | Status | When listed | Critical habitat | Special rules |
|---|---|---|---|---|---|---|---|
| Common name | Scientific name | | | | | | |
| * | * | * | * | * | * | | * |
| FISHES | | | | | | | |
| * | * | * | * | * | * | | * |
| Sturgeon, shovelnose. | *Scaphirhynchus platorynchus.* | U.S.A. (AL, AR, IA, IL, IN, KS, KY, LA, MN, MO, MS, MT, ND, NE, NM, OH, OK, PA, SD, TN, TX, WI, WV, WY). | Entire | T (S/A) | 778 | N/A | 17.44(aa) |
| * | * | * | * | * | * | | * |

■ 3. Amend § 17.44 by adding a new paragraph (aa) to read as follows:

**§ 17.44 Special rules—fishes.**

* * * * *

(aa) Shovelnose sturgeon (*Scaphirhynchus platorynchus*).

(1) Within the geographic areas set forth in paragraph (aa)(2) of this section, except as expressly noted in this paragraph, take of any shovelnose sturgeon, shovelnose-pallid sturgeon hybrids, or their roe associated with or related to a commercial fishing activity is prohibited. Capture of shovelnose sturgeon or shovelnose-pallid sturgeon hybrids in commercial fishing gear is not prohibited if it is accidental or incidental to otherwise legal commercial fishing activities, such as commercial fishing targeting nonsturgeon species, provided the animal is released immediately upon discovery, with all roe intact, at the point of capture.

(2) The shovelnose and shovelnose-pallid sturgeon hybrid populations covered by this special rule occur in portions of Arkansas, Iowa, Illinois, Kansas, Kentucky, Louisiana, Missouri, Mississippi, Montana, North Dakota, Nebraska, South Dakota, and Tennessee. The specific areas are:

(i) The portion of the Missouri River in Iowa, Kansas, Missouri, Montana, North Dakota, Nebraska, and South Dakota;

(ii) The portion of the Mississippi River downstream from the Melvin Price Locks and Dam (Lock and Dam 26) in Arkansas, Illinois, Kentucky,

Louisiana, Missouri, Mississippi, and Tennessee;

(iii) The Platte River downstream of the Elkhorn River confluence in Nebraska;

(iv) The portion of the Kansas River downstream from the Bowersock Dam in Kansas;

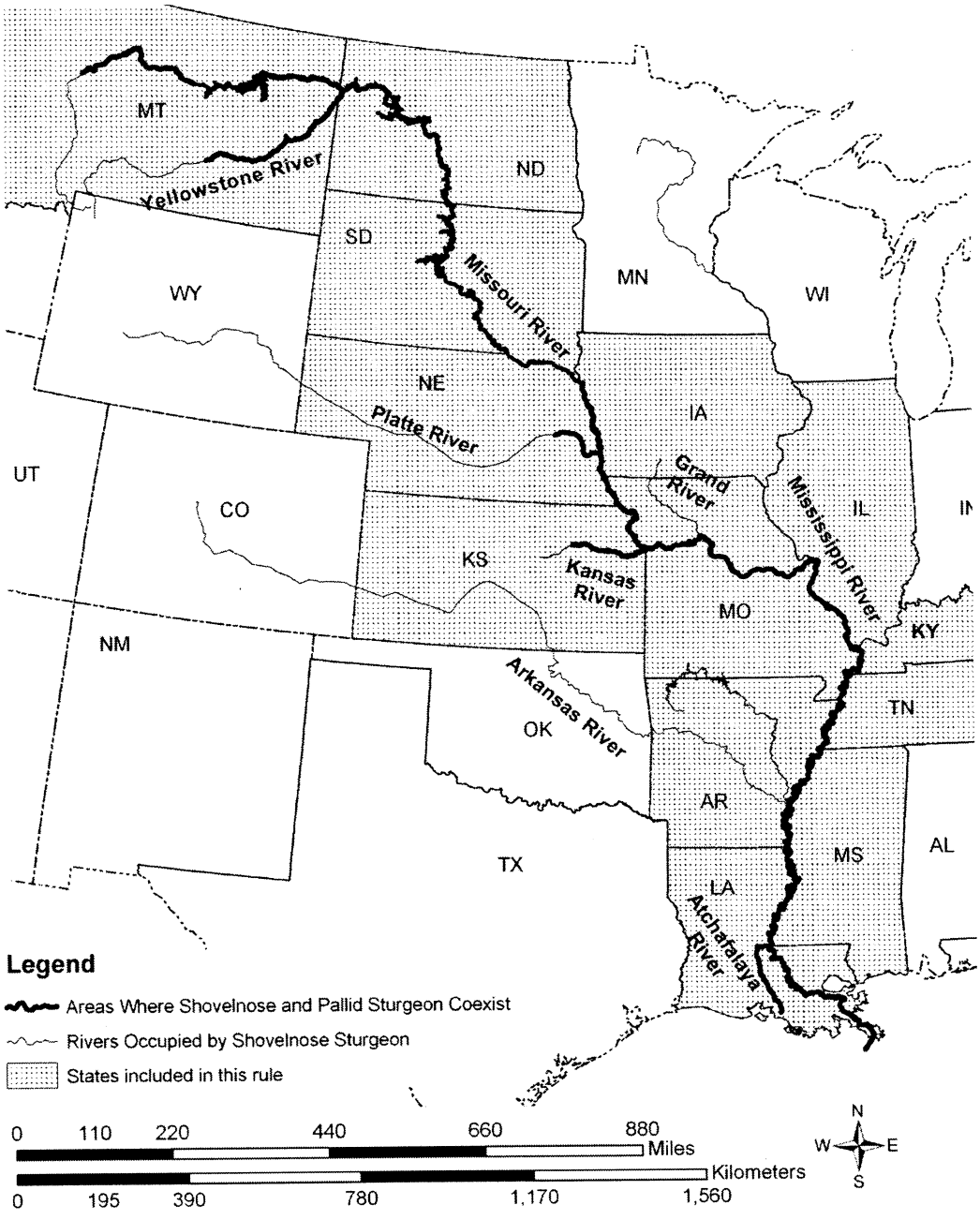
(v) The Yellowstone River downstream of the Bighorn River confluence in North Dakota and Montana; and

(vi) The Atchafalaya River in Louisiana.

(3) A map showing the area covered by this special rule (the area of shared habitat between shovelnose and pallid sturgeon) follows:

BILLING CODE 4310–55–C

Figure 1: Areas Where Pallid and Shovelnose Sturgeon Commonly Coexist in the Missouri and Mississippi River Basins



Dated: August 25, 2010.

**Will Shafroth,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 2010–21861 Filed 8–31–10; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 665

**[Docket No. 100630283–0388–02]**

**RIN 0648–XX15**

## Fisheries in the Western Pacific; Bottomfish and Seamount Groundfish Fisheries; 2010–11 Main Hawaiian Islands Bottomfish Total Allowable Catch

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

**ACTION:** Final specification.

**SUMMARY:** In this rule, NMFS specifies a total allowable catch (TAC) of 254,050 lb (115,235 kg) of Deep 7 bottomfish in the main Hawaiian Islands (MHI) for the 2010–11 fishing year. The expected impact of the TAC is long-term sustainability of Hawaii bottomfish.

**DATES:** This final specification is effective October 1, 2010.

**ADDRESSES:** Copies of the Fishery Ecosystem Plan for the Hawaiian Archipelago and associated Environmental Impact Statement are available from the Western Pacific Fishery Management Council (Council), 1164 Bishop St., Suite 1400, Honolulu, HI 96813, tel 808–522–8220, fax 808–522–8226, or *www.wpcouncil.org*.

A supplemental environmental assessment (EA), was prepared that describes the impact of this final specification on the human environment. Based on the environmental impact analysis presented in the EA, NMFS prepared a finding of no significant impact (FONSI). Copies of the EA and FONSI are available from *www.regulations.gov*, or Michael D. Tosatto, Acting Regional Administrator, NMFS Pacific Islands Region (PIR), 1601 Kapiolani Blvd. 1110, Honolulu, HI 96814.

**FOR FURTHER INFORMATION CONTACT:** Jarad Makaiau, Sustainable Fisheries Division, NMFS PIR, 808–944–2108.

**SUPPLEMENTARY INFORMATION:** NMFS hereby specifies a TAC of Deep 7 bottomfish in the MHI for the 2010–11 fishing year of 254,050 lb (115,235 kg), as recommended by the Council, based on the best available scientific, commercial, and other information, taking into account the associated risk of overfishing. The MHI Management Subarea is the portion of U.S. Exclusive Economic Zone around the Hawaiian Archipelago lying to the east of 161° 20' W. longitude. The Deep 7 bottomfish are onaga (*Etelis coruscans*), ehu (*E. carbunculus*), gindai (*Pristipomoides zonatus*), kalekale (*P. sieboldii*), opakapaka (*P. filamentosus*), lehi (*Aphareus rutilans*), and hapuupuu (*Epinephelus quernus*).

When the TAC is projected to be reached, NMFS will close the non-commercial and commercial Deep 7 bottomfish fisheries until the end of the fishing year (August 31, 2010). During a fishery closure for Deep 7 bottomfish, no person may fish for, possess, or sell any of these fish in the MHI, except as otherwise authorized by law. Specifically, fishing for, and the resultant possession or sale of, Deep 7 bottomfish by vessels legally registered to Pacific Remote Island Areas bottomfish fishing permits, and conducted in compliance with all laws and regulations, are not affected by the closure. There is no prohibition on fishing for or selling other non-Deep 7 bottomfish species throughout the year.

All other management measures continue to apply in the MHI bottomfish fishery. The MHI bottomfish fishery reopens on September 1, 2010, and will continue until August 31, 2010, unless the fishery is closed prior to August 31 as a result of the TAC being reached.

Additional background information on this final specification may be found in the preamble to the proposed specification published on August 2, 2010 (75 FR 45085), and is not repeated here.

### Comments and Responses

On August 2, 2010, NMFS published a proposed specification and request for public comments on the MHI Deep 7 bottomfish TAC (75 FR 45085). The comment period ended on August 17, 2010. NMFS did not receive any public comments.

### Changes from the Proposed Specification

There are no changes in the final specification.

### Classification

The Regional Administrator, NMFS PIR, determined that this final specification is necessary for the conservation and management of MHI bottomfish, and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

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

This action is exempt from review under Executive Order 12866.

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

Dated: August 27, 2010.

**Samuel D. Rauch III,**

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

[FR Doc. 2010–21829 Filed 8–31–10; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 679

**[Docket No. 0910131363–0087–02]**

**RIN 0648–XY62**

## Fisheries of the Exclusive Economic Zone Off Alaska; Atka Mackerel in the Bering Sea and Aleutian Islands Management Area

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

**ACTION:** Temporary rule; closures and openings.

**SUMMARY:** NMFS is prohibiting directed fishing for Atka mackerel in the Eastern Aleutian District and the Bering Sea subarea of the Bering Sea and Aleutian Islands management area (BSAI) by vessels participating in the BSAI trawl limited access fishery. This action is necessary to prevent exceeding the 2010 total allowable catch (TAC) of Atka mackerel in these areas by vessels participating in the BSAI trawl limited access fishery. NMFS is also announcing the opening and closing dates of the first and second directed fisheries within the harvest limit area (HLA) in areas 542 and 543. These actions are necessary to conduct

directed fishing for Atka mackerel in the HLA in areas 542 and 543.

**DATES:** The effective dates are provided in Table 1 under the **SUPPLEMENTARY INFORMATION** section of this temporary action.

**FOR FURTHER INFORMATION CONTACT:** Obren Davis, 907–586–7228.

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

The 2010 TAC of Atka mackerel for vessels participating in the BSAI trawl limited access fishery in the Eastern Aleutian District and the Bering Sea subarea was established as 1,264 metric tons (mt) by the final 2010 and 2011 harvest specifications for groundfish in the BSAI (75 FR 11778, March 12, 2010).

In accordance with § 679.20(d)(1)(i) and (d)(1)(ii)(B), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that 5 mt of the 2010 Atka mackerel TAC allocated to vessels participating in the BSAI trawl limited access fishery in the Eastern Aleutian District and the Bering Sea subarea will be necessary as incidental catch to support other anticipated groundfish fisheries. Therefore, the Regional Administrator is establishing a directed fishing allowance of 1,259 mt. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Atka mackerel in the Eastern Aleutian District and the Bering Sea subarea by vessels participating in the BSAI trawl limited access fishery.

In accordance with § 679.20(a)(8)(iii)(C), the Regional Administrator is opening the first directed fisheries for Atka mackerel within the HLA in areas 542 and 543, 48 hours after prohibiting directed fishing for Atka mackerel in the Eastern Aleutian District and the Bering Sea subarea. The Regional Administrator has established the opening dates for the second HLA directed fisheries as immediately after the last closure of the first HLA fisheries in either area 542 or 543 for those vessels participating in the Amendment 80 cooperative. The Regional Administrator also has established the opening dates for the second HLA directed fisheries as 48 hours after the last closure of the first HLA fisheries in either area 542 or 543 for those vessels participating in the Amendment 80 limited access sector. Consequently, NMFS is opening and closing directed fishing for Atka mackerel in the HLA of areas 542 and 543 in accordance with the periods listed under Table 1 of this notice.

TABLE 1—EFFECTIVE DATES AND TIMES

| Action | Area | Effective date [1] | |
|---|---|---|---|
| | | From | To |
| Prohibiting Atka mackerel by vessels participating in the BSAI trawl limited access fishery. | Eastern Aleutian District and the Bering Sea subarea. | 1200 hrs, September 1, 2010 ..... | 1200 hrs, November 1, 2010. |
| Opening the first and second directed fisheries in the HLA for the Amendment 80 cooperative. | 542 and 543 ..... | 1200 hrs, September 3, 2010 ..... | 1200 hrs, September 17, 2010. |
| | 542 and 543 ..... | 1200 hrs, September 17, 2010 ... | 1200 hrs, October 1, 2010. |
| Opening the first and second directed fisheries in the HLA for vessels participating in the Amendment 80 limited access sector. | 542 and 543 ..... | 1200 hrs, September 3, 2010 ..... | 1200 hrs, September 11, 2010. |
| | 542 and 543 ..... | 1200 hrs, September 13, 2010 ... | 1200 hrs, September 21, 2010. |
| Opening the first directed fishery in the HLA for vessels participating in the BSAI trawl limited access sector. | 542 ..... | 1200 hrs, September 3, 2010 ..... | 1200 hrs, September 17, 2010. |

[1] Alaska local time.

In accordance with § 679.20(a)(8)(iii)(A) and § 679.20(a)(8)(iii)(B), vessels using trawl gear for directed fishing for Atka mackerel have previously registered with NMFS to fish in the HLA fisheries in areas 542 and 543. NMFS has randomly assigned each vessel to the directed fishery or fisheries for which they have registered. NMFS has notified each vessel owner as to which fishery each vessel has been assigned by NMFS (75 FR 49422, August 13, 2010).

In accordance with the final 2010 and 2011 harvest specifications for groundfish in the BSAI (75 FR 11778, March 12, 2010) and § 679.20(a)(8)(ii)(C)(*1*), the HLA limits of the B season allowance of the 2010 TACs in areas 542 and 543 are 4,474 mt and 3,393 mt, respectively, for vessels participating in the Amendment 80 limited access fishery. The HLA limits of the B season allowance of the 2010 TACs in areas 542 and 543 are 2,959 mt and 2,111 mt, respectively, for Amendment 80 cooperatives. The HLA limit of the B season allowance of the 2010 TAC in area 542 is 474 mt for the BSAI trawl limited access fishery. In accordance with § 679.20(a)(8)(iii)(E), the Regional Administrator has established the closure dates of the Atka mackerel directed fisheries in the HLA for areas 542 and 543 based on the amount of the harvest limit and the estimated fishing capacity of the vessels assigned to the respective fisheries. Consequently, NMFS is prohibiting directed fishing for Atka mackerel in the HLA of areas 542 and 543 in accordance with the dates and times listed in Table 1 of this notice.

After the effective dates of these closures, the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

**Classification**

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA) finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5

U.S.C. 553(b)(B) as such a requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of the Atka mackerel fishery in the Eastern Aleutian District and the Bering Sea subarea for vessels participating in the BSAI trawl limited access fishery and the opening and closing of the fisheries for the HLA limits established for area 542 and area 543 pursuant to the 2010 Atka mackerel TAC. The fisheries opening and closure dates associated with the HLA limits are established based on the Regional Administrator's estimate of fishing capacity and effort for the vessels registered to fish in the HLA in area 542 and area 543, per § 679.20(a)(8)(iii)(E). NMFS was unable to publish a notice providing time for public comment because the most recent, relevant information about operational aspects of the vessels registered to fish in the HLA only became available as of August 23, 2010. The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: August 27, 2010.

**Carrie Selberg,**

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

[FR Doc. 2010–21831 Filed 8–31–10; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 679

**[Docket No. 0910131362–0087–02]**

**RIN 0648–XY66**

## Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Ocean Perch in the West Yakutat District of the Gulf of Alaska

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

**ACTION:** Temporary rule; closure.

**SUMMARY:** NMFS is prohibiting directed fishing for Pacific ocean perch in the West Yakutat District of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2010 total allowable catch (TAC) of Pacific ocean perch in the West Yakutat District of the GOA.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), August 28, 2010, through 2400 hrs, A.l.t., December 31, 2010.

**FOR FURTHER INFORMATION CONTACT:** Steve Whitney, 907–586–7269.

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2010 TAC of Pacific ocean perch in the West Yakutat District of the GOA is 2,004 metric tons (mt) as established by the final 2010 and 2011 harvest specifications for groundfish of the GOA (75 FR 11749, March 12, 2010).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2010 TAC of Pacific ocean perch in the West Yakutat District of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 1,904 mt, and is setting aside the remaining 100 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific ocean perch in the West Yakutat District of the GOA.

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

### Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of Pacific ocean perch in the West Yakutat District of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of August 26, 2010.

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

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: August 27, 2010.

**Carrie Selberg,**

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

[FR Doc. 2010–21860 Filed 8–27–10; 4:15 pm]

**BILLING CODE 3510–22–S**

# Proposed Rules

Federal Register
Vol. 75, No. 169
Wednesday, September 1, 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.

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2010–0870; Directorate Identifier 2010–CE–045–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–500 Airplanes

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

**ACTION:** Notice of proposed rulemaking (NPRM).

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

It has been found the occurrences of failure of the Flow Control Shutoff Valve (FCSOV) in the closed position. Failure of the two valves (left and right) can cause the loss of the pneumatic source, and lead to loss of the cabin pressurization.

Since this condition affects flight safety, a corrective action is required. Thus, sufficient reason exists to request compliance with this AD.

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

**DATES:** We must receive comments on this proposed AD by October 18, 2010.

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

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

### Examining the AD Docket

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

**FOR FURTHER INFORMATION CONTACT:** Karl Schletzbaum, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; *telephone:* (816) 329–4146; *fax:* (816) 329–4090.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–0870; Directorate Identifier 2010–CE–045–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

### Discussion

The AGÊNCIA NACIONAL DE AVIAÇÃO CIVIL—BRAZIL (ANAC), which is the aviation authority for Brazil, has issued AD No. 2010–08–01, dated September 3, 2010 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

It has been found the occurrences of failure of the Flow Control Shutoff Valve (FCSOV) in the closed position. Failure of the two valves (left and right) can cause the loss of the pneumatic source, and lead to loss of the cabin pressurization.

Since this condition affects flight safety, a corrective action is required. Thus, sufficient reason exists to request compliance with this AD.

The MCAI requires replacing both FCSOVs with new and improved FCSOVs. You may obtain further information by examining the MCAI in the AD docket.

### Relevant Service Information

Empresa Brasileira de Aeronáutica S.A. (EMBRAER) has issued Service Bulletin 500–21–0001, dated December 9, 2009. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

### FAA's Determination and Requirements of the Proposed AD

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

### Differences Between This Proposed AD and the MCAI or Service Information

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

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

highlighted in a **Note** within the proposed AD.

**Costs of Compliance**

We estimate that this proposed AD will affect 79 products of U.S. registry. We also estimate that it would take about 4 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $10,487 per product.

Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $855,333, or $10,827 per product.

According to Embraer, the parts cost of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage for affected individuals. As a result, we have included all cost in our cost estimate.

**Authority for This Rulemaking**

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

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

**Regulatory Findings**

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

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

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

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

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

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

**List of Subjects in 14 CFR Part 39**

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

**The Proposed Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

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

**Empresa Brasileira de Aeronautica S.A. (EMBRAER):** Docket No. FAA–2010–0870; Directorate Identifier 2010–CE–045–AD.

**Comments Due Date**

(a) We must receive comments by October 18, 2010.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to Embraer—Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–500 airplanes, serial numbers 50000005 through 50000118, 50000120, 50000122 through 50000126, 50000128, and 50000131, certificated in any category.

**Subject**

(d) Air Transport Association of America (ATA) Code 36: Pneumatic.

**Reason**

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

It has been found the occurrences of failure of the Flow Control Shutoff Valve (FCSOV) in the closed position. Failure of the two valves (left and right) can cause the loss of the pneumatic source, and lead to loss of the cabin pressurization.

Since this condition affects flight safety, a corrective action is required. Thus, sufficient reason exists to request compliance with this AD.

The MCAI requires replacing both FCSOVs with new and improved FCSOVs. You may obtain further information by examining the MCAI in the AD docket.

**Actions and Compliance**

(f) Unless already done, at the next scheduled maintenance check or within 12 months after the effective date of this AD or within 600 hours time-in-service after the effective date of this AD, whichever occurs first, replace both flow control shutoff valves, part number (P/N) 1300230–13 and P/N 1300230–23, with P/N 1300230–15 and P/N 1300230–25. Do the replacements following Empresa Brasileira de Aeronáutica S.A. (EMBRAER) Service Bulletin 500–21–0001, dated December 9, 2009.

**FAA AD Differences**

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

**Other FAA AD Provisions**

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to *Attn:* Karl Schletzbaum, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; *telephone:* (816) 329–4146; *fax:* (816) 329–4090. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

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

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

**Related Information**

(h) Refer to MCAI AGÊNCIA NACIONAL DE AVIAÇÃO CIVIL—BRAZIL (ANAC) AD No. 2010–08–01, dated September 3, 2010; and Empresa Brasileira de Aeronáutica S.A. (EMBRAER) Service Bulletin 500–21–0001, dated December 9, 2009, for related information.

Issued in Kansas City, Missouri, on August 25, 2010.

**John Colomy,**

*Acting Manager, Small Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2010–21874 Filed 8–31–10; 8:45 am]

**BILLING CODE 4910–13–P**

**DEPARTMENT OF COMMERCE**

**Bureau of Economic Analysis**

**15 CFR Part 806**

**[Docket No. 100202061–0063–01]**

**RIN 0691–AA75**

## Direct Investment Surveys: BE–577, Quarterly Survey of U.S. Direct Investment Abroad—Direct Transactions of U.S. Reporter With Foreign Affiliate

**AGENCY:** Bureau of Economic Analysis, Commerce.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This proposed rule would amend regulations of the Bureau of Economic Analysis (BEA), Department of Commerce, to set forth the reporting requirements for BE–577 quarterly survey of U.S. direct investment abroad. The survey is conducted quarterly and obtains sample data on transactions and positions between U.S.-owned foreign business enterprises and their U.S. parents.

BEA proposes modification of items on the survey form and in the reporting criteria. Changes are proposed to bring the BE–577 forms and related instructions into conformity with the 2009 BE–10, Benchmark Survey of U.S. Direct Investment Abroad, and to raise the threshold for reporting.

**DATES:** Comments on this proposed rule will receive consideration if submitted in writing on or before 5 p.m. November 1, 2010.

**ADDRESSES:** You may submit comments, identified by RIN 0691–AA75, and referencing the agency name (Bureau of Economic Analysis), by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. For agency, select "Commerce Department—all."
- *E-mail: David.Galler@bea.gov.*
- *Fax:* Office of the Chief, Direct Investment Division, (202) 606–5318.
- *Mail:* Office of the Chief, Direct Investment Division, U.S. Department of Commerce, Bureau of Economic Analysis, BE–50, Washington, DC 20230.
- *Hand Delivery/Courier:* Office of the Chief, Direct Investment Division, U.S. Department of Commerce, Bureau of Economic Analysis, BE–50, Shipping and Receiving, Section M100, 1441 L Street, NW., Washington, DC, 20005.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in the proposed rule should be sent to both BEA through any of the methods above and to the Office of Management and Budget (OMB), O.I.R.A., Paperwork Reduction Project 0608–0004, Attention PRA Desk Officer for BEA, via e-mail at *pbugg@omb.eop.gov,* or by FAX at (202) 395–7245.

*Public Inspection:* All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All personal identifying information (for example, name, address, *etc.*) voluntarily submitted by the commentator may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. BEA will accept anonymous comments.

**FOR FURTHER INFORMATION CONTACT:** David H. Galler, Chief, Direct Investment Division, BE–50, Bureau of Economic Analysis, U.S. Department of Commerce, Washington, DC 20230; phone (202) 606–9835.

**SUPPLEMENTARY INFORMATION:** In Section 3 of Executive Order 11961, as amended by Executive Orders 12318 and 12518, the President delegated responsibility for performing functions under the Act as concerns direct investment to the Secretary of Commerce, who has redelegated it to BEA. The BE–577 quarterly survey of U.S. direct investment abroad is a mandatory survey and is conducted quarterly by BEA under the International Investment and Trade in Services Survey Act, 22 U.S.C. 3101–3108 (the Act).

The survey is a sample survey that collects data on transactions and positions between U.S.-owned foreign business enterprises and their U.S. parents. The sample data are used to derive quarterly universe estimates from similar data reported in the BE–10, Benchmark Survey of U.S. Direct Investment Abroad, which is conducted every five years. The data are used in the preparation of the U.S. international transactions accounts and national income and product accounts. The data are needed to measure the size and economic significance of U.S. direct investment abroad, measure changes in such investment, and assess its impact on the U.S. and foreign economies. BEA will send BE–577 survey forms to potential respondents each quarter; responses will be due within 30 days after the close of each fiscal quarter, except for the final quarter of the fiscal year, when reports will be due within 45 days.

This proposed rule would amend 15 CFR 806.14 to set forth the reporting requirements for the BE–577 quarterly survey of U.S. direct investment abroad. The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520 (PRA).

### Description of Changes

BEA proposes to raise the threshold for exempting entities from the reporting requirements of BE–577 from $40 million to $60 million and to discontinue collecting information on transactions classified as permanent debt and related interest payments between U.S. parent companies that are banks, bank holding companies, or financial holding companies and their bank foreign affiliates. Recent changes in international standards call for the bank permanent debt previously classified as direct investment to be classified as other investment, for which statistics are collected by the Treasury Department through the Treasury International Capital System. BEA also proposes to change the title of Form BE–577 to "Quarterly Survey of U.S. Direct Investment Abroad—Transactions of U.S. Reporter With Foreign Affiliate."

The exemption level was last changed in 2006 following the 2004 Benchmark Survey of U.S. Direct Investment Abroad. The exemption level is stated in terms of the foreign affiliate's assets, sales, and net income. U.S. parents would be required to report for their foreign affiliates if the foreign affiliates have total assets, sales or gross operating revenues, or net income greater than $60 million (positive or negative). At the new reporting threshold, BEA would collect about 14,500 forms per quarter, compared to 17,500 under the previous threshold. About 3,000 affiliates—accounting for less than 1.5 percent of the final universe estimates of income and position—would drop out of the sample and would be estimated based on reports received on the benchmark survey.

### Survey Background

The Bureau of Economic Analysis (BEA), U.S. Department of Commerce, conducts the BE–577 survey under the authority of the International Investment and Trade in Services Survey Act (22 U.S.C. 3101–3108), hereinafter, "the Act." Section 4(a) of the Act (22.U.S.C. 3103(a)) provides that, with respect to United States direct investment abroad, the President shall, to the extent he deems necessary and

feasible, conduct a regular data collection program to secure current information on international capital flows and other information related to international investment and trade in services including (but not limited to) such information that may be necessary for computing and analyzing the United States balance of payments, the employment and taxes of United States parents and affiliates, and the international investment and trade in services position of the United States.

**Executive Order 12866**

This proposed rule has been determined to be not significant for purposes of E.O. 12866.

**Executive Order 13132**

This proposed rule does not contain policies with Federalism implications as that term is defined in E.O. 13132.

**Paperwork Reduction Act**

This proposed rule contains a collection-of-information requirement subject to review and approval by the OMB under the PRA. The requirement has been submitted to OMB for approval as a revision to a collection currently approved under OMB control number 0608–0004.

Notwithstanding any other provisions 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 displays a currently valid OMB control number.

The BE–577 survey, as proposed, is expected to result in the filing of about 14,500 foreign affiliate reports by an estimated 1,750 U.S. parent companies. A parent company must file one form per affiliate. The respondent burden for this collection of information is estimated to vary from one-half hour to three hours per response, with an average of one hour per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Because reports are filed 4 times per year, 58,000 responses annually are expected. Thus, the total annual respondent burden of the survey is estimated at 58,000 hours (14,500 respondents filing 4 times per year multiplied by 1 hour average burden). The survey's estimated respondent burden of 58,000 hours compares with a total burden of 62,000 burden hours in the current OMB inventory. The reduction in burden is a result of raising the threshold for filing from $40 million to $60 million.

Comments are requested concerning: (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 burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

Written comments regarding the burden-hour estimates or other aspects of the collection of information requirements contained in the proposed rule should be sent to both BEA and OMB following the instructions given in the **ADDRESSES** section above.

**Regulatory Flexibility Act**

The Chief Counsel for Regulation, Department of Commerce, has certified to the Chief Counsel for Advocacy, Small Business Administration (SBA), under the provisions of the Regulatory Flexibility Act (5 U.S.C. 605(b)), that this proposed rulemaking, if adopted, will not have a significant economic impact on a substantial number of small entities. Few small U.S. businesses are subject to the reporting requirements of this survey. U.S. companies that have direct investments tend to be quite large. Although the BE–577 survey does not itself collect data on the size of the U.S. companies that must respond, data collected on related BEA surveys indicate that about 200 of the estimated 1,750 U.S. parent companies that will be required to respond to the BE–577 quarterly survey are small businesses according to the standards established by the SBA. The exemption level for the BE–577 survey is set in terms of the size of a U.S. company's foreign affiliates (foreign companies owned 10 percent or more by the U.S. company); if a foreign affiliate has total assets, sales or gross operating revenues, or net income greater than $60 million (positive or negative), it must be reported. Usually, the U.S. parent company that is required to file the report is many times larger than its largest foreign affiliate.

The approximately 200 U.S. businesses that meet the SBA small business standards tend to have few foreign affiliates, and the foreign affiliates that they do own are small for the purposes of this analysis. With the proposed increase in the exemption level for the BE–577 survey from $40 million to $60 million (stated in terms of the foreign affiliate's assets, sales, and net income), small U.S. businesses will be required to file fewer reports for their foreign affiliates than would be required in the absence of this increase.

Because few small businesses are impacted by this rule, and because those small businesses that are impacted are subject to only minimal recordkeeping burdens, the Chief Counsel for Regulation certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities.

**List of Subjects in 15 CFR Part 806**

Economic statistics, International transactions, Penalties, Reporting and recordkeeping requirements, U.S. investment abroad.

**J. Steven Landefeld,**

*Director, Bureau of Economic Analysis.*

For the reasons set forth in the preamble, BEA proposes to amend 15 CFR part 806 as follows:

## PART 806—DIRECT INVESTMENT SURVEYS

1. The authority citation for 15 CFR part 806 continues to read as follows:

**Authority:** 5 U.S.C. 301; 22 U.S.C. 3101–3108; E.O. 11961 (3 CFR, 1977 Comp., p. 86), as amended by E.O. 12318 (3 CFR, 1981 Comp., p. 173); E.O. 12518 (3 CFR, 1985 Comp., p. 348).

2. Section 806.14(e) is revised to read as follows:

**§ 806.14 U.S. direct investment abroad.**

* * * * *

(e) *Quarterly report form.* BE–577, Quarterly Survey of U.S. Direct Investment Abroad—Transactions of U.S. Reporter With Foreign Affiliate: One report is required for each foreign affiliate exceeding an exemption level of $60 million except that a report need not be filed by a U.S. Reporter to report direct transactions with one of its foreign affiliates in which it does not hold a direct equity interest unless an intercompany balance for the quarter exceeds $1 million.

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[FR Doc. 2010–21833 Filed 8–31–10; 8:45 am]

**BILLING CODE 3510–06–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 51, 52, 72, 78, and 97

**[EPA–HQ–OAR–2009–0491; FRL–9194–9]**

**RIN 2060–AP50**

## Notice of Data Availability Supporting Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of data availability (NODA) for the Proposed Transport Rule.

**SUMMARY:** The EPA is providing notice that it is supplementing the record to the Proposed Transport Rule (75 FR 45210). The EPA has placed in the docket for the Proposed Transport Rule (Docket ID No. EPA–HQ–OAR–2009–0491) additional information relevant to the rulemaking, including, among other things, an updated version of the power sector modeling platform that EPA proposes to use to support the final rule. This new power sector modeling platform consists of updated unit level input data (the National Electric Energy Data System (NEEDS v4.10)) and a set of model run results with the updated modeling platform (Integrated Planning Model (IPM) v4.10), detailed documentation of the updated version of the model, and user guides to input assumptions and model outputs. The additional information also includes a list of further planned updates to support the final rulemaking. Except as explained below, EPA is not extending the comment period on the Proposed Transport Rule beyond October 1st, 2010.

**DATES:** Comments must be received on or before October 15, 2010. Please refer to **SUPPLEMENTARY INFORMATION** for additional information on submitting comments.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2009–0491 by one of the following methods:

- *http://www.regulations.gov.* Follow the online instructions for submitting comments. Attention Docket ID No. EPA–HQ–OAR–2009–0491.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2009–0491.
- *Mail:* EPA Docket Center, EPA West (Air Docket), Attention Docket ID No. EPA–HQ–OAR–2009–0491, U.S. Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Please include 2 copies. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.
- *Hand Delivery:* U.S. Environmental Protection Agency, EPA West (Air Docket), 1301 Constitution Avenue, NW., Room 3334, Washington, DC 20004, Attention Docket ID No. EPA–HQ–OAR–2009–0491. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–OAR–2009–0491. 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, avoid any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

*Docket:* All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA East Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

**FOR FURTHER INFORMATION CONTACT:** For questions regarding the NEEDS database Version 4.10 contact Erich Eschmann, Clean Air Markets Division, USEPA Headquarters, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Mail Code: 6204J, Washington, DC 20460; telephone number: (202) 343–9128; fax number: (202) 343–2359. For question regarding the IPM Version 4.10 assumptions contact Serpil Kayin, Clean Air Markets Division, USEPA Headquarters, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Mail Code: 6204J, Washington, DC 20460; telephone number: (202) 343–9390; fax number: (202) 343–2359.

**SUPPLEMENTARY INFORMATION:** Detailed background information describing the proposed rulemaking may be found in a previously published notice: *Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone* (Proposed Transport Rule); Proposed Rule 75 FR 45210, August 2, 2010.

The information placed in the docket is also available for public review on the Web site for this rulemaking at *http://www.epa.gov/airtransport/.* If additional relevant supporting information becomes available in the future, EPA will place this information in the docket and make it available for public review on this Web site. Today's notice of data availability does not extend the comment period for the Proposed Transport Rule, which ends on October 1, 2010. However, during the comment period for the NODA, EPA will accept comments on both the specific data that EPA is placing in the docket as well as any potential impacts of that data on the Proposed Transport Rule until October 15th, 2010.

**I. Additional Information on Submitting Comments**

*A. How can I help EPA ensure that my comments are reviewed quickly?*

To expedite review of your comments by Agency staff, you are encouraged to send a separate copy of your comments, in addition to the copy you submit to the official docket, to Murat Kavlak, Clean Air Markets Division, USEPA Headquarters, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Mail Code: 6204J, Washington, DC 20460; telephone number: (202) 343–9634; fax number: (202) 343 2359.

*B. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through EDOCKET, *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. Send or deliver information identified as CBI only to the following address: Gene Sun, Clean Air Markets Division, USEPA Headquarters, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Mail Code: 6204J, Washington, DC 20460; telephone number: (202) 343–9119; fax number: (202) 343 2359.

2. Tips for preparing your comments.

When submitting comments, remember to:

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

ii. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

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

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

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

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

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

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

**II. Web Site for Rulemaking Information**

The EPA has previously established a Web site for the proposed rulemaking at *http://www.epa.gov/airtransport.* The Web site includes the proposed rulemaking actions and other related information that the public may find useful in addition to a link to this NODA.

**III. New Information Placed in the Docket**

The EPA has placed the information described below in the Proposed Transport Rule docket EPA–HQ–OAR–2009–0491.

- An updated version of NEEDS (v4.10). This database provides unit level characteristics of the electric generating units (EGUs) included in the IPM modeling. This includes both units affected by the Proposed Transport Rule and other EGUs (*e.g.* fossil-fired units smaller than 25 MWe, non-fossil-fired units, and fossil-fired units 25 MWe or greater in States not subject to the Proposed Transport Rule).
- User Guide to NEEDS v4.10.
- Detailed documentation of the IPM v4.10.
- New base case modeling run results with the updated IPM platform (v4.10): Summary Reports (for 2012, 2015, 2020, 2030) and unit level parsed file for 2012 (this modeling run is analogous to the base case run used to support the air quality modeling that determined which States significantly contributed to non-attainment or interference with maintenance in the Proposed Transport Rule).
- New policy case modeling run (identified as "TR SB Limited Trading") with the updated IPM platform (v4.10): Summary Reports (for 2012, 2015, 2020, 2030) and unit level parsed file for 2014 (this modeling run is analogous to the preferred policy option run in the Proposed Transport Rule).
- New base case run results with the updated IPM platform (v4.10), as described above, except with the Energy Information Administration's Annual Energy Outlook (AEO) 2010 gas resource assumptions: Summary Reports (for 2012, 2015, 2020, 2030) and unit level parsed file for 2012.
- New policy case (identified as "TR SB Limited Trading") with the updated IPM platform (v4.10), as described above, except with AEO 2010 gas resource assumptions: Summary Reports (for 2012, 2015, 2020, 2030) and unit level parsed file for 2014.

These policy runs include the same State-level caps that EPA modeled in the Proposed Transport Rule. The caps have not been modified to account for any changes that the new modeling might suggest; they are merely provided for informational purposes to allow commenters to understand the impact that changes in the model platform have on the projected impacts of the caps.

- User Guide to IPM v4.10 output files (system summary report and parsed files).
- A description of how to build an alternative gas resource assumption input for modeling (an intermediate option between AEO 2010 and EPA gas resource assumptions).
- A summary of other planned input updates to be implemented in the final rulemaking (further described below).

EPA proposes to use this version of the IPM model in the final Transport Rule, modified to address any comments that EPA receives as part of the transport rulemaking effort and other power sector analysis. Changes from the projections relied on in the proposed rule, from using an updated model, could impact the final rulemaking in a number of ways including, but not limited to:

1. Changing emission projections that were used to determine which downwind areas have air quality concerns (*i.e.,* non-attainment or maintenance) absent this rulemaking and to determine which States contribute to those problems.

2. Changing cost and emission projections used in the multi-factor test to determine the amount of emissions that represent significant contribution.

EPA believes that the assumptions regarding natural gas resources in the primary IPM v4.10 base case are the appropriate ones to use. EPA is however providing information on an alternative set of assumptions (AEO 2010), as well as a third way that gas price assumptions could be developed. EPA requests comment on the appropriate natural gas assumptions to use.

EPA intends to update the $NO_X$ rates for fossil-fuel fired units in the final rule to reflect the more recent 2009 data. IPM v4.10 and the previous version of IPM used for the Proposed Transport Rule analysis relied on 2007 unit level $NO_X$ rates. The updated $NO_X$ rates will more

accurately portray the unit level control installations that have occurred at power plants during the past several years. In general, about 25% of coal plants have a 2009 $NO_X$ rate that reflects a change from the 2007 that is greater than 0.1 lb/mmbtu and 10% of the 2007 value. The 2009 unit level data can be retrieved from EPA's Data and Maps at *http://camddataandmaps.epa.gov/gdm/.*

EPA also intends to update information related to new units, new installation of pollution controls, and planned retirements. Information on changes in these areas that EPA believes have happened since IPM v4.10 version of the model has been finalized is also included in the docket.

Between now and the time that EPA finalizes the Transport Rule, additional information used to support the final transport rulemaking may be placed in the docket.

Dated: August 25, 2010.

**Dina W. Kruger,**

*Acting Director, Office of Atmospheric Programs.*

[FR Doc. 2010–21699 Filed 8–31–10; 8:45 am]

**BILLING CODE 6560–50–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### 50 CFR Part 17

**[FWS-R2-ES-2009-0039]**
**[MO 92210-0-0008]**

## Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to List the White-Sided Jackrabbit as Threatened or Endangered

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of 12–month petition finding.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce a 12–month finding on a petition to list the white-sided jackrabbit as endangered and to designate critical habitat under the Endangered Species Act of 1973, as amended. After review of all available scientific and commercial information, we find that listing the full species, *Lepus callotis*, is not warranted at this time. We further find that listing one or both of the subspecies, *Lepus callotis callotis* and *Lepus callotis gaillardi*, is not warranted at this time. We find that listing the northern populations of the subspecies *L. c. gaillardi* as a Distinct Population Segment is not warranted at this time. However, we ask the public to submit to us any new information that becomes available concerning the threats to the full species of the white-sided jackrabbit, or to either of the two currently recognized subspecies, or the species' habitat at any time.

**DATES:** The finding announced in this document was made on September 1, 2010.

**ADDRESSES:** This finding is available on the Internet at *http://www.regulations.gov at Docket Number FWS-R2-ES-2009-0039. Supporting* documentation we used in preparing this finding is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna NE, Albuquerque, NM 87113. Please submit any new information, materials, comments, or questions concerning this finding to the above address.

**FOR FURTHER INFORMATION CONTACT:** Wally Murphy, Field Supervisor, New Mexico Ecological Services Field Office, 2105 Osuna NE, Albuquerque, NM 87113; by telephone at 505-346-4781; or by facsimile at 505-346-2542. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:**

### Background

Section 4(b)(3)(B) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), requires that, for any petition to revise the Federal Lists of Endangered and Threatened Species that contains substantial scientific or commercial information that listing the species may be warranted, we make a finding within 12 months of the date of receipt of the petition. In this finding, we will determine that the petitioned action is: (1) Not warranted, (2) warranted, or (3) warranted, but the immediate proposal of a regulation implementing the petitioned action is precluded by other pending proposals to determine whether species are threatened or endangered, and expeditious progress is being made to add or remove qualified species from the Federal Lists of Endangered and Threatened Species. We must publish this 12–month finding in the **Federal Register**.

*Previous Federal Action*

On October 15, 2008, we received a petition dated October 9, 2008, from WildEarth Guardians requesting that the white-sided jackrabbit (*Lepus callotis*) be emergency listed as endangered under the Act and critical habitat be designated. Included in the petition was supporting information regarding the species' taxonomy and ecology, historical and current distribution, present status, and actual and potential causes of decline. We acknowledged the receipt of the petition in a letter to WildEarth Guardians, dated November 26, 2008. However, emergency listing a species is not a petitionable action under the Act or the Administrative Procedure Act (APA; 5 U.S.C. Subchapter II), and is treated solely as a petition to list. In our letter we also stated that we had reviewed the petition and determined that available information did not indicate that the species was at significant risk of well-being, thereby necessitating the need to provide the temporary protections under section 4(b)(7)the Act (i.e., emergency listing). In our letter, we advised the petitioner that, to the maximum extent practicable, we would address the petition within 90 days. During our review of the petition, we found that the majority of information cited in the petition was not readily available to us. Therefore, on January 13, 2009, we requested that the petitioner provide additional references. On February 13, 2009, the petitioner provided references. We received a 60–day notice of intent to sue from the petitioner dated January 28, 2009, and on April 15, 2009, the petitioner brought a lawsuit against us for failure to respond to the petition within 90 days of its receipt. On July 22, 2009, we published a 90–day finding indicating that the petition presented substantial information that listing the jackrabbit may be warranted, and initiated a status review (74 FR 36152). This notice constitutes the 12–month finding on the October 9, 2008, petition to list the white-sided jackrabbit as endangered.

The white-sided jackrabbit was first listed as a candidate (Category 2) for Federal listing as either a threatened or endangered species under the Act in the 1982 Candidate Notice of Review (47 FR 58454, December 30, 1982). Category 2 status included those taxa for which information in the Service's possession indicated that a proposed listing rule was possibly appropriate, but for which sufficient data on biological vulnerability and threats were not available to support a proposed rule. In the Candidate Notice of Review published on February 28, 1996, we announced a revised list of animal and plant taxa that were regarded as candidates for possible addition to the

Lists of Endangered and Threatened Wildlife and Plants (61 FR 7595). The revised candidate list included only former Category 1 species. All former Category 2 species were dropped from the list to reduce confusion about the conservation status of these species and to clarify that the Service no longer regarded these species as candidates for listing. Because the white-sided jackrabbit was a Category 2 species, it was no longer recognized as a candidate species.

The petition requests that we list the full species of the white-sided jackrabbit, *Lepus callotis*, as threatened or endangered. The petition also requests that we list each of the recognized subspecies of the white-sided jackrabbit, *Lepus callotis callotis* and *Lepus callotis gaillardi* as threatened or endangered, should we conclude that the full species does not warrant listing, and the petition states that these recognized subspecies are taxonomically valid. The petition further requests that we list the northern populations of the subspecies currently recognized as *L. c. gaillardi* as a distinct population segment under the Act. We will examine each of these requests separately below.

**Species Information: *Lepus callotis***

*Taxonomy and Species Description*

There has been some dispute and inconsistency regarding the taxonomy of the species and its subspecies, and much of the literature remains inconclusive. In his book, *Wildlife of Mexico: The Game Birds and Mammals,* Leopold (1959, p. 345) included four species of jackrabbits under his description of the common name "white-sided jackrabbits": *Lepus alleni, Lepus gaillardia, Lepus callotis,* and *Lepus flavigularis*. In their 1962 paper, *A Classification of the White-sided Jackrabbits of Mexico,* Anderson and Gaunt concurred with Leopold and others in the existence of four species, with non-overlapping geographic ranges, assigned the common name "white-sided jackrabbit" (Anderson and Guant 1962, p. 1). The authors later state that they regard each of the previously recognized species, *Lepus callotis* and *Lepus gaillardi,* as conspecific, or separate subspecies of the same species (that is, *Lepus callotis callotis* and *Lepus callotis gaillardi*) (Anderson and Guant 1962, p. 1). There are no recognized common names for these subspecies.

The white-sided jackrabbit, *Lepus callotis*, occurs in New Mexico and in Mexico (see Figure 1 below). It is one of four species of hares (family Leporidae) that occurs in New Mexico (Findley *et al.* 1975), and one of 15 species occurring throughout the states of Mexico (Lorenzo *et al.* 2003, p. 11). The white-sided jackrabbit can be distinguished from other hares by its extensive white sides and inconspicuous or absent black ear tips, as well as differences in features of the skull (Findley *et al.* 1975, pp. 92, 96; Best and Henry 1993, p. 1; Anderson and Guant 1962, pp. 1-2). The species has black on the upper parts of its tail and the back and flanks are white (Lorenzo *et al.* 2003, p. 11).

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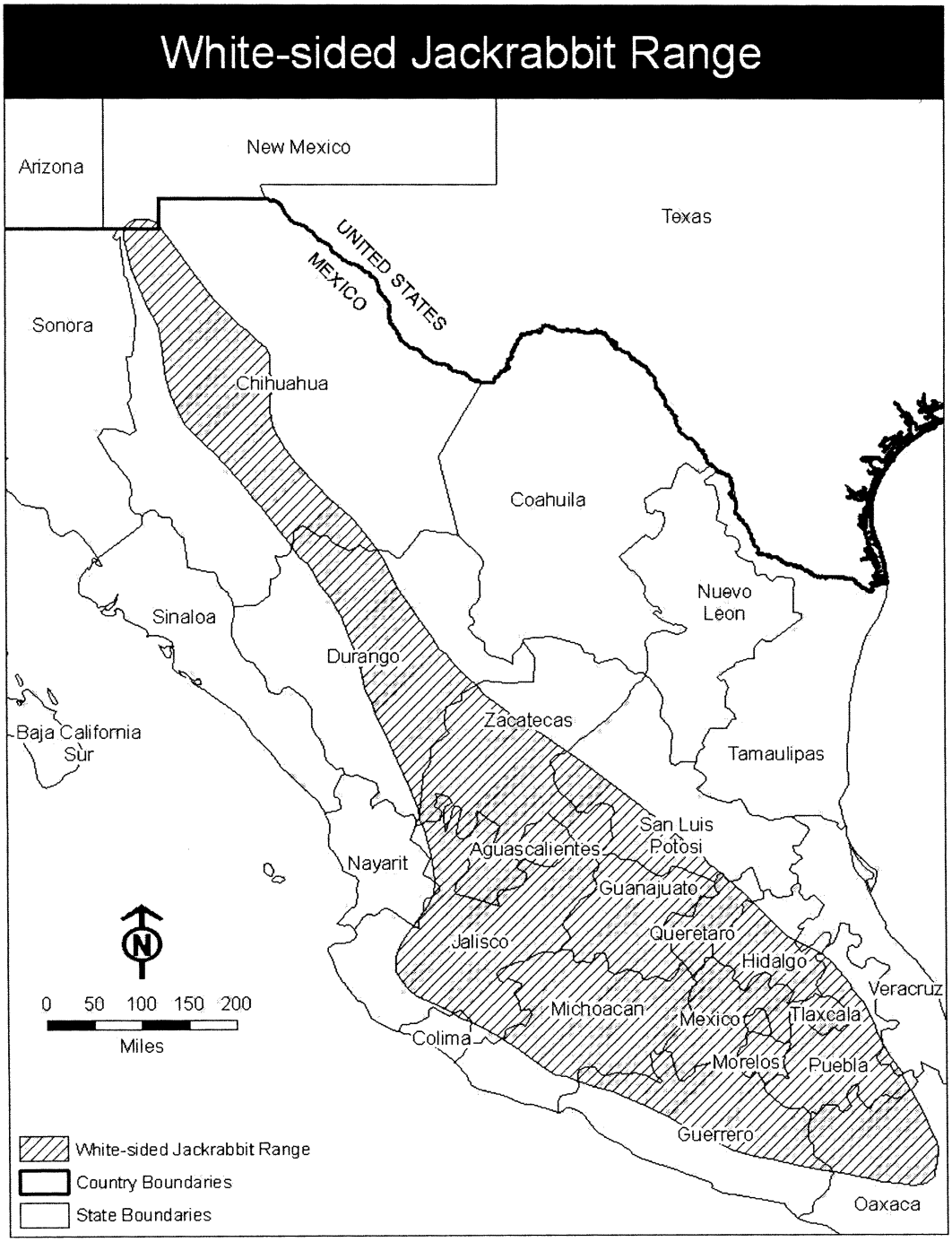
**Figure 1. Map of the range of the white-sided jackrabbit. (Based on Anderson and Gaunt 1962.)**

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There is limited discussion in the literature regarding the distinctions between the two subspecies, *Lepus callotis callotis* and *Lepus callotis gaillardi.* Anderson and Gaunt (1962, pp. 2-5) compared specimens from each of the subspecies and recorded the following differences: *L. c. gaillardi* has paler and coarser coat, including the fringe of hair along the inner margin of the ear, the throat patch, and the hue of dorsal cover hairs. Specimens of this subspecies also have paler rump patches that contrast less with the whitish flanks and paler patches on the shoulders that tend to contrast with (rather than match or blend with) the darker middorsal pelage (fur). The authors also observed differences between the two subspecies in skull structure.

Studies have been conducted to determine the genetic relationship between species within the genus *Lepus* (Lorenzo *et al.* 2003); however, we are not aware of any information that establishes the genetic distinctiveness of the two subspecies *Lepus callotis callotis* and *Lepus callotis gaillardi.* Although the literature is inconclusive, we have not encountered any information which indicates that the

subspecies *L. c. callotis* and *L. c. gaillardi* are not taxonomically valid. Therefore, we consider *L. c. callotis* and *L. c. gaillardi* to be valid subspecies of the species *L. callotis.*

*Biology*

In the white-sided jackrabbit, females are generally larger than males (Bednarz 1977, pp. 13, 15). In New Mexico, white-sided jackrabbits are observed almost unvaryingly in pairs (Bednarz 1977, p. 9), suggesting that mated animals remain together on a long-term basis. Pair bonds may serve to ensure adequate reproduction, in the context of generally low population density (Bednarz 1977, p. 12). The members of the pair are usually near each other and run together when approached by intruders (Bednarz 1977). Several litters are probably produced each year, with litter size appearing to average 2.2 young (Bednarz 1977, p. 12). The young tend to have a soft, woolly coat in early life and attain sexual maturity at a rapid rate. Daytime observations of white-sided jackrabbits are uncommon, as the species is primarily nocturnal (Bednarz 1977, pp. 6-11; Best and Henry 1993, p. 5). Although many species of jackrabbit and hare are considered pests because they may damage crops, fields, and orchards, the white-sided jackrabbit is not known to depredate crops.

*Distribution*

The core distribution of the white-sided jackrabbit lies within Mexico (New Mexico Department of Game and Fish (NMDGF) 2006a, p. 114). The species historically occurred from southern New Mexico to northern Oaxaca, Mexico, within two distinct geographic areas (Best and Henry 1993, p. 2). These two distinct geographic areas are occupied by each of the two subspecies. The historical range of the subspecies *Lepus callotis gaillardia* includes the southern Animas and Playas valleys of Hidalgo County, New Mexico, south into west-central Chihuahua and north-central Durango, Mexico (Bednarz and Cook 1984, p. 358; Reynolds 1988, p. 1), although it is now likely extirpated from the Playas Valley as no observations of the species have been made in this area during more recent surveys (Traphagen 2002, p. 5; Frey 2004, p. 22; NMDGF 2006a, p. 115; Traphagen 2010, p. 1). The other subspecies, *Lepus callotis callotis*, ranges from central Durango south across the open plains of the Mexican Plateau to the State of Oaxaca, Mexico (Hall 1981, p. 330). The geographic separation of the two areas occurs on either side of the Rio Nazas in Durango, Mexico. This river has been observed to act as a barrier and a catalyst for subspeciation in many mammal species, isolating one subspecies to the north of the river from the other to the south (Peterson 1976, pp. 496-498).

The jackrabbit's historical range in the Animas and Playas Valleys of New Mexico occurs entirely within the Diamond A Ranch (Traphagen 2010, p. 3) and was estimated to be about 121 square kilometers (sq km) (47 square miles (sq mi)), or approximately 12,000 hectares (ha) (30,000 acres (ac)) (Bednarz 1977, p. 6; Bednarz and Cook 1984, p. 359). We are unaware of any similar estimates for the jackrabbit's range in Mexico. However, utilizing Geographic Information System (GIS) techniques and assessing the range maps of Anderson and Gaunt (1962, p. 4) and Hall (1981, p. 330), we estimate the range of the jackrabbit in the United States to be less than one percent of the entire range of the species.

The white-sided jackrabbit has not been confirmed as extant in Arizona (Cahalane 1939, p. 436), although in 1954, Hoffmeister and Goodpaster reportedly observed what they believed to be white-sided jackrabbits along the west base of the Huachuca Mountains, Cochise County, Arizona (Hoffmeister 1986, p. 562). There have been other, more recent reported sightings of the white-sided jackrabbit in Arizona; however, these have been refuted by experts on the species (Traphagen 2009). Therefore, New Mexico is the only confirmed state in the United States where the species has been documented to occur.

*Habitat*

This species is highly elusive. It inhabits predominately mature open grasslands that have low shrub density and level terrain, avoiding hills or mountains (Bednarz and Cook 1984, p. 359; Cook 1986, p. 15; Desmond 2004, p. 416). In the United States portion of its range, the white-sided jackrabbit appears to be found only in association with grasslands (Bednarz 1977, p. 6). More than 97 percent of all observations of this species have been in pure grasslands and less than 3 percent in grasslands with varying amounts of forbs (flowering herbs) and shrubs (Bednarz and Cook 1984). In New Mexico, white-sided jackrabbits feed primarily on *Bouteloua gracilis* (blue grama), *Buchloe dactyloides* (buffalograss), *Bouteloua eripoda* (black grama), and *Lycurus phleoides* (wolftail) (Bednarz 1977, pp. 14, 16). In New Mexico, the white-sided jackrabbit was historically limited to two valleys, the Animas Valley and the Playas Valley, that differ in their vegetative composition. A detailed description of each follows.

The Animas Valley is a confined basin that lies 10 km (6 mi) west of the continental divide. The elevation is approximately 1,550 meters (m) (5,085 feet (ft)). It is bounded on the east by the Animas Mountains, on the west by the Peloncillo Mountains, and on the south by the Sierra San Luis Mountains. The International Boundary between the United States and Sonora, Mexico, lies near the southern terminus of the valley. Precipitation averages about 381 millimeters (mm) (15 inches (in)) annually, 60 percent of it falling between July and October. A large portion of the lower Animas Valley lies in a dry Pleistocene (the epoch that spanned from 2.6 million to 12,000 years ago) lakebed, parts of which fill seasonally to shallow depths of a few centimeters. Soil moisture is therefore sufficient to support a moderate amount of wetland vegetation, namely nutgrass (*Cyperus rotundus*), a plant that is thought to be a seasonally important food source for the jackrabbit (Bednarz 1977, p. 14).

The lower Animas Valley supports a variety of grass and forb species, such as blue grama; *Bouteloua curtipendula* (sideoats grama); *Sporobolus airoides* (alkali sacaton); *Muhlenbergia torreyii* (ring muhly); *Pleuraphis mutica*, also known as *Hilaria mutica* (tobosa); buffalograss; black grama; wolftail; *Muhlenbergia repens* (creeping muhly); *Panicum obtusum* (vine mesquite); *Aristida spp.* (three-awn), *Sphaeralcea spp.* (globemallow); *Gutierrezia sarothrae* (broom snakeweed); *Viguera annuum* (goldeneye); *Eriogonum wrightii* (Wright buckwheat); and *Aster spp.* The occurrence of this specific grassland association, known as plains grassland, is uncommon and fairly unique in the southwestern United States, although it becomes more common south into Chihuahua and northern Durango, Mexico (Traphagen 2009, p. 2). The southern Animas Valley is largely free of shrubs, probably as a function of soil structure, water drainage in soils, frequent fires, and cold air drainage. The Animas Valley is surrounded by several large mountain ranges that create winter microclimates too cold to support the establishment of shrubs such as mesquite (*Prosopis spp.*), cholla (*Cylindroopuntia spp.*), and creosote (*Larrea spp.*), which are not able to tolerate the cold winter nights (Traphagen 2009, p. 2).

McKinney Flats lies 10 km (6 mi) east of the Continental Divide in the western fork of the southern Playas Valley just west of the Whitewater Mountains. This 4,266-ha (10,240-ac) site is about 1,525

m (5,000 ft) above sea level. Bednarz (1977) estimated the area of suitable habitat for *Lepus callotis* on McKinney Flat to be 1,425 ha (3,520 ac). Conditions on McKinney Flat are drier than in the Animas Valley, averaging about 228 mm (9 in) annual precipitation. McKinney Flat is characterized as Chihuahuan desert grassland (Traphagen 2009, p. 2). Shrub invasion in this grassland association has occurred on a much larger scale than in the plains grassland association that exists in the Animas Valley (Traphagen 2009, pp. 2-3).

Graminoid species in the Playas Valley include blue grama, sideoats grama, *Eragrostis intermedia* (plains lovegrass), tobosa, *Bouteloua hirsuta* (hairy grama), *Scleropogon brevifolia* (burrograss), *Setaria machrostachya* (Plains bristlegrass), black grama, wolftail, creeping muhly, vine mesquite, *Bothrichloa barbinodis* (cane beardgrass), and three-awn; commonly found forbs are *Solanum eliaginifolium* (horse nettle), Wright buckwheat, various *Croton spp.,* and *Aster spp.* are commonly found forbs. Shrubs and trees such as honey mesquite (*Prosopis glandulosa*), soaptree yucca (*Yucca elata*), catclaw mimosa (*Mimosa biuncifera*), and various prickly pear (*Opuntia spp.*) and cholla (*Cylindroopuntia spp.*) are also present.

We have little information pertaining to the habitat of the white-sided jackrabbit in Mexico. The primary biotic province in which the jackrabbit occurs is termed the Chihuahua-Zacatecas biotic province. This province covers the northern interior plains in Chihuahua, western Coahuila, Durango, Zacatecas, San Luis Potosi, and Aguascalientes (Goldman and Moore 1945, p. 354). It is an arid interior desert region consisting mainly of grassland plains interrupted by areas overgrown by various shrub species (Goldman and Moore 1945, p. 354). The range of the jackrabbit also falls within the biotic provinces termed the Transverse Volcanic biotic province and the Sierra Madre del Sur biotic province. The Transverse Volcanic biotic province spans parts of 11 States and its diverse environmental and geographic features cannot be generalized; however, it includes areas of grasslands interspersed with shrubland (Goldman and Moore 1945, pp. 356-357). The Sierra Madre del Sur biotic province includes high mountain areas ranging from west to east through central Guerrero and the interior valleys of central and western Oaxaca. The climate is similar to that of the plateau of the northern portion of the country (Goldman and Moore 1945, p. 358). Although Goldman and Moore describe the major habitat types within Mexico, we have no information regarding the specific habitats occupied by the jackrabbit within these broad habitat types.

*Population Abundance*

The white-sided jackrabbit has never been known to be abundant in the United States. The species was first discovered in New Mexico by Mearns in 1892 during surveys of the International Border between the United States and Mexico (Mearns 1895, p. 552). Specimens were not collected again in New Mexico until 1931 (Anderson and Gaunt 1962), and then again in 1975 (Bogan and Jones 1975, p. 47; Bednarz 1977, p. 1). The literature between the time of the initial collections and the subsequent collections in 1975 show argument amongst researchers as to whether the white-sided jackrabbit did indeed occur in the United States in the early 1900s. Multiple survey efforts have occurred since the 1975 surveys in attempts to document the extent of the range of the species in the United States and the size and density of the populations.

As discussed above, white-sided jackrabbits are elusive and largely nocturnal. As such, the most effective surveys are completed in the dark by driving a vehicle through an area of potential habitat with a bright spotlight. Bednarz (1977) completed a series of such surveys and found a mean of 15 jackrabbits per survey in the Animas Valley. Later, Cook (1981) resurveyed a similar area and found a mean of 7.5 jackrabbits per survey. Mehlhop (1995) reported on surveys in the Animas and Playas Valleys conducted in 1990, 1994, and 1995. The mean number of jackrabbits observed during the 1990 surveys was 3.2, while the mean for the 1994 and 1995 surveys was 1.1 (Mehlhop 1995). Traphagen (2010) has completed the most recent surveys for white-sided jackrabbits, and while the author does not report the mean number of jackrabbits sighted per survey effort, he notes 28 were sighted over the course of 9 surveys. Traphagen (2010) also notes that surveys were conducted by another party between 1997 and 2002, but that the results of those studies have not been analyzed. On its face, the survey information for the white-sided jackrabbit would seem to suggest a decline in species density in the United States over the last 35 years. However, each of the surveyors utilized somewhat different survey methods and different survey routes, thus precluding a statistical comparison of their results. Based on the historical and current survey records, this species was likely always rare and appears to continue to be rare in the United States.

Some survey work has been completed in Mexico in modern times (Desmond 2004; Reynolds 1988); however, these surveys have tended to be one- or two-summer efforts, and without historical information to compare their numbers to, it is difficult to assess population trends. Reynolds (1988) interviewed "campesinos, ranchers, and whenever possible, members of a local hunting club" about their experiences with white-sided jackrabbits in the Mexican States of Guanajuato, Guerrero, Hidalgo, Jalisco, Mochoacan, Morelos, Oaxaca, Puebla, Queratoro, San Luis Potosi, Tlaxcala, and Zacatecas. The reliability of anecdotal reports can also be difficult to assess; however, Reynolds (1988) reported that the persons interviewed in Guanajuato, Guerrero, Hidalgo, and Morelos indicated that the white-sided jackrabbit may be reduced in numbers compared to the previous 20 to 25 years. Desmond (2004) reported on surveys of white-sided jackrabbits conducted in 1998 and 1999 in central and northwestern Chihuahua, Mexico. He reported 0.03 jackrabbits per acre surveyed in 1998, and 0.04 jackrabbits per acre surveyed in 1999 (Desmond 2004). When the numbers were adjusted to reflect just the area of plains grasslands, the preferred habitat of the white-sided jackrabbit in this part of its range, he reported 0.06 jackrabbits per acre in 1998 and 0.08 jackrabbits per acre in 1999 (Desmond 2004). Again, the importance of these numbers is difficult to assess because there is no prior or subsequent survey information to which to compare them; however, Desmond (2004, p. 417) notes, "It is not clear if white-sided jackrabbits have always occupied semidesert grasslands at low densities or if reduced densities in this grassland type are related to habitat degradation."

**Summary of Information Pertaining to the Five Factors for *Lepus callotis***

Section 4 of the Act and implementing regulations (50 CFR part 424) set forth procedures for adding species to, removing species from, or reclassifying species on the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, a species may be determined to be endangered or threatened based on any of the following five factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

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

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

In making this finding, information pertaining to the full species of the white-sided jackrabbit, *Lepus callotis*, in relation to the five factors provided in section 4(a)(1) of the Act is discussed below. In making our 12–month finding on a petition to list the full species of the white-sided jackrabbit, *Lepus callotis*, we considered and evaluated the best available scientific and commercial information.

In considering what factors might constitute threats to a species, we must look beyond the exposure of the species to a factor to evaluate whether the species may respond to the factor in a way that causes actual impacts to the species. If there is exposure to a factor and the species responds negatively, the factor may be a threat and we attempt to determine how significant a threat it is. The threat is significant if it drives, or contributes to, the risk of extinction of the species such that the species warrants listing as endangered or threatened as those terms are defined in the Act.

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

Livestock grazing and suppression of wildfire have been shown to lead to shrub encroachment and degradation of grasslands, separately and in combination (Bureau of Land Management (BLM) 2009, p. 2; Malpai Borderlands Habitat Conservation Plan Technical Working Group 2008, p. 18; Traphagen 2002, p. 12). In New Mexico, the white-sided jackrabbit is found only in association with mature, high-elevation (greater than 1,460-m (4,800-ft)) plains or Chihuahuan desert grasslands, characterized by flat topography and few shrubs and forbs (Bednarz 1977, p. 6). The bootheel region of southwestern New Mexico, which contains the range of the white-sided jackrabbit in the United States, was dominated by grassland until the late 19th century. Historically, the presence of shrubs and low growing trees was limited to drainages or to rocky shallow soil areas; however, changes in land use to accommodate agricultural practices, including livestock grazing and fire suppression, have led to the invasion of woody shrubs and their establishment into sites where they did not previously occur (BLM 2009, p. 10). Once invasive shrubs become established, they tend to increase in density and outcompete other native vegetation for soil moisture, nutrients, and sunlight and are less susceptible to drought than herbaceous species, which are green and fleshy as opposed to the generally more woody shrubs.

Numerous sources substantiate that past range-management practices have contributed to the degradation of desert grasslands or their conversion to shrublands (National Museum of Natural History 2008, p. 1; Bednarz and Cook 1984, p. 360; Desmond 2004, p. 417; Forest Service 2007, p. 15; Service 2008, p. 53). The BLM reports in its 2009 Environmental Assessment for the Bootheel Restoration Initiative that the vegetative community in the areas affected by shrub encroachment in southern New Mexico is far removed from the historical climax community and no longer supports the historical abundance and diversity of flora and fauna (BLM 2009, p. 13). Bednarz and Cook (1984, p. 360) postulated that numbers of white-sided jackrabbit had decreased in New Mexico as the density and vigor of grasses declined, while black-tailed jackrabbits and desert cottontail (*Sylvilagus audubonii*) numbers increased in response to an increase in woody shrubs. Desmond (2004, p. 417) reported a similar pattern from Chihuahua, Mexico, where she found that increased shrub encroachment into grasslands likely has negatively affected populations of white-sided jackrabbits (Desmond 2004, p. 417).

Traphagen (2009, pp. 1- 4) reports that the impacts of livestock grazing and fire suppression may differently affect the two valleys that compose the species' portion of the range in the United States. Traphagen (2009, p. 2) reports that the Animas Valley is largely free of shrubs, likely due to the soil structure, water drainage, frequent fires, and cold air drainage. Cold air drainage is a process that occurs in valleys as the ground cools at night, cooling the air and causing denser cold air from higher elevations to move down into the valley. The Animas Valley is surrounded by several large mountain ranges that create winter microclimates too cold to support the establishment of shrubs on the valley floor such as mesquite, cholla, and creosote (Traphagen 2009, p. 2). In contrast, the Playas Valley receives less precipitation annually and is generally drier than the Animas Valley (Traphagen 2009, p. 2). Shrub invasion in this grassland association has occurred on a much larger scale than in the grassland association found in the Animas Valley (Traphagen 2009, p. 2).

Livestock Grazing

Areas where white-sided jackrabbits historically or currently occur in the United States were continuously grazed for over a century (Traphagen 2002, p. 3). Overgrazed grassland is susceptible to invasion by shrubs and forbs, a cover type which greatly favors the black-tailed jackrabbit (Baker 1977, pp. 222-223; Bednarz and Cook 1984, pp. 359-360; Desmond 2004, p. 417; Moore-Craig 1992, p. 13; NMDGF 2006a, p. 115).

The Diamond A Ranch in New Mexico, which includes the historic range of the jackrabbit in both the Animas and Playas Valleys, has been very lightly grazed since 1994, and there have been several periods where grazing was deferred on the ranch for 4 years or more (Traphagen 2009, p. 3). Prior to ownership by the Animas Foundation, the ranch was owned by The Nature Conservancy, and stocking rates were very low (Traphagen 2009, p. 5). During the period from 2003 to 2006 there was no cattle grazing in the Animas Valley where the white-sided jackrabbit occurs (Traphagen 2009, p. 5). We have no information about current grazing practices in historical habitat in the Playas Valley beyond the general statement that the Diamond A Ranch has been lightly grazed since 1994. This species appears to be extirpated from that portion of its range. The extent to which past grazing practices may have contributed to that extirpation is unknown; however, the Playas Valley may have been more susceptible to shrub encroachment resulting from past overgrazing than the Animas Valley as a result of the differences in grassland type and cold air drainage patterns discussed above.

Finally, while we know that grazing of livestock occurs in Mexico (see, for example, Buller *et al.* 1960), we do not have information on the extent or intensity of historical or current livestock grazing practices throughout the range of the species in Mexico. Brown (1994) reported that a primary cause of loss and degradation of grasslands in the Chihuahuan Desert is overgrazing by cattle; however, the extent of those grassland losses throughout the historical range of the jackrabbit and the impacts of those losses on the jackrabbit are not known.

Previous research had indicated that the jackrabbit required 65 percent grass cover of species that included blue and black grama, ring muhly, buffalograss, wolftail, and bottlebrush squirreltail (*Elymus elymoides*) (Bednarz and Cook 1984, pp. 359-360). However, in a

research project commissioned by the NMDGF it was found that presence of the white-sided jackrabbit was highly correlated with the presence of buffalograss (Traphagen 2002, p. 6). No other grasses analyzed in the study, including blue and black grama, ring muhly, wolftail, and bottlebrush squirreltail, showed any correlation with white-sided jackrabbit habitat. The Animas Valley is dominated in many areas by buffalograss, but buffalograss is no longer present in the Playas Valley (Traphagen 2009, p. 3).

One study found a relationship between grazing and the presence of buffalograss in two plots in the Animas Valley (Traphagen 2009, pp. 3-4). The Sacahuiste Grazing Exclosure has been ungrazed since 1996. This plot is paired with a grazed plot located 50 m (160 ft) outside the exclosure. The ungrazed exclosure experienced a decline of 300 percent in cover of buffalograss during the 12–year period of no grazing, while the grazed plot declined by only 30 percent (Traphagen 2009, p. 4). If grazing does not occur, buffalograss is outcompeted because of its lack of shade tolerance (Traphagen 2009, p. 5). These results indicate that light grazing may be an important part of maintaining the health of the ecosystem.

The best available information indicates that grazing is not currently occurring at a level which may constitute a threat to extant populations of the species in New Mexico, although grazing may have played a role in the presumed extirpation of white sided-jackrabbits in the Playas Valley. Information about the species' status in Mexico is very limited. As discussed above, overgrazing may have caused some loss or degradation of grasslands in the Chihuahuan Desert, and the encroachment of shrubs into grasslands may have negatively affected populations of white-sided jackrabbits there. However, the information available concerning grazing practices in Mexico does not allow us to assess the magnitude or immediacy of these impacts on the species, nor the extent of the occupied range of the jackrabbit that may be subject to overgrazing impacts. In the absence of information that allows us to make a reasonable connection between the impacts of livestock grazing and current or future declines of white-sided jackrabbits, we are unable to conclude that this species is threatened by grazing practices.

Wildfire Suppression

Wildfire suppression is often a cause of grassland degradation. Fire exclusion has likely led to encroachment of shrubs into the grassland habitat of the white-sided jackrabbit. Humphrey (1958, p. 245) believed fires were the controlling factor that kept shrubs from invading the desert grasslands in southeastern Arizona and southwestern New Mexico. The BLM came to a similar conclusion for the region of southwestern New Mexico where the white-sided jackrabbit historically occurred (BLM 2009, pp. 1-3). Alternatively, Valone *et al.* (2002, p. 563) reported that two fires in 5 years did not result in high levels of mortality to woody shrubs such as mesquite on the Diamond A Ranch.

Traphagen (2009, p. 4) reports that fire has occurred on a frequent and widespread basis across the Diamond A Ranch in recent decades, and that fire suppression has not occurred on the ranch in recent years. He states that there have been several major fires in the Animas Valley that have burned nearly 100 percent of the habitat of the jackrabbit (Traphagen 2009, p. 4). He provides a partial list of fires and area burned on the ranch: in June of 2009 the "Pascoe fire" burned 23,635 ha (58,404 ac) in the southern Animas Valley and 12,304 ha (30,405 ac) in the west fork of the Playas Valley. In 1998 the "Flat fire" burned over 12,867 ha (31,796 ac) of the Animas and Playas Valleys. In 1999 the "Garcia fire" burned 8,660 ha (21,400 ac) in habitat. In 2000 the "Fitz fire" burned 2,007 ha (4,961 ac) in the heart of white-sided jackrabbit habitat. The "Lang fire" burned another 404 ha (1,000 ac) adjacent to the Fitz fire.

From these data, we can conclude that fire suppression does not currently constitute a threat to the species in New Mexico because there is information on the dates of fires from the last several years as well as the approximate area burned. The best available information does not indicate that fire suppression occurs in New Mexico at a level which may impact the status of the species, by allowing for the conversion of its preferred habitat. We have no information about the frequency or distribution of wildfires throughout the species' range in Mexico. We have no information about the existence of wildfire suppression or prescribed burn programs throughout the species' range in Mexico.

It is known that both shrub encroachment into grassland fostered by current and historical grazing practices, as well as fire exclusion, have degraded habitat occupied by the species in the United States portion of the range. However, as stated above, we do not find this to be at a level that would constitute a threat to extant populations of this species in New Mexico. Again, there is very little information available about the species' status and its habitat in the large portion of its range in Mexico. The best available information does not describe the historical or current trends in grassland health in the Mexican portion of the species' range in a way that allows us to assess the magnitude or immediacy of the impacts on the species. Thus, we cannot conclude that habitat degradation due to livestock grazing and fire suppression leading to shrub encroachment is a threat to the species as a whole, either now or in the foreseeable future.

*Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes*

The white-sided jackrabbit is not believed to be overutilized in the U.S. portion of its range, and current information on its utilization in Mexico is limited (Traphagen 2009, p. 4). Hunting of the species is prohibited in New Mexico as it is currently protected under the New Mexico Wildlife Conservation Act (NMDGF 2008, p. 10). Further, in New Mexico, the white-sided jackrabbit only occurs on private land, thereby limiting hunting opportunities (Traphagen 2009, p. 4). Literature indicates that the species has been commonly hunted in Mexico for commercial markets (Leopold 1959, p. 349; Reynolds 1988). While hunting for commercial markets is no longer allowed, Reynolds (1988) reports that hunting for personal use continues. Matson and Baker (1986, p. 41) indicated that the species was heavily hunted and considered highly edible. While there is information that hunting of white-sided jackrabbits occurs in Mexico, we are unable to assess the level of hunting that occurs and whether it is having an impact on the population levels and overall status of the species.

The vast majority of the species' range lies in Mexico and the best available information does not allow us to assess the magnitude and immediacy of this impact on the species in that country. Additionally, the species does not appear to be impacted by such practices in the New Mexico portion of its range. Therefore, we conclude that hunting is not currently a known a threat to the species as a whole throughout its range.

There is some information which indicates that the white-sided jackrabbit is occasionally subject to impacts from animal damage control programs. Various rabbit species occasionally feed on crop plants and are seen as pests; however, the white-sided jackrabbit has not been documented as a heavy consumer of crop plants. The U.S. Department of Agriculture (USDA) reported that jackrabbits (*Lepus* spp.) have been taken in New Mexico as part

of their animal damage control program (USDA Animal and Plant Health Inspection Service 1994, Appendix H, pp. 18-19). More recent data from 2007 and 2008 on the numbers and kinds of animals killed or euthanized by wildlife services in New Mexico report only cottontail rabbits as having been lost. There is no description of current or future plans for lethal control of any white-sided jackrabbits, nor is there a quantification of the amount that may have occurred historically by either the USDA or the general public. We have no information on the activities of this type throughout the species' range in Mexico. Therefore, we find that the best available information does not indicate that the white-sided jackrabbit is currently subject to animal damage control programs by methods such as trapping or shooting, or is likely to be in the future in New Mexico.

While individual white-sided jackrabbits may be subject to overutilization or animal damage control programs, the available information on this impact does not allow us to assess whether or not these impacts are occurring at a level which may affect the status of the species as a whole. Therefore, we find that the white-sided jackrabbit is not threatened due to overutilization for commercial, recreational, scientific, or educational purposes, either now or in the foreseeable future.

*Factor C. Disease or Predation*

We are not aware of any research that has been conducted to specifically examine the role of disease in the white-sided jackrabbit. Bednarz (1977, p. 19) indicated that a lung infection has been observed in white-sided jackrabbits in New Mexico; however, Moore-Craig (1992, p. 11) noted that the infections found by Bednarz were all of a minor nature, and the overall health of the jackrabbit population appeared to be fair to good. Tularemia, a common disease among black-tailed jackrabbits, has not been found in the white-sided jackrabbit in New Mexico (Moore-Craig 1992, p. 11). We do not have any reports of disease in the white-sided jackrabbit in Mexico.

A variety of potential predators exists throughout the species' range, including coyote (*Canus latrans*), kit fox (*Vulpes macrotis*), gray fox (*Urocyon cinereoargenteus*), badger (*Taxidea taxus*), spotted skunk (*Mephitis mephitis*), and a number of predatory bird species. Of these carnivores, probably only the coyote is able to successfully prey on adult jackrabbits with much frequency, as the jackrabbit is nocturnal and generally avoids predation by bird species active during the day (Bednarz 1977, p. 18). Although the jackrabbit is subject to predation, there is no data from either country which indicates that predation is occurring at a level which may constitute a threat to the species throughout its range.

Although white-sided jackrabbit individuals may be subject to occasional infections or predation, there is no evidence that either of these is occurring at a level which may affect the status of the species as a whole. Therefore, we find that the white-sided jackrabbit is not threatened due to disease or predation, either now or in the foreseeable future.

*Factor D. The Inadequacy of Existing Regulatory Mechanisms*

To determine if existing regulatory mechanisms are adequate to protect the white-sided jackrabbit, we evaluated agreements and laws in effect within the range of the species. The white-sided jackrabbit was listed as threatened by the State of New Mexico on January 24, 1975. This designation provides the protection of the New Mexico Wildlife Conservation Act, which prohibits direct take of the species except under issuance of a scientific collecting permit. However, this only conveys protection from collection or intentional harm. Although the State of New Mexico statutes require the NMDGF to develop a recovery plan that will restore and maintain habitat for threatened species, the jackrabbit does not have a finalized recovery plan, conservation plan, or conservation agreement (NMDGF 2006b, p. 430).

There is some dispute concerning the effectiveness of the conservation efforts of the Malpai Borderlands Group in Hidalgo County, New Mexico. The petitioners state that the Malpai Borderlands Group does not afford protection to the white-sided jackrabbit or to its habitat as intended (WildEarth Guardians (2008)). The apparent basis of this position is that the Service issued an incidental take permit under section 10(a)(1)(B) of the Act on private lands to the Malpai Borderlands Group for the Malpai Borderlands Habitat Conservation Plan (MBHCP). WildEarth Gardians (2008) also contends, based upon observed degradation of grassland habitat and declines in the jackrabbit population, that the Malpai Borderlands Group is not fulfilling its stated mission to restore and maintain natural processes that support diverse and flourishing animal life in the borderlands region, which includes the Diamond A Ranch in southern Hidalgo County, and constitutes the range of the white-sided jackrabbit in the United States. However, they provide no information that documents the extent, magnitude, or immediacy of the perceived inadequacies of the MBHCP or how they threaten the white-sided jackrabbit in New Mexico. Traphagen (2009, pp. 4-5) provides information indicating that the Animas Foundation and the Malpai Borderlands Group have supported numerous research, monitoring, and restoration projects, with nearly all of the projects focusing on aspects of rangeland health, shrub invasion, and endangered species conservation. Traphagen (2009, p. 5) states that several major prescribed burns have been conducted in the Malpai Borderlands Region in the last 20 years in addition to allowing natural fires to run free. Traphagen (2009, p. 5) also describes the cooperation of private ranchers in deferring grazing in order to reduce woody shrub cover and to allow pastures with insufficient biomass to recover.

The Mexican Federal agency known as the Instituto Nacional de Ecologiá is responsible for the analysis of the status and threats that pertain to species that are proposed for listing in the Norma Oficial Mexicana NOM-059 (the Mexican equivalent to a threatened and endangered species list), and if appropriate, the nomination of species to the list. The Instituto Nacional de Ecologiá is generally considered the Mexican counterpart to the United States' Fish and Wildlife Service. The white-sided jackrabbit is not included in the NOM-059 (SEDESOL 2008) and is therefore not protected by Federal regulation in Mexico.

In NatureServe, the white-sided jackrabbit's global ranking is G3 (vulnerable) and its National and State Status rankings are N1S1 (critically imperiled). The species' status under the International Union for Conservation of Nature and Natural Resources is "near threatened." However, these lists are not regulatory mechanisms; they serve only to notify the public of the species' status; no conservation or management actions are required and no regulatory authority for species conservation is established through these listings. Additionally, the white-sided jackrabbit is on the Regional Forester's Sensitive Species List for the Coronado National Forest (Forest Service 2007, p. 15); however, we found no information to that indicates the jackrabbit is present on any Forest Service lands in New Mexico.

There is information that indicates that the white-sided jackrabbit's status as a State-listed threatened species in

New Mexico confers little regulatory protection (except against direct take). Further, the white-sided jackrabbit is not covered by any known regulations in Mexico. However, as discussed in the other Factors of this section, we have not identified any threats to this species that are likely to negatively affect the status of the species as a whole, such that the limited regulatory protection is not likely to represent a threat to the species. Therefore, we find that the white-sided jackrabbit is not threatened by inadequacy of regulatory mechanisms, either now or in the foreseeable future.

*Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence*

The following natural or manmade factors may affect the white-sided jackrabbit or its habitat, or both, and are discussed below: climate change, consumption of poisonous plants, impacts by vehicles on roads, and fire.

Climate Change

The Intergovernmental Panel on Climate Change (IPCC) is a scientific body set up by the World Meteorological Organization and the United Nations Environment Program in 1988. It was established because policy makers needed an objective source of information about the causes of climate change, its potential environmental and socio-economic consequences, and the adaptation and mitigation options to respond to it. The Service considers the IPCC an impartial and legitimate source of information on climate change. In 2007, the IPCC published its Fourth Assessment Report, which is considered the most comprehensive compendium of information on actual and projected global climate change currently available.

Although the extent of warming likely to occur is not known with certainty at this time, the IPCC (2007, p. 5) has concluded that warming of the climate is unequivocal and continued greenhouse gas emissions at or above current rates would cause further warming (IPCC 2007, p. 13). The IPCC also projects that there will very likely be an increase in the frequency of hot extremes, heat waves, and heavy precipitation (IPCC 2007, p. 15). Warming in the southwestern United States is expected to be greatest in the summer (IPCC 2007, p. 887). Annual mean precipitation is likely to decrease in the southwestern United States and the length of snow season and snow depth are very likely to decrease (IPCC 2007, p. 887). Further, the IPCC (2007, p. 888) concluded that grasslands and shrublands appear to be more sensitive than previously thought to variability of, and changes in, major climate change drivers, such as the increase in atmospheric carbon dioxide. Several climate change models project that the southwestern United States will become hotter and drier, and indicate that the portion of southwestern New Mexico currently occupied by the white-sided jackrabbit will be characterized by shrubland or woodland as a result of climate change (The Wildlife Society 2004, p. 6; Izaurralde *et al.* 2005, pp. 110-111). In their Vulnerability Assessment for Biodiversity in New Mexico, Enquist and Gori (2008, p. 14) consider the white-sided jackrabbit to be a drought-sensitive conservation target based upon the predicted conversion of its grassland habitat to shrubland. Further, information indicates that climate change might contribute to more frequent and intense drought within the United States and northern Mexico portion of the range of the jackrabbit (Seager *et al.* 2007, pp. 1181-1182).

In consultation with leading scientists from the southwestern United States, the New Mexico Office of the State Engineer prepared a report for the Governor (D'Antonio 2006) which made the following observations about the impact of climate change in New Mexico:

(1) Warming trends in the American Southwest exceed global averages by about 50 percent (p. 5);

(2) Models suggest that even moderate increases in precipitation would not offset the negative impacts to the water supply caused by increased temperature (p. 5);

(3) Temperature increases in the Southwest are predicted to continue to be greater than the global average (p. 5); and

(4) The intensity, frequency, and duration of drought may increase (p. 7).

The best available information indicates that the white-sided jackrabbit may be vulnerable to climatic changes that would decrease suitable habitat in New Mexico; however, while it appears reasonable to assume that the white-sided jackrabbit may be affected, we lack sufficient certainty to know specifically how climate change will affect the species. Despite large-scale conclusions that climate change is occurring in New Mexico, we have not identified, nor are we aware of, any data on an appropriate scale to evaluate habitat or population trends for the white-sided jackrabbit within its range in New Mexico or in Mexico at this time, or to make predictions on future trends and whether the species will be impacted. There are multiple hypothetical outcomes associated with climate change that could potentially affect the white-sided jackrabbit habitat. However, we lack predictive local or regional models on how climate change will specifically affect the habitat in either country. Given that reliable, predictive models have not been developed for use at the local scale in New Mexico's bootheel region or for the sites in the many States in Mexico within the jackrabbit's range, currently there is little certainty regarding the timing, magnitude, and net effect of impact. Therefore, we find it is not possible at this time to make reliable predictions of climate change effects on the status of the white-sided jackrabbit, due to the current limitations in available data and climate models. Based on the best available information and our current knowledge and understanding, we conclude that climate change is not a known threat to the white-sided jackrabbit or its habitat, now or in the foreseeable future.

Food Poisoning

A single suspected case of food poisoning of white-sided jackrabbits is known. Bednarz (1977, p. 18) detailed a case in which a New Mexico rancher found several dead white-sided jackrabbits while eradicating mustard plants. Bednarz (1977, p. 18) suggests that this mortality may have been caused by the jackrabbits' consumption of mustard plants and ensuing nitrate poisoning. Consumption of mustard plants is known to cause nitrate poisoning in cattle, and Bednarz (1977, p. 18) states that it likely has the same effect on jackrabbits. We are not aware of any other similar reports or information that indicates that food poisoning threatens the jackrabbit. There is no evidence that food poisoning is occurring at a level which may affect the status of the species as a whole, now or in the foreseeable future.

Impacts by Vehicles

There is information that indicates that the white-sided jackrabbit is subject to fatal impacts from vehicles on roads within the species' range in New Mexico. Moore-Craig (1992, p. 16) and Bednarz (1977, p. 18) reported that that white-sided jackrabbits were occasionally killed by vehicles. Rangewide, jackrabbits are likely somewhat protected from significant impacts due to vehicle collisions because they are largely nocturnal animals and not active in the day when most people are active. However, the recent increase in U.S. Border Patrol activity may have increased the magnitude of this impact on white-sided

jackrabbit populations near the international border. Due to the nature of the U.S. Border Patrol activities, these vehicles would be present on roads at night more often than vehicles were present on roads at night historically. Traphagan (2010) notes that U.S. Border Patrol agents have reported roadkills at night. However, there is no reason to extrapoloate these U.S. Border Patrol activities and vehicle collision rates to other portions of the range of the species because U.S. Border Patrol impacts are unique to the area near the international border. Based on this review of the best available information, we find that, although individual jackrabbits may be subject to impacts as a result of vehicle collisions, there is no evidence that this is occurring at a level that may affect the status of the species as a whole, now or in the foreseeable future.

Fire Management

The active fire management program in the Malpai Borderlands area may affect the white-sided jackrabbit. Effects to jackrabbits during fire management may include mortality or injury of individuals as a result of direct exposure to fire, smoke inhalation, and crushing by the tires or tracks of vehicles used in fire management activities (Service 2008, pp. 64-65). We believe that the jackrabbit is capable of surviving such fire effects by running away (Service 2008, p. 64). We find prescribed burns may also expose white-sided jackrabbits to higher rates of predation, but may also allow the jackrabbits to more easily detect terrestrial predators (Service 2008, p. 65). The effects of a prescribed burn to habitats would likely be short term, because the fire-adapted grassland community usually responds quickly, with plant species showing regrowth within several days post-fire. Nevertheless, a reduction of shrubs would benefit the white-sided jackrabbit by improving grassland habitat. Although the management measures employed under the MBHCP will likely result in short-term adverse effects to the jackrabbit, the long-term effects will improve the grassland community used by white-sided jackrabbits by reducing the shrub component, providing additional suitable habitat, and improving the area around occupied habitat for potential expansion; thus, implementation of the MBHCP, including the fire management program, should promote the conservation of the white-sided jackrabbit. Based on this review of the best available information, we find that although individual jackrabbits may be subject to impacts of fire management, there is no evidence that the short-term impacts of fire management are occurring at a level that may affect the status of the species as a whole now or in the foreseeable future. Further, the long-term impacts of fire management may serve to improve white-sided jackrabbit habitat and thus provide a benefit to the species.

**Finding for *Lepus callotis***

As required by the Act, we considered the five factors in assessing whether the full species of the white-sided jackrabbit, *Lepus callotis*, is threatened or endangered throughout its range. We have carefully examined the best scientific and commercial information available regarding the past, present, and future threats faced by the species. We reviewed the petition, information available in our files, and other available published and unpublished information.

Our review of the best available scientific and commercial information pertaining to the five factors does not indicate that the white-sided jackrabbit is in danger of extinction (endangered), or likely to become endangered within the foreseeable future (threatened), throughout its range. This is based on our finding in the five-factor analysis that stressors in New Mexico do not constitute threats to the jackrabbit in its current range in New Mexico, and the fact that the best available information concerning the jackrabbit's status and its habitat in Mexico, limited as it is, does not allow us to assess the magnitude or immediacy of those potential impacts on the species, nor the extent of the occupied range of the jackrabbit that may be subject to impacts. While we have evidence that some impacts may be occurring within the range of the species (e.g., shrub encroachment, grazing, hunting, vehicle collisions, changing climate conditions), we do not have any specific information that allows us to make a reasonable connection between these potential impacts and current or future declines of white-sided jackrabbits. Therefore, we find that listing the full species of the white-sided jackrabbit as a threatened or an endangered species throughout its range is not warranted at this time.

**Species Information: *Lepus callotis callotis***

The distribution of the subspecies of the white-sided jackrabbit, *Lepus callotis callotis*, is limited to Mexico. The northern limit of the subspecies' range is established by the Rio Nazas (Peterson 1976, p. 497). The range of the subspecies *L. c. callotis* spans several States in the Mexican interior, from Durango in the north to Oaxaca in the south (Hall 1981, p. 330). The range of the subspecies *L. c. callotis* is fully encompassed by the range of the species *L. callotis*. Please see the "**Species Information: *Lepus callotis***" section above for a full discussion of white-sided jackrabbit taxonomy, species description, biology, distribution, habitat, and population abundance.

**Summary of Information Pertaining to the Five Factors for *Lepus callotis callotis***

In making this finding, information pertaining to the subspecies of the white-sided jackrabbit, *Lepus callotis callotis*, in relation to the five factors provided in section 4(a)(1) of the Act is discussed below. In making our 12–month finding on a petition to list the subspecies of the white-sided jackrabbit, *Lepus callotis callotis*, we considered and evaluated the best available scientific and commercial information.

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

Based on extensive literature searches, we find there is no information available to us which describe threats to the subspecies' habitat or range in a way that allows us to assess the magnitude or immediacy of these impacts on the subspecies. It is likely that many of the same or similar anthropogenic activities that occur in the United States portion of the full species' range, discussed above, occur within the subspecies' range in Mexico. However, there is no information available to evaluate whether these factors or potential threats have a negative effect on the subspecies. We are not aware of additional or specific activities which may be contributing to the present or threatened destruction, modification, or curtailment of the subspecies' habitat or range in Mexico. Therefore, we find that the best available information regarding threats to the subspecies' habitat or range does not indicate that listing the subspecies throughout all or a portion of its range is warranted due to the present or threatened destruction, modification, or curtailment of its habitat or range, either now or in the foreseeable future.

*Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes*

There are reports of the historical utilization of white-sided jackrabbits in Mexico. As discussed above, we are unable to assess the level of utilization that occurs and whether it is having an impact on the population levels and

overall status of the species or either subspecies. The best available information does not indicate that the subspecies is overutilized for commercial, recreational, scientific, or educational purposes. We have not encountered any information that indicates the contrary. In the absence of evidence that this may constitute a threat to the subspecies throughout all or a portion of its range, we find that listing the subspecies *Lepus callotis callotis* due to overutilization is not warranted, now or in the foreseeable future.

*Factor C. Disease or Predation*

The full extent of information available on the subject of disease and predation as threats to the species, and therefore this subspecies, is discussed above. We have no information available to us that indicates that the subspecies is subject to disease or predation at a level that is affecting the status of the subspecies. Since we do not have information that this may constitute a threat to the subspecies throughout all or a portion of its range, we find that listing the subspecies *Lepus callotis callotis* due to disease or predation is not warranted, either now or in the foreseeable future.

*Factor D. The Inadequacy of Existing Regulatory Mechanisms*

As discussed above, white-sided jackrabbits (including the subspecies *Lepus callotis callotis*) are not covered under any known regulations in Mexico. We have encountered no information that indicates that the status of the subspecies is declining due to the inadequacy of existing regulatory mechanisms. Since we have no information that this may constitute a threat to the subspecies throughout all or a portion of its range, we find that listing the subspecies *Lepus callotis callotis* due to the inadequacy of existing regulatory mechanisms is not warranted, either now or in the foreseeable future.

*Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence*

We have no detailed information concerning additional natural or manmade factors affecting the subspecies' continued existence. Global climate change will likely affect the subspecies or its habitat; however, the effects of climate change on the region and their magnitude and imminence are unknown. We lack predictive models on how climate change will specifically affect the subspecies' habitat in Mexico. Given that reliable, predictive models have not been developed for use at the local scale for the sites in the many States in Mexico within the subspecies' range, currently there is little certainty regarding the timing, magnitude, and net effect of impact of climate change. Therefore, we find it is not possible to make reliable predictions of climate change effects on the status of the white-sided jackrabbit, due to the current limitations in available data and climate models. Based on the best available information and our current knowledge and understanding, we conclude that climate change is not currently a known threat to the subspecies *Lepus callotis callotis*, either now or in the foreseeable future.

**Finding for *Lepus callotis callotis***

As required by the Act, we considered the five factors in assessing whether the subspecies of the white-sided jackrabbit, *Lepus callotis callotis*, is threatened or endangered throughout all or a significant portion of its range. We have carefully examined the best scientific and commercial information available regarding the past, present, and future threats faced by the species. We reviewed the petition, information available in our files, and other available published and unpublished information. We know very little about the status and threats to the subspecies. The best available information does not indicate that these populations are going to experience impacts at a level at that would affect the status of the subspecies.

Our review of the best available scientific and commercial information pertaining to the five factors does not indicate that the subspecies of white-sided jackrabbit, *Lepus callotis callotis*, is in danger of extinction (endangered), or likely to become endangered within the foreseeable future (threatened), throughout its range. This is based on our finding in the five-factor analysis that the best available information concerning the jackrabbit's status and its habitat in Mexico, limited as it is, does not allow us to assess the magnitude or immediacy of those potential impacts on the species, nor the extent of the occupied range of the jackrabbit that may be subject to impacts. While we have evidence that some impacts may be occurring within the range of the species (e.g., shrub encroachment, grazing, hunting, changing climate conditions), we do not have any specific information that allows us to make a reasonable connection between these potential impacts and current or future declines of the subspecies. Therefore, we find that listing the subspecies of the white-sided jackrabbit, *Lepus callotis callotis*, as a threatened or an endangered subspecies throughout its range is not warranted at this time.

**Species Information: *Lepus callotis gaillardi***

The subspecies of the white-sided jackrabbit, *Lepus callotis gaillardi,* occurs in both the United States and in Mexico. As discussed above, the historical range of the subspecies *Lepus callotis gaillardia* includes the southern Animas and Playas valleys of Hidalgo County, New Mexico, south into west-central Chihuahua and north-central Durango, Mexico (Bednarz and Cook 1984, p. 358; Reynolds 1988, p. 1), although it is now likely extirpated from the Playas Valley as no observations of the species have been made in this area during more recent surveys (Traphagen 2002, p. 5; Frey 2004, p. 22; NMDGF 2006a, p. 115; Traphagen 2010, p. 1). The range of the subspecies *L. c. gaillardi* is fully encompassed by the range of the species *L. callotis*. Please see the "**Species Information**: ***Lepus callotis***"section above for a full discussion of white-sided jackrabbit taxonomy, species description, biology, distribution, habitat, and population abundance.

**Summary of Information Pertaining to the Five Factors for *Lepus callotis gaillardi***

In making this finding, information pertaining to the subspecies of the white-sided jackrabbit, *Lepus callotis gaillardi*, in relation to the five factors provided in section 4(a)(1) of the Act is discussed below. In making our 12–month finding on a petition to list the subspecies of the white-sided jackrabbit, *Lepus callotis gaillardi*, we considered and evaluated the best available scientific and commercial information.

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

The habitat of the subspecies *Lepus callotis gaillardi* within the United States may be threatened by shrub encroachment as a result of livestock grazing and wildfires. This threat is discussed in detail in the threat assessment for the full species *Lepus callotis*. There is information that this perceived threat may differentially affect the subspecies' separate habitats in New Mexico in the Animas and Playas Valleys.

Traphagen (2009, pp. 1-2) indicates that the assertion that the current and historical grazing practices and suppression of wildfire, and the subsequent encroachment of shrubs threaten the subspecies is not entirely

accurate in regard to the habitat of the subspecies in the Animas Valley; however, it may have been a factor in the Playas Valley, where the subspecies is presumed to be extirpated.

As discussed above, Traphagen (2009, p. 2) reports that the Animas Valley is largely free of shrubs, likely due to the soil structure, water drainage, frequent fires, and cold air drainage. Cold air drainage is a process that occurs in valleys as the ground cools at night, cooling the air and causing denser cold air from higher elevations to move down into the valley. The Animas Valley is surrounded by several large mountain ranges that create winter microclimates too cold to support the establishment of shrubs on the valley floor such as mesquite, cholla, and creosote (Traphagen 2009, p. 2). In contrast, the Playas Valley receives less precipitation annually and is generally drier than the Animas Valley (Traphagen 2009, p. 2). Shrub invasion in this grassland association has occurred on a much larger scale than in the grassland association found in the Animas Valley (Traphagen 2009, p. 2).

The Diamond A Ranch, which incorporates the two valleys, has practiced a very light grazing regime under ownership by The Nature Conservancy, and subsequently, by the Animas Foundation (Traphagen 2009, p. 3). Traphagen (2009, p. 3) reports that since 1994, there have been several periods during which grazing was deferred on the ranch for 4 years or more, and from 2003 to 2006, there was no cattle grazing in the Animas Valley.

Traphagen (2009, p. 4) reports that fire suppression has not occurred in recent years on the Diamond A Ranch, and states that there have been several major fires in the Animas Valley that have nearly burned all of the white-sided jackrabbits' habitat in that valley. These fires are described in further detail above.

We have no information about current grazing or fire suppression practices in historical habitat in the Playas Valley beyond the general statement that the Diamond A Ranch has been lightly grazed since 1994. This jackrabbit appears to be extirpated from that portion of its range. The extent to which past grazing or fire suppression practices may have contributed to that extirpation is unknown; however, the Playas Valley may have been more susceptible to shrub encroachment resulting from past overgrazing than the Animas Valley as a result of the differences in grassland type and cold air drainage patterns discussed above.

Finally, while we know that grazing of livestock occurs in Mexico (see, for example, Buller *et al.* 1960), we do not have information on the extent or intensity of historical or current livestock grazing practices throughout the range of the species in Mexico. Brown (1994) reported that a primary cause of loss and degradation of grasslands in the Chihuahuan Desert is overgrazing by cattle; however, the extent of those grassland losses throughout the historical range of the jackrabbit and the impacts of those losses on the jackrabbit are not known.

The best available information indicates that grazing and fire suppression are not currently occurring at a level which may constitute a threat to extant populations of the subspecies in New Mexico, although these impacts may have played a role in the presumed extirpation of white sided-jackrabbits in the Playas Valley. Information about the subspecies' status in Mexico is very limited. As discussed above, overgrazing may have caused some loss or degradation of grasslands in the Chihuahuan Desert, and the encroachment of shrubs into grasslands may have negatively affected populations of white-sided jackrabbits there. However, the information available concerning grazing practices in Mexico does not allow us to assess the magnitude or immediacy of these impacts on the subspecies, nor the extent of the occupied range of the subspecies that may be subject to overgrazing impacts. In the absence of information that allows us to make a reasonable connection between the impacts of livestock grazing and fire suppression, and current or future declines of white-sided jackrabbits, we are unable to conclude that this subspecies is threatened by grazing practices or fire suppression.

*Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes*

In New Mexico, the subspecies is currently protected under the New Mexico Wildlife Conservation Act (NMDGF 2008, p. 10). Further, in New Mexico, the subspecies only occurs on private land, thereby limiting hunting opportunities (Traphagen 2009, p. 4). Literature indicates that the species was commonly hunted in Mexico for commercial markets (Leopold 1959, p. 349; Reynolds 1988). Matson and Baker (1986, p. 41) indicated that the species was heavily hunted and considered highly edible. Thus, it is possible that hunting may have played a role in the presumed decline of the white-sided jackrabbit in Mexico (Moore-Craig, 1992, p. 13); however, as discussed above, we are unable to assess the level of hunting that occurs and whether it is having an impact on the population levels and overall status of the species. As the subspecies is legally protected from overutilization in New Mexico and the best available information does not indicate that overutilization constitutes a threat to the subspecies in Mexico, we find that overutilization does not constitute a significant threat to the subspecies. We find that listing the subspecies *Lepus callotis gaillardi* due to overutilization is not warranted, now or in the foreseeable future.

*Factor C. Disease or Predation*

The full extent of information available on the subject of disease and predation as potential threats to the species, and therefore this subspecies, is discussed above. We have encountered no information which indicates that the subspecies is subject to excessive disease or predation. We have not encountered any information which indicates the contrary; however, in the absence of evidence that this may constitute a threat to the subspecies throughout all or a portion of its range, we find that listing the subspecies *Lepus callotis gaillardi* due to disease or predation is not warranted, now or in the foreseeable future.

*Factor D. The Inadequacy of Existing Regulatory Mechanisms*

The full extent of information available on the subject of existing regulatory mechanisms as a threat to the species, and therefore this subspecies, is discussed above. There is information that indicates that the white-sided jackrabbit's status as a State-listed threatened species in New Mexico confers little regulatory protection (except against direct take). Further, the white-sided jackrabbit is not covered by any known regulations in Mexico. However, as discussed in the other Factors of this section, we have not identified any threats to this species that are likely to negatively affect the status of the subspecies as a whole, such that the limited regulatory protection is not likely to represent a threat to the subspecies. In the absence of evidence that the inadequacy of existing regulatory mechanisms may constitute a threat to the subspecies throughout all or a portion of its range, we find that listing the subspecies *Lepus callotis gaillardi* due to the inadequacy of existing regulatory mechanisms is not warranted, now or in the foreseeable future.

*Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence*

The possible impacts to the subspecies *Lepus callotis gaillardi* due to other natural or manmade factors affecting its continued existence do not differ from those for the full species, discussed above. It is possible that the effects of climate change will impact the subspecies and its habitat; however, we don't know if the potential habitat changes will result in a decline in the status of the species. Additionally, there has been no research investigating the ways in which the effects will impact its specific environment. Rather, the models of projected change indicate a conversion to shrubland over much of the region of the southwestern United States and northern Mexico and do not account for the specific habitat types currently occupied by the subspecies. Due to the lack of information specific to the subspecies' relatively unique grassland association, detailed above in the Factor A discussion for this subspecies, we find that the best available information does not indicate that climate change may constitute a threat to the subspecies throughout all or a portion of its range, now or in the foreseeable future.

The effects of the reported fatal impacts of the subspecies by vehicles on roads within the subspecies' range in New Mexico are discussed above. Although there is potential for this factor to affect individuals in the future, depending on the activity of the U.S. Border Patrol, impacts are currently not known to be occurring at a level that will affect the status of the subspecies throughout all or a significant portion of its range.

**Finding for *Lepus callotis gaillardi***

As required by the Act, we considered the five factors in assessing whether the subspecies of the white-sided jackrabbit, *Lepus callotis gaillardi*, is threatened or endangered throughout all or a significant portion of its range. We have carefully examined the best scientific and commercial information available regarding the past, present, and future threats faced by the species. We reviewed the petition, information available in our files, and other available published and unpublished information.

Our review of the best available scientific and commercial information pertaining to the five factors does not indicate that the subspecies of the white-sided jackrabbit, *Lepus callotis gaillardia*, is in danger of extinction (endangered), or likely to become endangered within the foreseeable future (threatened), throughout its range. This is based on our finding in the five-factor analysis that stressors in New Mexico do not constitute threats to the jackrabbit in its current range in New Mexico, and the fact that the best available information concerning the jackrabbit's status and its habitat in Mexico, limited as it is, does not allow us to assess the magnitude or immediacy of those potential impacts on the subspecies, nor the extent of the occupied range of the jackrabbit that may be subject to impacts. While we have evidence that some impacts may be occurring within the range of the subspecies (e.g., shrub encroachment, grazing, hunting, vehicle collisions, changing climate conditions), we do not have any specific information that allows us to make a reasonable connection between these potential impacts and current or future declines of white-sided jackrabbits. Therefore, we find that listing the subspecies of the white-sided jackrabbit, *Lepus callotis gaillardia*, as a threatened or an endangered species throughout its range is not warranted at this time.

**Distinct Vertebrate Population Segments**

After assessing whether the species and the two subspecies are threatened or endangered throughout their range, we next consider whether any Distinct Vertebrate Population Segment (DPS) of the white-sided jackrabbit's range meets the definition of endangered or is likely to become endangered in the foreseeable future.

*Distinct Vertebrate Population Segment*

Under the Service's Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (61 FR 4722, February 7, 1996), three elements are considered in the decision concerning the establishment and classification of a possible DPS. These are applied similarly for additions to or removal from the Federal List of Endangered and Threatened Wildlife. These elements include:

(1) The discreteness of a population in relation to the remainder of the species to which it belongs;

(2) The significance of the population segment to the species to which it belongs; and

(3) The population segment's conservation status in relation to the Act's standards for listing, delisting, or reclassification (i.e., is the population segment endangered or threatened).

*Discreteness*

Under the DPS policy, a population segment of a vertebrate taxon may be considered discrete if it satisfies either one of the following 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.

(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.

We were asked to list the northern populations of the *Lepus callotis gaillardi* subspecies, which includes two valleys in Hidalgo County, New Mexico, as a DPS. First, we evaluated whether the potential DPS met the condition of discreteness. Because we have so little information about the species in Mexico, we are unable to thoroughly assess the potential separation of the United States populations from the Mexico populations as a consequence of physical, physiological, ecological, or behavioral factors. However, as discussed in Factor D above, the white-sided jackrabbit is not addressed by the regulatory mechanisms available in Mexico. Because the white-sided jackrabbit is covered by regulatory mechanisms in the State of New Mexico, there is a difference in regulatory mechanisms, and we find that the United States populations of the white-sided jackrabbit are discrete under the DPS Policy.

*Significance*

If we determine that a population segment is discrete under one or more of the discreteness conditions described in the DPS Policy, we then evaluate its biological and ecological significance based on "the available scientific evidence of the discrete population segment's importance to the taxon to which it belongs" (61 FR 4725). We make this evaluation in light of congressional guidance that the Service's authority to list DPSs be used "sparingly" while encouraging the conservation of genetic diversity (61 FR 4722; February 7, 1996). 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 population segment's biological and ecological importance to the taxon to which it belongs. As specified in the DPS Policy (61 FR 4722), consideration of the population segment's significance may include, but is not limited to the following:

(1) Persistence of the population segment in an ecological setting that is unusual or unique for the taxon;

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

(3) evidence that the population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside of its historical range; and

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

The following discussion considers the significance of the United States population of the white-sided jackrabbit in light of the above criteria. The populations of white-sided jackrabbit that occur in the United States occupy the plains grassland and Chihuahuan Desert grassland vegetation types. These vegetation types, especially the plains grassland, are somewhat rare in the United States, but are more common in Mexico, thus the United States populations do not occur in a unique ecological setting. The populations of white-sided jackrabbit that occur in the United States represent less than one percent of the range of the species. While populations which are on the edge or periphery of a species' range sometimes have unique characteristics which may benefit the survival of a species as a whole, or while such areas may play an important life-history role for a species (such as outlying populations composed of juvenile, non-breeding animals), there is no information that indicates this is the case with the jackrabbit. Instead, these are peripheral populations occurring in an area where the species was never known to be abundant. The loss of these populations is not likely to result in a significant gap in the range of the taxon. While very little is known about the species in Mexico, there is no information which suggests that these populations are the only surviving natural occurances of the taxon. Additionally, there is no information that indicates that there are any introduced populations outside of their historical range anywhere. Finally, to our knowledge, no genetic studies of any kind have been conducted which looked at the genetic differences of the United States jackrabbits as compared to the jackrabbits in Mexico; thus we are not able to assess whether the United States populations differ markedly from populations in Mexico. In summary, there is no information that indicates the United States population of the white-sided jackrabbit can be considered significant under our DPS Policy.

*DPS Conclusion*

On the basis of the best available information, we conclude that the United States population of white-sided jackrabbits is discrete, but it is not significant under the DPS Policy. Since we found that the population segment did not meet the significance element and, therefore, does not qualify as a DPS under the Service's DPS Policy, we will not proceed with an evaluation of the status of the population segment under the Act.

**Significant Portion of the Range**

Having determined that the species *Lepus callotis* does not meet the definition of a threatened or endangered species, we must next consider whether there are any significant portions of the range where this species is in danger of extinction or is likely to become endangered in the foreseeable future.

On March 16, 2007, a formal opinion was issued by the Solicitor of the Department of the Interior, "The Meaning of 'In Danger of Extinction Throughout All or a Significant Portion of Its Range'" (United States Department of Interior 2007). We have summarized our interpretation of that opinion and the underlying statutory language below. A portion of a species' range is significant if it is part of the current range of the species and it contributes substantially to the representation, resiliency, or redundancy of the species. The contribution must be at a level such that its loss would result in a decrease in the ability to conserve the species.

In determining whether a species is threatened or endangered in a significant portion of its range, we first identify any portions of the range of the species that warrant further consideration. The range of a species can theoretically be divided into portions an infinite number of ways. However, there is no purpose to analyzing portions of the range that are not reasonably likely to be significant and threatened or endangered. To identify only those portions that warrant further consideration, we determine whether there is substantial information indicating that: (1) The portions may be significant, and (2) the species may be in danger of extinction there or likely to become so within the foreseeable future. In practice, a key part of this analysis is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats applies only to portions of the species' range that are not significant, such portions will not warrant further consideration.

If we identify portions that warrant further consideration, we then determine whether the species is threatened or endangered in these portions of its range. Depending on the biology of the species, its range, and the threats it faces, the Service may address either the significance question or the status question first. Thus, if the Service considers significance first and determines that a portion of the range is not significant, the Service need not determine whether the species is threatened or endangered there. Likewise, if the Service considers status first and determines that the species is not threatened or endangered in a portion of its range, the Service need not determine if that portion is significant. However, if the Service determines that both a portion of the range of a species is significant and the species is threatened or endangered there, the Service will specify that portion of the range as threatened or endangered under section 4(c)(1) of the Act.

Applying the process described above for determining whether a species is threatened in a significant portion of its range, we next addressed whether any portions of the range of the white-sided jackrabbit warranted further consideration. On the basis of our review of the five listing factors above, we found no evidence of geographic concentration of threats either in New Mexico or Mexico such that the full species or either of the subspecies may be in danger of extinction in that portion. The information that is known about impacts to the white-sided jackrabbit is generally specific to those populations in the United States; however, a lack of information about threats in other portions of the range of the species one way or another does not mean that threats are concentrated in the United States.

There is no information to suggest that any portion of the range of the species or either subspecies contributes more significantly to the resiliency, redundancy, and representation of the species or either subspecies than any other portion of the range. There is no

information to suggest that any portion of the range is particularly of better quality than any other portion, or than any portion includes an important concentration of certain types of habitat that are necessary for the species to carry out its life-history functions, such as breeding, feeding, migration, dispersal, or wintering. Further, there is no information to suggest than any portion of the range provides a greater increment of redundancy than any other area. Finally, very little genetic information is known about white-sided jackrabbits. There have been some studies that used a variety to taxonomy, morphology, and chromosome information to differentiate white-sided jackrabbits from other species of jackrabbits, but no genetic studies have been conducted to compare various populations of white-sided jackrabbits, thus representation cannot be assessed. As a result of the above analysis, we conclude that there is no indication that a particular portion of the white-sided jackrabbit's range warrants further consideration as threatened or endangered.

We do not find that the species is in danger of extinction now, nor is it likely to become endangered within the foreseeable future throughout all or a significant portion of its range. Therefore, listing the full species or either subspecies as threatened or endangered under the Act is not warranted at this time.

We request that you submit any new information concerning the status of, or threats to, this subspecies to our Southwest Regional Ecological Services Fish and Wildlife Office (see **ADDRESSES** section) whenever it becomes available. New information will help us monitor this subspecies and encourage its conservation. If an emergency situation develops for this subspecies or any other species, we will act to provide immediate protection.

## References Cited

A complete list of references cited is available on the Internet at *http://www.regulations.gov and upon request from the Southwest Regional Ecological* Services Office (see **ADDRESSES** section).

## Author(s)

The primary authors of this notice are the staff members of the Southwest Regional Ecological Services Office (see **ADDRESSES** section)

## Authority

The authority for this section is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: August 19, 2010.

**Wendi Weber,**

*Acting Deputy Director, Fish and Wildlife Service.*

[FR Doc. 2010–21774 Filed 8–31–10; 8:45 am]

**BILLING CODE 4310–55–S**

# Notices

Federal Register

Vol. 75, No. 169

Wednesday, September 1, 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

### Notice of Public Meeting, Cherokee National Forest Resource Advisory Committee

**SUMMARY:** In accordance with the Secure Rural Schools and Community Self Determination Act of 2000 (Pub. L. 106–393), [as reauthorized as part of Pub. L. 110–343] and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of Agriculture, Forest Service, Cherokee National Forest Resource Advisory Committee will meet for the first time as indicated below.

**DATES:** The Cherokee National Forest RAC meeting will be conducted on Wednesday, September 29, 2010 from 12:30–4:30 p.m.

**ADDRESSES:** The Cherokee National Forest Resource Advisory Committee (RAC) meeting will be held at the Bass Pro Shop at 3629 Outdoor Sportsmans Place in Kodak, TN 37764. Phone (865) 932–5600. The facility is located approximately 20 miles north of Knoxville, TN off 1–40 at exit #407 (Sevierville, TN—Winfield Dunn Parkway).

**FOR FURTHER INFORMATION CONTACT:** Terry Bowerman, Designated Federal Official, Cherokee National Forest, 4900 Asheville Hwy SR 70, Greeneville, TN 37743: *Telephone:* 423–638–4109, e-mail *tbowerman@fs.fed.us.*

**SUPPLEMENTARY INFORMATION:** The Cherokee National Forest Resource Advisory Committee (RAC) proposes projects and funding to the Secretary of Agriculture under Section 203 of the Secure Rural Schools and Community Self Determination Act of 2000, (as reauthorized as part of Pub. L. 110–343). The Cherokee National Forest RAC consists of 15 people selected to serve on the committee by Secretary of Agriculture Tom Vilsack. Two Tennessee counties, Cocke and Monroe, are setting aside a percentage of their Secure Rural Schools Act payment under Title II of the Act to be used for projects on Federal land. The RAC will ultimately review and recommend projects to be funded from this money. Projects approved must benefit National Forest land. Projects can maintain infrastructure, improve the health of watersheds and ecosystems, protect communities, and strengthen local economies.

The agenda for the first meeting of the Cherokee National Forest RAC will focus on a general overview of the Secure Rural Schools Act and election of a chairperson. RAC meetings are open to the public.

**H. Thomas Speaks, Jr.,**

*Forest Supervisor, Cherokee National Forest.*

[FR Doc. 2010–21809 Filed 8–31–10; 8:45 am]

**BILLING CODE 3410–11–M**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### El Dorado County Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The El Dorado County Resource Advisory Committee will meet in Placerville, California. The committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) and in compliance with the Federal Advisory Committee Act. The agenda includes: review of the draft media release informing people about future solicitation for project proposal, presentation, discussion and approval of the project application packet; create, discuss, and approve a plan/strategy for informing potential project proposers about the opportunity and the application guidelines; discuss RAC administrative costs; discuss and approve potential field trips; and continuing education about the Secure Rural Schools and Community Self-Determination Act of 2008.

**DATES:** The meeting will be held on September 20, 2010 at 6 p.m.–9 p.m.

**ADDRESSES:** The meeting will be held at the El Dorado Center of Folsom Lake College, Community Room, 6699 Campus Drive, Placerville, CA 95667. Written comments should be sent to Frank Mosbacher; Forest Supervisor's Office; 100 Forni Road; Placerville, CA 95667. Comments may also be sent via e-mail to *fmosbacher@fs.fed.us,* or via facsimile to 530–621–5297.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at 100 Forni Road; Placerville, CA 95667. Visitors are encouraged to call ahead to 530–622–5061 to facilitate entry into the building.

**FOR FURTHER INFORMATION CONTACT:** Frank Mosbacher, Public Affairs Officer, Eldorado National Forest Supervisors Office, (530) 621–5268.

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 Standard Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** The meeting is open to the public. The following business will be conducted: Review of the draft media release informing people about future solicitation for project proposal, Presentation, discussion and approval of the project application packet; Create, discuss, and approve a plan/strategy for informing potential project proposers about the opportunity and the application guidelines; discuss RAC administrative costs; discuss and approve potential field trips; and continuing education about the Secure Rural Schools and Community Self-Determination Act of 2008.

More information will be posted on the Eldorado National Forest Web site at *http://www.fs.fed.us/r5/eldorado.* A public comment opportunity will be made available following the business activity. Future meetings will have a formal public imput period for those following the yet to be developed public imput process.

Dated: August 26, 2010.

**John M. Sherman,**

*Acting Forest Supervisor.*

[FR Doc. 2010–21876 Filed 8–31–10; 8:45 am]

**BILLING CODE 3410–11–P**

## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

### Missing Parts Practice

**ACTION:** Proposed collection; comment request.

**SUMMARY:** The United States Patent and Trademark Office (USPTO), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on this new information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

**DATES:** Written comments must be submitted on or before November 1, 2010.

**ADDRESSES:** You may submit comments by any of the following methods:

- *E-mail: InformationCollection@uspto.gov.* Include "0651–00xx Missing Parts Practice comment" in the subject line of the message.
- *Fax:* 571–273–0112, marked to the attention of Susan Fawcett.
- *Mail:* Susan K. Fawcett, Records Officer, Office of the Chief Information Officer, U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.
- *Federal e-Rulemaking Portal: http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information should be directed to the attention of Raul Tamayo, Legal Advisor, Office of Patent Legal Administration, U.S. Patent and Trademark Office (USPTO), P.O. Box 1450, Alexandria, VA 22313–1450; by telephone 571–272–7728; or by e-mail at *raul.tamayo@uspto.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Abstract

In response to a number of requests to reduce the costs due one year after filing a provisional application, the USPTO published a **Federal Register** notice titled "Request for Comments on Proposed Change to Missing Parts Practice" proposing a change that would provide applicants with an extended time period to reply to a Notice to File Missing Parts requiring certain fees in a nonprovisional application if certain conditions were met. Based on public feedback, the USPTO is implementing an extended missing parts pilot program which will permit applicants to request a 12-month time period to reply to a Notice to File Missing Parts of Nonprovisional Application to pay certain fees. The pilot program would be scheduled to run for one year.

The extended missing parts pilot program is expected to benefit applicants by permitting additional time to determine if patent protection should be sought at a relatively low cost and by permitting applicants to focus efforts on commercialization during this period. The extended missing parts pilot program is also expected to benefit the USPTO and the public by adding publications to the body of prior art, and by removing from the USPTO's workload those nonprovisional applications for which the applicants will later decide not to pursue examination.

There is one form associated with this collection of information. The USPTO has created PTO/SB/421, *Request for Extended Missing Parts Pilot Program,* for applicants to request participation in the program.

### II. Method of Collection

By mail or electronically through EFS–Web using Form PTO/SB/421 to request participation in the extended missing parts pilot program.

### III. Data

*OMB Number:* 0651–00xx.

*Form Number(s):* PTO/SB/421.

*Type of Review:* New information collection.

*Affected Public:* Business or other for profit; not-for-profit institutions.

*Estimated Number of Respondents:* 10,000 responses per year.

*Estimated Time per Response:* The USPTO estimates that it will take 15 minutes (0.25 hours) to gather the information, prepare the form, and submit it to the USPTO, depending upon the complexity of the situation. The USPTO expects that it will take the same amount of time to complete and submit the form, whether it is mailed or submitted electronically.

*Estimated Total Annual Respondent Burden Hours:* 2,500 hours.

*Estimated Total Annual Respondent Cost Burden:* $812,500. Using the professional hourly rate of $325 for attorneys in private firms, the USPTO estimates $812,500 per year for salary costs associated with respondents.

| Item | Estimated time for response | Estimated annual responses | Estimated annual burden hours |
|---|---|---|---|
| Request for Extended Missing Parts Program | 15 minutes | 700 | 175 |
| Request for Extended Missing Parts Program (EFS–Web) | 15 minutes | 9,300 | 2,325 |
| Totals | | 10,000 | 2,500 |

*Estimated Total Annual Non-Hour Respondent Cost Burden:* $0. There are no capital start-up or maintenance costs associated with this information collection. The request does not have filing or other fees associated with it. There are postage and recordkeeping costs associated with this form; however, these costs are covered under OMB Control Number 0651–0032 Initial Patent Applications. Since the requests for participation in the extended missing parts pilot program must be filed with the nonprovisional applications, which are covered under 0651–0032, the USPTO has concluded that the postage costs and filing fees for these requests are part of the cost calculations for 0651–0032 and do not need to be calculated separately for this collection.

### IV. Request for Comments

*Comments are invited on:* (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, *e.g.,* the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized or included in the request for OMB approval of this information collection;

they will also become a matter of public record.

**Susan K. Fawcett,**

*Records Officer, USPTO, Office of the Chief Information Officer.*

[FR Doc. 2010–21767 Filed 8–31–10; 8:45 am]

**BILLING CODE 3510–16–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–583–844, A–570–952]**

### Narrow Woven Ribbons With Woven Selvedge From Taiwan and the People's Republic of China: Antidumping Duty Orders

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** Based on affirmative final determinations by the Department of Commerce (the Department) and the International Trade Commission (the ITC), the Department is issuing antidumping duty orders on narrow woven ribbons with woven selvedge (narrow woven ribbons) from Taiwan and the People's Republic of China (PRC). On August 25, 2010, the ITC notified the Department of its affirmative determination of threat of material injury to a U.S. industry.

**DATES:** *Effective Date:* September 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** Holly Phelps (Taiwan), AD/CVD Operations, Office 2, or Karine Gziryan (PRC), AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0656 and (202) 482–4081, respectively.

**SUPPLEMENTARY INFORMATION:**

#### Background

On July 19, 2010, the Department published its affirmative final determinations of sales at less-than-fair-value in the antidumping duty investigations of narrow woven ribbons from Taiwan and the PRC. *See Notice of Final Determination of Sales at Less Than Fair Value: Narrow Woven Ribbons with Woven Selvedge from Taiwan,* 75 FR 41804 (July 19, 2010) (*Taiwan Final Determination*); *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 75 FR 41808 (July 19, 2010) (*PRC Final Determination*).

On August 25, 2010, the ITC notified the Department of its final determination pursuant to section 735(d) of the Tariff Act of 1930, as amended (the Act), that an industry in the United States is threatened with material injury by reason of less-than-fair-value imports of narrow woven ribbons from Taiwan and the PRC. *See* section 735(b)(1)(A)(ii) of the Act.

#### Scope of the Orders

The scope of the orders covers narrow woven ribbons with woven selvedge, in any length, but with a width (measured at the narrowest span of the ribbon) less than or equal to 12 centimeters, composed of, in whole or in part, man-made fibers (whether artificial or synthetic, including but not limited to nylon, polyester, rayon, polypropylene, and polyethylene teraphthalate), metal threads and/or metalized yarns, or any combination thereof. Narrow woven ribbons subject to the orders may:

- Also include natural or other non-man-made fibers;
- Be of any color, style, pattern, or weave construction, including but not limited to single-faced satin, double-faced satin, grosgrain, sheer, taffeta, twill, jacquard, or a combination of two or more colors, styles, patterns, and/or weave constructions;
- Have been subjected to, or composed of materials that have been subjected to, various treatments, including but not limited to dyeing, printing, foil stamping, embossing, flocking, coating, and/or sizing;
- Have embellishments, including but not limited to appliqué, fringes, embroidery, buttons, glitter, sequins, laminates, and/or adhesive backing;
- Have wire and/or monofilament in, on, or along the longitudinal edges of the ribbon;
- Have ends of any shape or dimension, including but not limited to straight ends that are perpendicular to the longitudinal edges of the ribbon, tapered ends, flared ends or shaped ends, and the ends of such woven ribbons may or may not be hemmed;
- Have longitudinal edges that are straight or of any shape, and the longitudinal edges of such woven ribbon may or may not be parallel to each other;
- Consist of such ribbons affixed to like ribbon and/or cut-edge woven ribbon, a configuration also known as an "ornamental trimming;"
- Be wound on spools; attached to a card; hanked (*i.e.,* coiled or bundled); packaged in boxes, trays or bags; or configured as skeins, balls, bateaus or folds; and/or
- Be included within a kit or set such as when packaged with other products, including but not limited to gift bags, gift boxes and/or other types of ribbon.

Narrow woven ribbons subject to the orders include all narrow woven fabrics, tapes, and labels that fall within this written description of the scope of these antidumping duty orders.

Excluded from the scope of the orders are the following:

(1) Formed bows composed of narrow woven ribbons with woven selvedge;

(2) "Pull-bows" (*i.e.,* an assemblage of ribbons connected to one another, folded flat and equipped with a means to form such ribbons into the shape of a bow by pulling on a length of material affixed to such assemblage) composed of narrow woven ribbons;

(3) Narrow woven ribbons comprised at least 20 percent by weight of elastomeric yarn (*i.e.,* filament yarn, including monofilament, of synthetic textile material, other than textured yarn, which does not break on being extended to three times its original length and which returns, after being extended to twice its original length, within a period of five minutes, to a length not greater than one and a half times its original length as defined in the Harmonized Tariff Schedule of the United States (HTSUS), Section XI, Note 13) or rubber thread;

(4) Narrow woven ribbons of a kind used for the manufacture of typewriter or printer ribbons;

(5) Narrow woven labels and apparel tapes, cut-to-length or cut-to-shape, having a length (when measured across the longest edge-to-edge span) not exceeding eight centimeters;

(6) Narrow woven ribbons with woven selvedge attached to and forming the handle of a gift bag;

(7) Cut-edge narrow woven ribbons formed by cutting broad woven fabric into strips of ribbon, with or without treatments to prevent the longitudinal edges of the ribbon from fraying (such as by merrowing, lamination, sono-bonding, fusing, gumming or waxing), and with or without wire running lengthwise along the longitudinal edges of the ribbon;

(8) Narrow woven ribbons comprised at least 85 percent by weight of threads having a denier of 225 or higher;

(9) Narrow woven ribbons constructed from pile fabrics (*i.e.,* fabrics with a surface effect formed by tufts or loops of yarn that stand up from the body of the fabric);

(10) Narrow woven ribbon affixed (including by tying) as a decorative detail to non-subject merchandise, such as a gift bag, gift box, gift tin, greeting card or plush toy, or affixed (including by tying) as a decorative detail to

packaging containing non-subject merchandise;

(11) Narrow woven ribbon that is (a) affixed to non-subject merchandise as a working component of such non-subject merchandise, such as where narrow woven ribbon comprises an apparel trimming, book marker, bag cinch, or part of an identity card holder, or (b) affixed (including by tying) to non-subject merchandise as a working component that holds or packages such non-subject merchandise or attaches packaging or labeling to such non-subject merchandise, such as a "belly band" around a pair of pajamas, a pair of socks or a blanket;

(12) Narrow woven ribbon(s) comprising a belt attached to and imported with an item of wearing apparel, whether or not such belt is removable from such item of wearing apparel; and

(13) Narrow woven ribbon(s) included with non-subject merchandise in kits, such as a holiday ornament craft kit or a scrapbook kit, in which the individual lengths of narrow woven ribbon(s) included in the kit are each no greater than eight inches, the aggregate amount of narrow woven ribbon(s) included in the kit does not exceed 48 linear inches, none of the narrow woven ribbon(s) included in the kit is on a spool, and the narrow woven ribbon(s) is only one of multiple items included in the kit.

The merchandise subject to these orders is classifiable under the HTSUS statistical categories 5806.32.1020; 5806.32.1030; 5806.32.1050 and 5806.32.1060. Subject merchandise also may enter under subheadings 5806.31.00; 5806.32.20; 5806.39.20; 5806.39.30; 5808.90.00; 5810.91.00; 5810.99.90; 5903.90.10; 5903.90.25; 5907.00.60; and 5907.00.80 and under statistical categories 5806.32.1080; 5810.92.9080; 5903.90.3090; and 6307.90.9889. The HTSUS statistical categories and subheadings are provided for convenience and customs purposes; however, the written description of the merchandise covered by these orders is dispositive.

**Antidumping Duty Orders**

On August 25, 2010, in accordance with section 735(d) of the Act, the ITC notified the Department of its final determination that an industry in the United States is threatened with material injury within the meaning of section 735(b)(1)(A)(ii) of the Act by reason of less-than-fair-value imports of narrow woven ribbons from Taiwan and the PRC. Therefore, in accordance with section 736(a)(1) of the Act, the Department will direct U.S. Customs Border and Protection (CBP) to assess, upon further instruction by the Department, antidumping duties equal to the amount by which the normal value of the merchandise exceeds the U.S. price of the merchandise for all relevant entries of narrow woven ribbons from Taiwan and the PRC, except for imports of narrow woven ribbons from those combinations of producers and exporters identified below: [1]

| Exporter | Producer |
|---|---|
| **Taiwan** | |
| Dear Year Brothers Manufacturing Co., Ltd | Dear Year Brothers Manufacturing Co., Ltd. |
| Dear Year Brothers Manufacturing Co., Ltd | Fool Shing Enterprise Co., Ltd. |
| Dear Year Brothers Manufacturing Co., Ltd | Hong Tai Enterprise. |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Boa Shun Enterprise Co., Ltd. |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Chi Hua Textile Corporate Ltd. |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Chieng Xin Enterprise Co., Ltd. |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Ching Yu Weaving String Corp. |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Done Hong Enterprise Co., Ltd. |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Guang Xing Zhi Zao Enterprise Co., Ltd. |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Hang-Liang Company. |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Hon Xin Co., Ltd. |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Hong-Tai Company. |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Hua Yi Enterprise Co., Ltd. |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Hung Cheng Enterprises Co., Ltd. |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Hung Ching Enterprise Co., Ltd. |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | I Lai Enterprise Co., Ltd. |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Ji Cheng Industry. |

[1] We note that Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./Novelty Handicrafts Co., Ltd. (collectively, Shienq Huong) has not disclosed for the public record the name of a certain unaffiliated supplier. Therefore, upon public disclosure of this information to the Department, we will notify CBP that Shienq Huong's exports of merchandise produced by this unaffiliated company have a less-than-fair-value investigation margin of zero and thus are excluded from any order resulting from this investigation. Until and unless such public disclosure is made, we will notify CBP that all entries of merchandise produced by Shienq Huong's undisclosed unaffiliated supplier will be subject to the "all others" rate established in this proceeding. *See Taiwan Final Determination,* 75 FR at 41807.

| Exporter | Producer |
|---|---|
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Le Quan Enterprise Co., Ltd. |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Lei Di Si Corporation Ltd. |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Oun Mao Co., Ltd. |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Shang Yan Gong Ye She. |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Sung-Chu Industry (a/k/a Qiao Zhi Industry). |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Wei Xin Enterprise Co., Ltd. |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Xin Jia Enterprise Co., Ltd. |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Yi Chang Corp. |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Yi Cheng Gong Ye She. |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Yi Long Enterprise Co., Ltd. |
| Shienq Huong Enterprise Co., Ltd./Hsien Chan Enterprise Co., Ltd./ Novelty Handicrafts Co., Ltd. | Zheng Chi Chi Corp. |
| **PRC** | |
| Yama Ribbons and Bows Co., Ltd | Yama Ribbons and Bows Co., Ltd. |

For all other manufacturers/exporters, pursuant to section 736(b)(2) of the Act, duties shall be assessed on subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the ITC's notice of final determination, given that that determination is based on the threat of material injury, other than threat of material injury described in section 736(b)(1) of the Act. Section 736(b)(1) of the Act states that, "{i}f the Commission, in its final determination under section 735(b), finds material injury or threat of material injury which, but for the suspension of liquidation under section 733(d)(2) would have led to a finding of material injury, then entries of the subject merchandise, the liquidation of which has been suspended under section 733(d)(2), shall be subject to the imposition of antidumping duties under section 731." In addition, section 736(b)(2) of the Act requires CBP to release any bond or other security and refund any cash deposit made of estimated antidumping duties posted since the Department's preliminary antidumping duty determinations (*i.e.,* February 18, 2010). *See Narrow Woven Ribbons With Woven Selvedge From Taiwan: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 75 FR 7236 (February 18, 2010); and *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 75 FR 7244 (February 18, 2010).

Because the ITC's final determination is based on the threat of material injury and is not accompanied by a finding that injury would have resulted but for the imposition of suspension of liquidation of entries since the Department's preliminary determinations, section 736(b)(2) of the Act is applicable. According to section 736(b)(2) of the Act, where the ITC finds threat of material injury, duties shall only be assessed on subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the ITC's notice of final determination. In addition, section 736(b)(2) of the Act requires CBP to refund any cash deposits or bonds of estimated antidumping duties posted since the preliminary antidumping determinations and prior to the ITC's notice of final determination.

Therefore, on or after the date of publication of the ITC's notice of final determination in the **Federal Register**, except for imports of narrow woven ribbons from those combinations of producers and exporters identified above, CBP will require a cash deposit equal to the estimated dumping margins listed below, pursuant to section 736(a)(3) of the Act, at the same time that importers would normally deposit estimated duties on this merchandise. The "All Others" rate for Taiwan applies to all Taiwan producers or exporters not specifically listed and not specifically excluded. The PRC-wide rate applies to all PRC exporters of subject merchandise not specifically listed and not specifically excluded. The Department will also instruct CBP to terminate the suspension of liquidation for entries of narrow woven ribbons from Taiwan and the PRC entered or withdrawn from warehouse, for consumption prior to August 25, 2010, and refund any cash deposits made and release any bonds posted between the publication of the Department's preliminary determinations on February 18, 2010, and the publication of the ITC's final determination.

**Final Determination Margins**

The margins and cash deposit rates are as follows:

| Exporter or producer | Margin (percent) |
|---|---|
| **Taiwan** | |
| Roung Shu Industry Corporation | 4.37 |
| All Others | 4.37 |

| Exporter | Producer | Margin (percent) |
|---|---|---|
| **PRC** | | |
| Beauty Horn Investment Limited | Tianjin Sun Ribbon Co., Ltd | 123.83 |
| Fujian Rongshu Industry Co., Ltd | Fujian Rongshu Industry Co., Ltd | 123.83 |
| Guangzhou Complacent Weaving Co., Ltd | Guangzhou Complacent Weaving Co., Ltd | 123.83 |
| Ningbo MH Industry Co., Ltd | Hangzhou City Linghu Jiacheng Silk Ribbon Co., Ltd | 123.83 |
| Ningbo V.K. Industry & Trading Co., Ltd | Ningbo Yinzhou Jinfeng Knitting Factory | 123.83 |
| Stribbons (Guangzhou) Ltd | Stribbons (Guangzhou) Ltd | 123.83 |
| Stribbons (Guangzhou) Ltd | Stribbons (Nanyang) MNC Ltd | 123.83 |
| Sun Rich (Asia) Limited | Dongguan Yi Sheng Decoration Co., Ltd | 123.83 |
| Tianjin Sun Ribbon Co., Ltd | Tianjin Sun Ribbon Co., Ltd | 123.83 |
| Weifang Dongfang Ribbon Weaving Co., Ltd | Weifang Dongfang Ribbon Weaving Co., Ltd | 123.83 |
| Weifang Yu Yuan Textile Co., Ltd | Weifang Yu Yuan Textile Co., Ltd | 123.83 |
| Xiamen Yi He Textile Co., Ltd | Xiamen Yi He Textile Co., Ltd | 123.83 |
| Yangzhou Bestpak Gifts & Crafts Co., Ltd | Yangzhou Bestpak Gifts & Crafts Co., Ltd | 123.83 |
| PRC-wide entity[2] | | 247.65 |

For the PRC separate rate respondents, we will instruct CBP to require an antidumping duty cash deposit or the posting of a bond for each entry equal to the margin indicated above, adjusted for the export subsidy rate determined in the CVD final determination (*i.e.,* International Market Development Fund Grants for Small and Medium Enterprises). *See PRC Final Determination,* 75 FR at 41812. *See also Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Final Affirmative Countervailing Duty Determination,* 75 FR 41801 (July 19, 2010), and accompanying Issues and Decision Memorandum at section I.D. The adjusted cash deposit rate for the separate rate respondents (as listed above in the "Final Determination Margins" section, above) is 123.44 percent. These suspension-of-liquidation instructions will remain in effect until further notice.

This notice constitutes the antidumping duty orders with respect to narrow woven ribbons from Taiwan and the PRC, pursuant to section 736(a) of the Act. Interested parties may contact the Department's Central Records Unit, Room 7046 of the main Commerce Building, for copies of an updated list of antidumping duty orders currently in effect.

These orders are issued and published in accordance with section 736(a) of the Act and 19 CFR 351.211(b).

Dated: August 30, 2010.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

[FR Doc. 2010–21975 Filed 8–31–10; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**FOR FURTHER INFORMATION CONTACT:** Sheila E. Forbes, Office of AD/CVD Operations, Customs Unit, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, telephone: (202) 482–4697.

### Background

Each year during the anniversary month of the publication of an antidumping or countervailing duty order, finding, or suspension of investigation, an interested party, as defined in section 771(9) of the Tariff Act of 1930, as amended ("the Act"), may request, in accordance with 19 CFR 351.213 that the Department of Commerce ("the Department") conduct an administrative review of that antidumping or countervailing duty order, finding, or suspended investigation.

### Respondent Selection

In the event the Department limits the number of respondents for individual examination for administrative reviews initiated pursuant to requests made for the orders identified below, the Department intends to select respondents based on U.S. Customs and Border Protection ("CBP") data for U.S. imports during the period of review ("POR"). We intend to release the CBP data under Administrative Protective Order ("APO") to all parties having an APO within five days of publication of the initiation notice and to make our decision regarding respondent selection within 20 days of publication of the initiation **Federal Register** notice. Therefore, we encourage all parties interested in commenting on respondent selection to submit their APO applications on the date of publication of the initiation notice, or as soon thereafter as possible. The Department invites comments regarding the CBP data and respondent selection within 10 calendar days of publication of the initiation **Federal Register** notice.

*Opportunity to request a review:* Not later than the last day of September 2010,[1] interested parties may request administrative review of the following orders, findings, or suspended investigations, with anniversary dates in September for the following periods:

| | Period of review |
|---|---|
| **Antidumping Duty Proceedings Period of Review** | |
| BELARUS: Steel Concrete Reinforcing Bars, A–822–804 | 9/1/09–8/31/10 |

[2] Ningbo Jintian Import & Export Co., Ltd., is included in the PRC-wide entity.

[1] Or the next business day, if the deadline falls on a weekend, federal holiday or any other day when the Department is closed.

| | Period of review |
|---|---|
| INDIA: Certain Lined Paper Products, A–533–843 | 9/1/09–8/31/10 |
| INDONESIA: | |
| Certain Lined Paper Products, A–560–818 | 9/1/09–8/31/10 |
| Steel Concrete Reinforcing Bars, A–560–811 | 9/1/09–8/31/10 |
| ITALY: Stainless Steel Wire Rod, A–475–820 | 9/1/09–8/31/10 |
| JAPAN: Stainless Steel Wire Rod, A–588–843 | 9/1/09–8/31/10 |
| LATVIA: Steel Concrete Reinforcing Bars, A–449–804 | 9/1/09–8/31/10 |
| MOLDOVA: Steel Concrete Reinforcing Bars, A–841–804 | 9/1/09–8/31/10 |
| POLAND: Steel Concrete Reinforcing Bars, A–455–803 | 9/1/09–8/31/10 |
| REPUBLIC OF KOREA: Stainless Steel Wire Rod, A–580–829 | 9/1/09–8/31/10 |
| SPAIN: Stainless Steel Wire Rod, A–469–807 | 9/1/09–8/31/10 |
| TAIWAN: | |
| Raw Flexible Magnets, A–583–842 | 9/1/09–8/31/10 |
| Stainless Steel Wire Rod, A–583–828 | 9/1/09–8/31/10 |
| THE PEOPLE'S REPUBLIC OF CHINA: | |
| Certain Lined Paper Products, A–570–901 | 9/1/09–8/31/10 |
| Foundry Coke, A–570–862 | 9/1/09–8/31/10 |
| Freshwater Crawfish Tail Meat, A–570–848 | 9/1/09–8/31/10 |
| Greige Polyester Cotton Print Cloth, A–570–101 | 9/1/09–6/27/10 |
| Kitchen Appliance Shelving and Racks, A–570–941 | 3/5/09–8/31/10 |
| New Pneumatic Off-The-Road Tires, A–570–912 | 9/1/09–8/31/10 |
| Raw Flexible Magnets, A–570–922 | 9/1/09–8/31/10 |
| Steel Concrete Reinforcing Bars, A–570–860 | 9/1/09–8/31/10 |
| UKRAINE: | |
| Silicomanganese, A–823–805 | 9/1/09–8/31/10 |
| Solid Agricultural Grade Ammonium Nitrate, A–823–810 | 9/1/09–8/31/10 |
| Steel Concrete Reinforcing Bars, A–823–809 | 9/1/09–8/31/10 |
| **Countervailing Duty Proceedings** | |
| BRAZIL: Hot-Rolled Carbon Steel Flat Products, C–351–829 | 1/1/09–12/31/09 |
| INDIA: Certain Lined Paper Products, C–533–844 | 1/1/09–12/31/09 |
| INDONESIA: Certain Lined Paper Products, C–560–819 | 1/1/09–12/31/09 |
| THE PEOPLE'S REPUBLIC OF CHINA: | |
| Kitchen Appliance Shelving and Racks, C–570–942 | 1/7/09–12/31/09 |
| New Pneumatic Off-The-Road Tires, C–570–913 | 1/1/09–12/31/09 |
| Raw Flexible Magnets, C–570–923 | 1/1/09–12/31/09 |
| **Suspension Agreements** | |
| ARGENTINA: Lemon Juice, A–357–818 | 9/1/09–8/31/10 |
| MEXICO: Lemon Juice, A–201–835 | 9/1/09–8/31/10 |

In accordance with 19 CFR 351.213(b), an interested party as defined by section 771(9) of the Act may request in writing that the Secretary conduct an administrative review. For both antidumping and countervailing duty reviews, the interested party must specify the individual producers or exporters covered by an antidumping finding or an antidumping or countervailing duty order or suspension agreement for which it is requesting a review. In addition, a domestic interested party or an interested party described in section 771(9)(B) of the Act must state why it desires the Secretary to review those particular producers or exporters.[2] If the interested party intends for the Secretary to review sales of merchandise by an exporter (or a producer if that producer also exports merchandise from other suppliers) which were produced in more than one country of origin and each country of origin is subject to a separate order, then the interested party must state specifically, on an order-by-order basis, which exporter(s) the request is intended to cover.

Please note that, for any party the Department was unable to locate in prior segments, the Department will not accept a request for an administrative review of that party absent new information as to the party's location. Moreover, if the interested party who files a request for review is unable to locate the producer or exporter for which it requested the review, the interested party must provide an explanation of the attempts it made to locate the producer or exporter at the same time it files its request for review, in order for the Secretary to determine if the interested party's attempts were reasonable, pursuant to 19 CFR 351.303(f)(3)(ii).

As explained in *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003), the Department has clarified its practice with respect to the collection of final antidumping duties on imports of merchandise where intermediate firms are involved. The public should be aware of this clarification in determining whether to request an administrative review of merchandise subject to antidumping findings and orders. *See also* the Import Administration Web site at *http://ia.ita.doc.gov.*

Six copies of the request should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. The Department also asks parties to serve a copy of their requests to the Office of Antidumping/Countervailing Operations, Attention: Sheila Forbes, in room 3065 of the main Commerce Building. Further, in accordance with 19 CFR 351.303(f)(l)(i), a copy of each request must be served on every party on the Department's service list.

[2] If the review request involves a non-market economy and the parties subject to the review request do not qualify for separate rates, all other exporters of subject merchandise from the non-market economy country who do not have a separate rate will be covered by the review as part of the single entity of which the named firms are a part.

The Department will publish in the **Federal Register** a notice of "Initiation of Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation" for requests received by the last day of September 2010. If the Department does not receive, by the last day of September 2010, a request for review of entries covered by an order, finding, or suspended investigation listed in this notice and for the period identified above, the Department will instruct the CBP to assess antidumping or countervailing duties on those entries at a rate equal to the cash deposit of (or bond for) estimated antidumping or countervailing duties required on those entries at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposit previously ordered.

For the first administrative review of any order, there will be no assessment of antidumping or countervailing duties on entries of subject merchandise entered, or withdrawn from warehouse, for consumption during the relevant provisional-measures "gap" period, of the order, if such a gap period is applicable to the period of review.

This notice is not required by statute but is published as a service to the international trading community.

Dated: August 20, 2010.

**Edward C. Yang,**

*Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2010–21830 Filed 8–31–10; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Advance Notification of Sunset Reviews

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**Background**

Every five years, pursuant to section 751(c) of the Tariff Act of 1930, as amended ("the Act"), the Department of Commerce ("the Department") and the International Trade Commission automatically initiate and conduct a review to determine whether revocation of a countervailing or antidumping duty order or termination of an investigation suspended under section 704 or 734 of the Act would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) and of material injury.

**Upcoming Sunset Reviews for October 2010**

The following Sunset Reviews are scheduled for initiation in October 2010 and will appear in that month's Notice of Initiation of Five-Year Sunset Reviews.

| Antidumping duty proceedings | Department contact |
|---|---|
| Carbon Steel Butt-Weld Pipe Fittings from Brazil (A–351–602) (3rd Review) | Dana Mermelstein, (202) 482–1391. |
| Carbon Steel Butt-Weld Pipe Fittings from Japan (A–588–602) (3rd Review) | Dana Mermelstein, (202) 482–1391. |
| Carbon Steel Butt-Weld Pipe Fittings from Taiwan (A–583–605) (3rd Review) | Dana Mermelstein, (202) 482–1391. |
| Carbon Steel Butt-Weld Pipe Fittings from Thailand (A–549–807) (3rd Review) | Dana Mermelstein, (202) 482–1391. |
| Glycine from the People's Republic of China (A–570–836) (3rd Review) | Dana Mermelstein, (202) 482–1391. |
| Porcelain-On-Steel Cooking Ware from Taiwan (A–583–508) (3rd Review) | Dana Mermelstein, (202) 482–1391. |
| Top-of-the-Stove Stainless Steel Cooking Ware from South Korea (A–580–601) (3rd Review) | Dana Mermelstein, (202) 482–1391. |
| Apple Juice Concentrate, Non-Frozen from the People's Republic of China (A–570–855) (2nd Review) | Jennifer Moats, (202) 482–5047. |
| Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China (A–570–814) (3rd Review) | Jennifer Moats, (202) 482–5047. |
| Porcelain-On-Steel Cooking Ware from the People's Republic of China (A–570–506) (3rd Review) | Jennifer Moats, (202) 482–5047. |
| **Countervailing Duty Proceedings** | |
| Top-of-the-Stove Stainless Steel Cooking Ware from South Korea (C–580–602) (3rd Review) | Patricia Tran, (202) 482–1503. |

**Suspended Investigations**

No Sunset Review of suspended investigations is scheduled for initiation in October 2010.

The Department's procedures for the conduct of Sunset Reviews are set forth in 19 CFR 351.218. Guidance on methodological or analytical issues relevant to the Department's conduct of Sunset Reviews is set forth in the Department's Policy Bulletin 98.3—*Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin,* 63 FR 18871 (April 16, 1998). The Notice of Initiation of Five-Year ("Sunset") Reviews provides further information regarding what is required of all parties to participate in Sunset Reviews.

Pursuant to 19 CFR 351.103(c), the Department will maintain and make available a service list for these proceedings. To facilitate the timely preparation of the service list(s), it is requested that those seeking recognition as interested parties to a proceeding contact the Department in writing within 10 days of the publication of the Notice of Initiation.

Please note that if the Department receives a Notice of Intent to Participate from a member of the domestic industry within 15 days of the date of initiation, the review will continue. Thereafter, any interested party wishing to participate in the Sunset Review must provide substantive comments in response to the notice of initiation no later than 30 days after the date of initiation.

This notice is not required by statute but is published as a service to the international trading community.

Dated: August 18, 2010.

**Edward C. Yang,**

*Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2010–21828 Filed 8–31–10; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[Docket 51–2010]**

### Foreign-Trade Zone 104—Savannah, GA; Application for Reorganization Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board) by the Savannah Airport Commission, grantee of FTZ 104, requesting authority to reorganize the zone under the alternative site

framework (ASF) adopted by the Board (74 FR 1170, 1/12/09; correction 74 FR 3987, 1/22/09). The ASF is an option for grantees for the establishment or reorganization of general-purpose zones and can permit significantly greater flexibility in the designation of new "usage-driven" FTZ sites for operators/users located within a grantee's "service area" in the context of the Board's standard 2,000-acre activation limit for a general-purpose zone project. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on August 26, 2010.

FTZ 104 was approved by the Board on April 18, 1984 (Board Order 256, 49 FR 17789, 4/25/84) and expanded on November 20, 2008 (Board Order 1587, 73 FR 76610–76611, 12/17/08).

The current zone project includes the following sites: *Site 1* (18.0 acres)—Savannah International Airport, Savannah; *Site 2* (1,075.0 acres)—Garden City Terminal, 2 Main Street, Chatham County and Ocean Terminal, 950 West River Street, Savannah; *Site 2A* (1.0 acres)—730 King George Blvd., Savannah; *Site 3* (1,820.0 acres)—Crossroads Business Center, I–95 and Godley Road, Chatham County; *Site 4* (1,353.0 acres)—SPA Industrial Park, East of the I–95/U.S. 80 Interchange, Chatham County; *Site 5* (24.0)—Savannah International Trade and Convention Center, One International Drive, Savannah; *Site 6* (24.0 acres)—Mulberry Grove Site, I–95 and State Highway 21, Savannah; *Site 7* (1,592.0 acres)—Tradeport Business Center Industrial Park, 380 Sunbury Road, Midway; *Site 8* (98.0 acres)—Tremont Road near I–16 and Georgia 516 Interchange, Savannah; *Site 9* (15.0 acres)—Savannah Warehouse Services, 145 Distribution Drive, Savannah; and *Site 10* (62.9 acres)—Savannah Logistics Park at Morgan Center, S.H. Morgan Parkway and Pooler Parkway, Savannah.

The grantee's proposed service area under the ASF would be the Georgia counties of Bulloch, Bryan, Chatham, Effingham, Evans, Liberty, Long, and Screven, as described in the application. If approved, the grantee would be able to serve sites throughout the service area based on companies' needs for FTZ designation. The proposed service area is within and adjacent to the Savannah Customs and Border Protection port of entry.

The applicant is requesting authority to reorganize its existing zone project to include five of the existing sites as "magnet" sites and is requesting approval of the following additional magnet sites: *Proposed Site 11* (1,081.0 acres)—Interstate Centre Industrial Park, 11250 US Highway 280, Black Creek; *Proposed Site 12* (1,557.0 acres)—Pooler Megasite, SR307/Dean Forest Road and Pine Meadow Road, Chatham County; and *Proposed Site 14* (50.0 acres)—Georgia Ports Authority Terminal, 120 Crossgate Road, Savannah. The applicant is also requesting to include two of the existing sites as "usage-driven" sites and is requesting approval of the following additional "usage-driven" site: *Proposed Site 13* (31.0 acres)—Flint River Services, 101 Progress Drive, Rincon. The applicant requests that non-contiguous portions of existing Sites 2 and 7 be renumbered to Sites 15 and 16 respectively. The applicant also requests that FTZ designation be removed from Sites 2A, 4, 5, and 8. Because the ASF only pertains to establishing or reorganizing a general-purpose zone, the application would have no impact on FTZ 104's authorized subzones.

In accordance with the Board's regulations, Maureen Hinman of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is November 1, 2010. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to November 15, 2010.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230–0002, and in the "Reading Room" section of the Board's Web site, which is accessible via *http://www.trade.gov/ftz.* For further information, contact Maureen Hinman at *maureen.hinman@trade.gov* or (202) 482–0627.

Dated: August 26, 2010.

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. 2010–21841 Filed 8–31–10; :45 am]

**BILLING CODE P**

## DEPARTMENT OF COMMERCE

## Foreign-Trade Zones Board

**[Order No. 1701]**

## Approval for Manufacturing Authority; Foreign-Trade Zone 22; LG Electronics Mobilecomm USA, Inc. (Cell Phone Kitting and Distribution); Chicago, IL

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

*Whereas,* the Illinois International Port District, grantee of Foreign-Trade Zone 22, has requested manufacturing authority on behalf of LG Electronics Mobilecomm USA, Inc. (LGEMU), within FTZ 22 in Bolingbrook, Illinois, (FTZ Docket 3–2010, filed 1/14/2010);

*Whereas,* notice inviting public comment has been given in the **Federal Register** (75 FR 4343–4344, 1/27/2010) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

*Whereas,* the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

*Now, therefore,* the Board hereby orders:

The application for manufacturing authority under zone procedures within FTZ 22 on behalf of LG Electronics Mobilecomm USA, Inc., as described in the application and **Federal Register** notice, is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 19th day of August 2010.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.*

*Attest:*

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. 2010–21845 Filed 8–31–10; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

**[Docket No. 100812348–0366–01]**

### Best Practices for Transit, Transshipment, and Reexport of Items Subject to the Export Administration Regulations

**AGENCY:** Bureau of Industry and Security, Commerce.

**ACTION:** Notice of Inquiry.

**SUMMARY:** The Department of Commerce's Bureau of Industry and Security (BIS) seeks public comments on a set of proposed "Best Practices for Transit, Transshipment, and Reexport of Items Subject to the Export Administration Regulations." BIS is particularly interested in engaging in a dialogue with industry regarding new transshipment principles and best practices that complement those already identified by BIS in its Web guidance (*http://www.bis.doc.gov/complianceandenforcement/emcp.htm*), and industry outreach regarding export management and compliance. BIS will consider all comments timely submitted before finalizing these best practices and publishing them in the **Federal Register** and on the BIS Web site. This document will include a discussion of those comments.

**DATES:** Comments must be received before October 18, 2010.

**ADDRESSES:** Comments may be submitted by e-mail to *best_practices@bis.doc.gov,* by fax at (202) 482–5361, or on paper to Gerard Horner, Office of Technology Evaluation, Bureau of Industry and Security, Room 1093, U.S. Department of Commerce, 14th Street and Pennsylvania Avenue, NW., Washington, DC 20230.

#### How To Comment

All comments must be in writing and submitted to the address indicated above or via e-mail. Comments must be received by BIS no later than October 18, 2010. BIS may consider comments received after that date if feasible to do so, but such consideration cannot be assured. All comments submitted in response to this notice will be made a matter of public record, and will be available for public inspection and copying. Anyone submitting business confidential information should clearly identify the business confidential portion of the submission and also provide a non-confidential submission that can be placed in the public record. BIS will seek to protect business confidential information from public disclosure to the extent permitted by law.

**FOR FURTHER INFORMATION CONTACT:** Office of Technology Evaluation, Gerard Horner at *ghorner@bis.doc.gov* or (202) 482–2078, or Donald Creed at *dcreed@bis.doc.gov* or (202) 482–8341.

**SUPPLEMENTARY INFORMATION:**

#### Background

In this notice of inquiry, BIS is seeking public comment on a proposed updated list of a set of "best practices" for industry regarding the transit, transshipment, and reexport of dual-use items. The previous list, which was developed following the solicitation of public comments (68 FR 26567, May 16, 2003), was posted on BIS's Web site on November 24, 2003. BIS is updating the list in light of the U.S. Government's current export control reform efforts and the increased attention that reexport, transit, and transshipment trade has generated in recent years, both within the U.S. and globally. BIS will publish an updated list of best practices in the **Federal Register** that will include a discussion of those comments. BIS will also post the final list on the BIS Web site.

The best practices identified herein include the types of practices that industry has adopted to guard against diversion risk. Both government and industry recognize that implementing effective export compliance programs is an important component of responsible corporate citizenship and good business practices.

BIS seeks information to refine and revise this proposed list of best practices to help ensure that industry and the government continue to prevent diversion of controlled items subject to the Export Administration Regulations (EAR) through transshipment points. The success of export control laws in the context of transit, transshipment, and reexport transactions rests on well-managed and comprehensive export compliance programs. The diversion of controlled and unlisted U.S. origin items from authorized to unauthorized end-uses, end-users, or destinations, even inadvertently, undermines efforts to counter the proliferation of weapons of mass destruction, terrorism, and other threats to national and international security. Global "transshipment hubs"—*i.e.,* countries or areas that function as major hubs for the trading and shipment of cargo—pose special risks due to their large volumes of transit, transshipment, and import and reexport traffic. Such hubs make transshipment trade particularly vulnerable to the diversion of sensitive items to illicit purposes.

To combat diversion risk, BIS seeks to strengthen its partnership with industry (including exporters, freight forwarders, carriers, consolidators, express couriers, and others that are parties to dual-use export transactions) involved in the transshipment of items subject to the EAR by consolidating existing best practices and establishing new and emerging ones to prevent diversion. BIS recognizes the importance of soliciting input from industry to define a set of best practices tailored to the particular activities and circumstances of transshipment trade.

The publication of these best practices creates no legal obligation to comply with such practices on the part of any person, absent a legal requirement that is set forth elsewhere in the EAR. Compliance with these best practices creates no defense to liability for the violation of export control laws. However, demonstrated compliance with these best practices by a company will be considered an important mitigating factor in administrative prosecutions arising out of violations of provisions of the EAR that apply to transit, transshipment or reexport transactions.

Although BIS intends to issue this guidance on industry best practices as it applies to items and transactions that are subject to the EAR, the guidance clearly has broader potential application. BIS envisions this guidance as a step toward a strengthened dialogue with industry, other agencies that administer export controls, and foreign governments in a manner that may make the guidance pertinent beyond its application to the EAR.

#### Principles

These best practices are based on the following four principles:

- Industry and government should work together in a cooperative partnership on a domestic and global basis to foster secure trade.
- Secure trade will reduce the incidence of diversion of dual-use items to prohibited end-uses and end-users.
- Effective export management and compliance programs will encourage expeditious movement of legitimate trade.
- Industry can achieve secure trade objectives through quality-driven export management and compliance practices.

#### Practices

The following reflect existing and emerging transshipment best practices that guard against diversion risk. BIS seeks comment on these and additional

practices from the public based on experience.

*Best Practice #1.* Pay heightened attention to the Red Flag Indicators on the BIS Web site (*see http://www.bis.doc.gov/Enforcement/redflags.htm*) with respect to transactions to, from, or through transshipment hubs. When a company encounters a suspicious transaction, such as those outlined in the "Know Your Customer" Guidance and Red Flags (Supplement No. 3 to Part 732 of the EAR), it should inquire further and attempt to resolve any questions raised by the transaction.

*Best Practice #2.* An Exporter/Reexporter should seek to utilize only those Trade Facilitators/Freight Forwarders that also observe these best practices and possess their own export management and compliance program.

*Best Practice #3.* Exporters/Reexporters should have information regarding their foreign customers. In particular, a company should know if the customer is a trading company or distributor, and inquire whether the customer resells to or has guidelines to resell to third parties.

*Best Practice #4.* With respect to transactions to, from, or through transshipment hubs, Exporters/Reexporters should take appropriate steps to inquire about the end-user and to determine whether the item will be reexported or incorporated in an item to be reexported.

*Best Practice #5.* Freight Forwarders should inquire about the details of a routed transaction when asked by a foreign principal party in interest to ship to a country or countries of destination or ultimate consignees that are different from those provided by the U.S. principal party in interest.

*Best Practice #6.* An Exporter/Reexporter should communicate the appropriate Export Control Classification Number (ECCN) or other classification information (EAR99) for each export/reexport to the end-user and, where relevant, to the ultimate consignee.

*Best Practice #7.* An Exporter/Reexporter should report such ECCN or the EAR99 classifications for all export transactions, including "No License Required" designations to the Trade Facilitator/Freight Forwarder or enter them in the Automated Export System (AES).

Dated: August 27, 2010.

**Matthew S. Borman,**

*Deputy Assistant Secretary for Export Administration.*

[FR Doc. 2010–21843 Filed 8–31–10; 8:45 am]

**BILLING CODE 3510–JT–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[Docket No.: 100806330–0330–01]**

## Call for Applications for the International Buyer Program Calendar Year 2012

**AGENCY:** International Trade Administration, Department of Commerce.

**ACTION:** Notice and call for applications.

**SUMMARY:** This notice sets forth objectives, procedures and application review criteria associated with support for domestic trade shows by the International Buyer Program (IBP) of the U.S. Department of Commerce (DOC). This announcement covers selection for International Buyer Program participation for calendar year 2012 (January 1, 2012 through December 31, 2012). The purpose of the IBP program is to bring international buyers together with U.S. firms by promoting leading U.S. trade shows in industries with high export potential.

**DATES:** Applications must be received by November 1, 2010.

**ADDRESSES:** The application may be downloaded from *http://www.export.gov/IBP.* Applications may be submitted by any of the following methods: (1) Mail/Hand Delivery Service: International Buyer Program, Global Trade Programs, U.S. and Foreign Commercial Service, International Trade Administration, U.S. Department of Commerce, Ronald Reagan Building, 1300 Pennsylvania Ave., Ronald Reagan Building, Suite 800M—Mezzanine Level—Atrium North, Washington, DC 20004. Telephone (202) 482–4207; (2) Facsimile: (202) 482–7800; or (3) e-mail: *Blanche.Ziv@trade.gov.* Facsimile and e-mail applications will be accepted as interim applications, but must be followed by a signed original application that is received by the program within five (5) business days after the application deadline. To ensure that applications are timely received by the deadline, applicants are strongly urged to send applications by hand delivery service (*e.g.,* U.S. Postal Service Express Delivery, Federal Express, UPS, *etc.*).

**FOR FURTHER INFORMATION CONTACT:** Blanche Ziv, Director, International Buyer Program, Global Trade Programs, U.S. and Foreign Commercial Service, International Trade Administration, U.S. Department of Commerce, 1300 Pennsylvania Ave., Ronald Reagan Building, Suite 800M—Mezzanine Level—Atrium North, Washington, DC 20004; Telephone (202) 482–4207; Facsimile: (202) 482–7800; E-mail: *Blanche.Ziv@trade.gov.*

**SUPPLEMENTARY INFORMATION:** The International Buyer Program was established to bring international buyers together with U.S. firms by promoting leading U.S. trade shows in industries with high export potential. The International Buyer Program emphasizes cooperation between the DOC and trade show organizers to benefit U.S. firms exhibiting at selected events and provides practical, hands-on assistance such as export counseling and market analysis to U.S. companies interested in exporting. The assistance provided to show organizers includes worldwide overseas promotion of selected shows to potential international buyers, end-users, representatives and distributors. The worldwide promotion is executed through the offices of the DOC U.S. and Foreign Commercial Service (hereinafter referred to as the Commercial Service) in more than 80 countries representing the United States' major trading partners, and also in U.S. Embassies in countries where the Commercial Service does not maintain offices.

The Commercial Service is accepting applications for the International Buyer Program for trade events taking place between January 1, 2012 through December 31, 2012. Selection of a trade show is valid for one event, *i.e.,* a trade show organizer seeking selection for a recurring event must submit a new application for selection for each occurrence of the event. Even if the event occurs more than once in the 12-month period covered by this announcement, the trade show organizer must submit a separate application for each event.

The Commercial Service expects to select approximately 35 events from among applicants to the program for the January 1, 2012 through December 31, 2012 period. The Commercial Service will select those events that are determined to most clearly meet the Commercial Service's statutory mandate to promote U.S. exports, especially those of small—and medium-sized enterprises, and that best meet the selection criteria articulated below. Shows selected for the International Buyer Program will provide a venue for U.S. companies interested in expanding their sales into international markets. Successful show organizer applicants will be required to enter into a Memorandum of Agreement (MOA) with the DOC. The MOA constitutes an agreement between the DOC and the show organizer specifying which

responsibilities are to be undertaken by the DOC as part of the International Buyer Program and, in turn, which responsibilities are to be undertaken by the show organizer. Anyone requesting application information will be sent a sample copy of the MOA along with the application and a copy of this **Federal Register** Notice. The responsibilities to be undertaken by the DOC will be carried out by the Commercial Service.

There is no fee required to submit an application. If accepted into the program, a participation fee of $8,000 for shows of five days or less is required within 45 days of written notification of acceptance into the program. For trade shows more than five days in duration, or requiring more than one International Business Center, a participation fee of $14,000 is required. For trade shows ten days or more in duration, and/or requiring more than two International Business Centers, the participation fee will be negotiated, but shall not be less than $19,500.

The DOC selects trade shows to be International Buyer Program partners that it determines to be leading international trade shows appropriate for participation by U.S. exporting firms and for promotion in overseas markets by U.S. Embassies and Consulates. Selection as an International Buyer Program partner does not constitute a guarantee by the U.S. Government of the show's success. International Buyer Program partnership status is not an endorsement of the show organizer except as to its international buyer activities. Non-selection should not be viewed as a finding that the event will not be successful in the promotion of U.S. exports.

*Exclusions:* Trade shows that are either first-time or horizontal (non-industry specific) events generally will not be considered.

*Eligibility:* All 2012 U.S. trade events are eligible to apply.

*General Selection Criteria:* The Commercial Service will select shows to be International Buyer Program partners that, in the judgment of the Commercial Service, best meet the following criteria:

(a) *Level of Intellectual Property Rights Protection:* The trade show organizer includes in the terms and conditions of its exhibitor contracts provisions for the protection of intellectual property rights (IPR); has procedures in place at the trade show to address IPR infringement, which, at a minimum, provides information to help U.S. exhibitors procure legal representation during the trade show; and agrees to assist the DOC to reach and educate U.S. exhibitors on the Strategy Targeting Organized Piracy (STOP!), IPR protection measures available during the show, and the means to protect IPR in overseas markets, as well as in the United States.

(b) *Export Potential:* The trade show promotes products and services from U.S. industries that have high export potential, as determined by DOC sources, *e.g.,* Commercial Service best prospects lists and U.S. export statistics (certain industries are rated as priorities by our domestic and international commercial officers in their Country Commercial Guides, available through the Web site, *http://www.export.gov*).

(c) *Level of International Interest:* The trade show meets the needs of a significant number of overseas markets and corresponds to marketing opportunities as identified by the posts in their Country Commercial Guides (*e.g.,* best prospect lists). Previous international attendance at the show may be used as an indicator.

(d) *Scope of the Show:* The event must offer a broad spectrum of U.S. made products and services for the subject industry. Trade shows with a majority of U.S. firms as exhibitors are given priority.

(e) *U.S. Content of Show Exhibitors:* Trade shows with exhibitors featuring a high percentage of products produced in the United States or products with a high degree of U.S. content will be preferred.

(f) *Stature of the Show:* The trade show is clearly recognized by the industry it covers as a leading event for the promotion of that industry's products and services both domestically and internationally, and as a showplace for the latest technology or services in that industry.

(g) *Level of Exhibitor Interest:* There is demonstrated interest on the part of U.S. exhibitors in receiving international business visitors during the trade show. A significant number of U.S. exhibitors should be new-to-export (NTE) or seeking to expand their sales into additional export markets.

(h) *Level of Overseas Marketing:* There has been a demonstrated effort to market prior shows overseas. In addition, the applicant should describe in detail the international marketing program to be conducted for the event, and explain how efforts should increase individual and group international attendance. (Planned cooperation with Visit USA Committees overseas is desirable. For more information on Visit USA Committees go to: *http://www.visitusa.com.*

(i) *Logistics:* The trade show site, facilities, transportation services, and availability of accommodations at the site of the exhibition must be capable of accommodating large numbers of attendees whose native language will not be English.

(j) *Level of Cooperation:* The applicant demonstrates a willingness to cooperate with the Commercial Service to fulfill the program's goals and adhere to the target dates set out in the MOA and in the event timetables, both of which are available from the program office (*see* the **FOR FURTHER INFORMATION CONTACT** section above). Past experience in the International Buyer Program will be taken into account in evaluating the applications received for the January 1, 2012 through December 31, 2012 period.

(k) *Delegation Incentives:* Show organizers should list or identify a range of incentives to be offered to delegations and/or delegation leaders recruited by the Commercial Service overseas posts. Examples of incentives to international visitors and to organized delegations include, but are not limited to: Waived or reduced admission fees; special organized events, such as receptions, meetings with association executives, briefings, and site tours; and complimentary accommodations for delegation leaders. Waived or reduced admission fees are required for international attendees who are members of Commercial Service recruited delegations under this program. Delegation leaders also must be provided complimentary admission to the event.

*Application Requirements:* Show organizers submitting applications for the 2012 International Buyer Program are requested to submit with each application: (1) A narrative statement addressing each question in the application, Form ITA–4102P; (2) a signed statement that "The above information provided is correct and the applicant will abide by the terms set forth in this Call for Applications for the 2012 International Buyer Program (January 1, 2012 through December 31, 2012)"; and (3) two copies of the application, on company letterhead, and one electronic copy submitted on a CD–RW (preferably in Microsoft Word® format), on or before the deadline noted above. There is no fee required to apply. The DOC expects to issue the results of this process in March 2011.

*Legal Authority:* The Commercial Service has the legal authority to enter into MOAs with show organizers (partners) under the provisions of the Mutual Educational and Cultural Exchange Act of 1961 (MECEA), as amended (22 U.S.C. 2455(f) and 2458(c)). MECEA allows the Commercial Service to accept contributions of funds and services from firms for the purposes of furthering its

mission. The statutory program authority for the Commercial Service to conduct the International Buyer Program is 15 U.S.C. 4724.

The Office of Management and Budget (OMB) has approved the information collection requirements of the application to this program (Form ITA–4102P) under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (OMB Control No. 0625–0151). Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number.

Dated: August 26, 2010.

**Blanche Ziv,**

*Director, International Buyer Program, U.S. and Foreign Commercial Service, International Trade Administration, U.S. Department of Commerce.*

[FR Doc. 2010–21838 Filed 8–31–10; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[C–570–953]**

### Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Countervailing Duty Order

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** Based on affirmative final determinations by the Department of Commerce ("the Department") and the International Trade Commission ("ITC"), the Department is issuing a countervailing duty order on narrow woven ribbons with woven selvedge ("narrow woven ribbons") from the People's Republic of China ("PRC").

**DATES:** *Effective Date:* September 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** Scott Holland, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–1279.

**Background**

On July 19, 2010, the Department published its final determination in the countervailing duty investigation of narrow woven ribbons from the PRC. *See Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Final Affirmative Countervailing Duty Determination,* 75 FR 41801 (July 19, 2010).

On August 25, 2010, the ITC notified the Department of its final determination pursuant to sections 705(d) and 705(b)(1)(A)(ii) of the Tariff Act of 1930, as amended ("the Act"), that an industry in the United States is threatened with material injury by reason of subsidized imports of subject merchandise from the PRC. *See Narrow Woven Ribbons With Woven Selvedge from China,* USITC Pub. 4180, Investigation Nos. 701–TA–467 and 731–TA–1164–1165 (Final) (August 2010). Pursuant to section 706(a) of the Act, the Department is publishing a countervailing duty order on the subject merchandise.

**Scope of the Order**

The merchandise subject to the order is narrow woven ribbons with woven selvedge, in any length, but with a width (measured at the narrowest span of the ribbon) less than or equal to 12 centimeters, composed of, in whole or in part, man-made fibers (whether artificial or synthetic, including but not limited to nylon, polyester, rayon, polypropylene, and polyethylene teraphthalate), metal threads and/or metalized yarns, or any combination thereof. Narrow woven ribbons subject to the order may:

- Also include natural or other non-man-made fibers;
- Be of any color, style, pattern, or weave construction, including but not limited to single-faced satin, double-faced satin, grosgrain, sheer, taffeta, twill, jacquard, or a combination of two or more colors, styles, patterns, and/or weave constructions;
- Have been subjected to, or composed of materials that have been subjected to, various treatments, including but not limited to dyeing, printing, foil stamping, embossing, flocking, coating, and/or sizing;
- Have embellishments, including but not limited to appliqué, fringes, embroidery, buttons, glitter, sequins, laminates, and/or adhesive backing;
- Have wire and/or monofilament in, on, or along the longitudinal edges of the ribbon;
- Have ends of any shape or dimension, including but not limited to straight ends that are perpendicular to the longitudinal edges of the ribbon, tapered ends, flared ends or shaped ends, and the ends of such woven ribbons may or may not be hemmed;
- Have longitudinal edges that are straight or of any shape, and the longitudinal edges of such woven ribbon may or may not be parallel to each other;
- Consist of such ribbons affixed to like ribbon and/or cut-edge woven ribbon, a configuration also known as an "ornamental trimming;"
- Be wound on spools; attached to a card; hanked (*i.e.,* coiled or bundled); packaged in boxes, trays or bags; or configured as skeins, balls, bateaus or folds; and/or
- Be included within a kit or set such as when packaged with other products, including but not limited to gift bags, gift boxes and/or other types of ribbon.

Narrow woven ribbons subject to the order include all narrow woven fabrics, tapes, and labels that fall within this written description of the scope of this order.

Excluded from the scope of the order are the following:

(1) Formed bows composed of narrow woven ribbons with woven selvedge;

(2) "Pull-bows" (*i.e.,* an assemblage of ribbons connected to one another, folded flat and equipped with a means to form such ribbons into the shape of a bow by pulling on a length of material affixed to such assemblage) composed of narrow woven ribbons;

(3) Narrow woven ribbons comprised at least 20 percent by weight of elastomeric yarn (*i.e.,* filament yarn, including monofilament, of synthetic textile material, other than textured yarn, which does not break on being extended to three times its original length and which returns, after being extended to twice its original length, within a period of five minutes, to a length not greater than one and a half times its original length as defined in the Harmonized Tariff Schedule of the United States ("HTSUS"), Section XI, Note 13) or rubber thread;

(4) Narrow woven ribbons of a kind used for the manufacture of typewriter or printer ribbons;

(5) Narrow woven labels and apparel tapes, cut-to-length or cut-to-shape, having a length (when measured across the longest edge-to-edge span) not exceeding eight centimeters;

(6) Narrow woven ribbons with woven selvedge attached to and forming the handle of a gift bag;

(7) Cut-edge narrow woven ribbons formed by cutting broad woven fabric into strips of ribbon, with or without treatments to prevent the longitudinal edges of the ribbon from fraying (such as by merrowing, lamination, sono-bonding, fusing, gumming or waxing), and with or without wire running lengthwise along the longitudinal edges of the ribbon;

(8) Narrow woven ribbons comprised at least 85 percent by weight of threads having a denier of 225 or higher;

(9) Narrow woven ribbons constructed from pile fabrics (*i.e.,* fabrics with a surface effect formed by tufts or loops of yarn that stand up from the body of the fabric);

(10) Narrow woven ribbon affixed (including by tying) as a decorative detail to non-subject merchandise, such as a gift bag, gift box, gift tin, greeting card or plush toy, or affixed (including by tying) as a decorative detail to packaging containing non-subject merchandise;

(11) Narrow woven ribbon that is (a) affixed to non-subject merchandise as a working component of such non-subject merchandise, such as where narrow woven ribbon comprises an apparel trimming, book marker, bag cinch, or part of an identity card holder, or (b) affixed (including by tying) to non-subject merchandise as a working component that holds or packages such non-subject merchandise or attaches packaging or labeling to such non-subject merchandise, such as a "belly band" around a pair of pajamas, a pair of socks or a blanket;

(12) Narrow woven ribbon(s) comprising a belt attached to and imported with an item of wearing apparel, whether or not such belt is removable from such item of wearing apparel; and

(13) Narrow woven ribbon(s) included with non-subject merchandise in kits, such as a holiday ornament craft kit or a scrapbook kit, in which the individual lengths of narrow woven ribbon(s) included in the kit are each no greater than eight inches, the aggregate amount of narrow woven ribbon(s) included in the kit does not exceed 48 linear inches, none of the narrow woven ribbon(s) included in the kit is on a spool, and the narrow woven ribbon(s) is only one of multiple items included in the kit.

The merchandise subject to this order is classifiable under the HTSUS statistical categories 5806.32.1020; 5806.32.1030; 5806.32.1050 and 5806.32.1060. Subject merchandise also may enter under subheadings 5806.31.00; 5806.32.20; 5806.39.20; 5806.39.30; 5808.90.00; 5810.91.00; 5810.99.90; 5903.90.10; 5903.90.25; 5907.00.60; and 5907.00.80 and under statistical categories 5806.32.1080; 5810.92.9080; 5903.90.3090; and 6307.90.9889. The HTSUS statistical categories and subheadings are provided for convenience and customs purposes; however, the written description of the merchandise under the order is dispositive.

**Countervailing Duty Order**

According to section 706(b)(2) of the Act, duties shall be assessed on subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the ITC's notice of final determination if that determination is based upon the threat of material injury. Section 706(b)(1) of the Act states, "If the Commission, in its final determination under section 705(b), finds material injury or threat of material injury which, but for the suspension of liquidation under section 703(d)(2), would have led to a finding of material injury, then entries of the merchandise subject to the countervailing duty order, the liquidation of which has been suspended under section 703(d)(2), shall be subject to the imposition of countervailing duties under section 701(a)." In addition, section 706(b)(2) of the Act requires CBP to refund any cash deposits or bonds of estimated countervailing duties posted since the Department's preliminary countervailing duty determination, if the ITC's final determination is threat-based. Because the ITC's final determination in this case is based on the threat of material injury and is not accompanied by a finding that injury would have resulted but for the imposition of suspension of liquidation of entries since the Department's *Preliminary Determination* [1] was published in the **Federal Register**, section 706(b)(2) of the Act is applicable.

As a result of the ITC's determination, and in accordance with section 706(a)(1) of the Act, the Department will direct U.S. Customs and Border Protection ("CBP") to assess, upon further instruction by the Department, countervailing duties equal to the amount of the net countervailable subsidy for all relevant entries of narrow woven ribbons from the PRC. In accordance with section 706 of the Act, the Department will direct CBP to reinstitute suspension of liquidation [2] effective on the date of publication of the ITC's notice of final determination in the **Federal Register**, and to require a cash deposit for each entry of subject merchandise in an amount equal to the net countervailable subsidy rates noted below.

| Exporter/manufacturer | Net subsidy rate |
|---|---|
| Yama Ribbons and Bows Co., Ltd | 1.56 |
| Changtai Rongshu Textile Co., Ltd | 117.95 |
| All Others | 1.56 |

**Termination of the Suspension of Liquidation**

The Department will also instruct CBP to terminate the suspension of liquidation for entries of narrow woven ribbons from the PRC entered, or withdrawn from warehouse, for consumption prior to the publication of the ITC's notice of final determination, and refund any cash deposits made and release any bonds posted between December 14, 2009 (*i.e.,* the date of publication of the Department's *Preliminary Determination*) and the date of publication of the ITC's final determination in the **Federal Register**.

This notice constitutes the countervailing duty order with respect to narrow woven ribbons from the PRC, pursuant to section 706(a) of the Act. Interested parties may contact the Department's Central Records Unit, Room 1117 of the main Commerce Building, for copies of an updated list of countervailing duty orders currently in effect.

This order is issued and published in accordance with section 706(a) of the Act and 19 CFR 351.211(b).

Dated: August 30, 2010.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

[FR Doc. 2010–21978 Filed 8–31–10; 8:45 am]

**BILLING CODE 3510–DS–P**

[1] *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination,* 74 FR 66090 (December 14, 2009).

[2] The Department instructed CBP to discontinue the suspension of liquidation on April 13, 2010, in accordance with section 703(d) of the Act. Section 703(d) states that the suspension of liquidation pursuant to a preliminary determination may not remain in effect for more than four months.

## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

**[Docket No.: PTO–P–2010–0055]**

### Examination Guidelines Update: Developments in the Obviousness Inquiry After KSR v.Teleflex

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Notice.

**SUMMARY:** The United States Patent and Trademark Office (USPTO or Office) is issuing an update (*2010 KSR Guidelines Update*) to its obviousness guidelines for its personnel to be used when applying the law of obviousness under

35 U.S.C. 103. This *2010 KSR Guidelines Update* highlights case law developments on obviousness under 35 U.S.C. 103 since the 2007 decision by the United States Supreme Court (Supreme Court) in *KSR Int'l Co.* v. *Teleflex Inc.* These guidelines are intended to be used by Office personnel in conjunction with the guidance in the Manual of Patent Examining Procedure when applying the law of obviousness under 35 U.S.C. 103. Members of the public are invited to provide comments on the *2010 KSR Guidelines Update.* The Office is especially interested in receiving suggestions of recent decisional law in the field of obviousness that would have particular value as teaching tools.

**DATES:** *Effective Date:* This *2010 KSR Guidelines Update* is effective September 1, 2010.

**ADDRESSES:** Comments concerning this *2010 KSR Guidelines Update* may be sent by electronic mail message over the Internet addressed to *KSR_Guidance@uspto.gov,* or submitted by mail addressed to: Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450. Although comments may be submitted by mail, the Office prefers to receive comments via the Internet.

**FOR FURTHER INFORMATION CONTACT:** Kathleen Kahler Fonda or Pinchus M. Laufer, Legal Advisors, Office of Patent Legal Administration, Office of the Associate Commissioner for Patent Examination Policy, by telephone at (571) 272–7754 or (571) 272–7726; by mail addressed to: Mail Stop Comments Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450; or by facsimile transmission to (571) 273–7754, marked to the attention of Kathleen Kahler Fonda.

**SUPPLEMENTARY INFORMATION:**

1. *Introduction.* The purpose of this *2010 KSR Guidelines Update* is to remind Office personnel of the principles of obviousness explained by the Supreme Court in *KSR Int'l Co.* v. *Teleflex Inc.,* 550 U.S 398 (2007) (*KSR*), and to provide additional guidance in view of decisions by the United States Court of Appeals for the Federal Circuit (Federal Circuit) since *KSR.* This body of case law developed over the past three years provides additional examples that will be useful to Office personnel as well as practitioners during the examination process. Although every question of obviousness must be decided on its own facts, these cases begin to clarify the contours of the obviousness inquiry after *KSR,* and help to show when a rejection on this basis is proper and when it is not.

This *2010 KSR Guidelines Update* does not constitute substantive rule making and hence does not have the force and effect of law. It has been developed as a matter of internal Office management and is not intended to create any right or benefit, substantive or procedural, enforceable by any party against the Office. Rejections will continue to be based upon the substantive law, and it is these rejections that are appealable. Consequently, any failure by Office personnel to follow this *2010 KSR Guidelines Update* is neither appealable nor petitionable.

After a review of the principles of obviousness and Office policy as reflected in the *Manual of Patent Examining Procedure* (MPEP), this *2010 KSR Guidelines Update* addresses a number of issues that arise when Office personnel consider whether or not a claimed invention is obvious. The concepts discussed are grounded in Federal Circuit cases, and correlated with existing Office policy as appropriate. A number of cases which have been selected for their instructional value on the issue of obviousness will be discussed in detail.

The law of obviousness will continue to be refined, and Office personnel are encouraged to maintain an awareness of precedential case law from the Federal Circuit and precedential decisions of the Board of Patent Appeals and Interferences (Board) in this area. The Office will train Office personnel and update the MPEP as necessary to reflect the current state of the law.

2. *Principles of Obviousness and the Guidelines.* In response to the Supreme Court's April 2007 decision in *KSR,* the Office developed guidelines for patent examiners to follow when determining obviousness of a claimed invention and published these guidelines in the **Federal Register** and Official Gazette. *See Examination Guidelines for Determining Obviousness Under 35 U.S.C. 103 in View of the Supreme Court Decision in KSR International Co.* v. *Teleflex Inc.,* 72 FR 57526 (Oct. 10, 2007), 1324 *Off. Gaz. Pat. Office* 23 (Nov. 6, 2007) (*2007 KSR Guidelines*). The *2007 KSR Guidelines* have been incorporated in the MPEP. *See* MPEP § 2141 (8th ed. 2001) (Rev. 6, Sept. 2007). The purpose of the *2007 KSR Guidelines* was to give Office personnel practical guidance on how to evaluate obviousness issues under 35 U.S.C. 103(a) in accordance with the Supreme Court's instruction in *KSR.* The *2007 KSR Guidelines* also alerted Office personnel to the importance of considering rebuttal evidence submitted by patent applicants in response to obviousness rejections.

The *2007 KSR Guidelines* pointed out, as had the Supreme Court in *KSR,* that the factual inquiries announced in *Graham* v. *John Deere,* 383 U.S. 1, 17–18 (1966) (scope and content of the prior art; differences between the claimed invention and the prior art; level of ordinary skill in the art; and secondary indicia of nonobviousness), remain the foundation of any determination of obviousness. It remains true that "[t]he determination of obviousness is dependent on the facts of each case." *Sanofi-Synthelabo* v. *Apotex, Inc.,* 550 F.3d 1075, 1089 (Fed. Cir. 2008) (citing *Graham,* 383 U.S. at 17–18 (1966)). As for the reasoning required to support an obviousness determination, the *2007 KSR Guidelines* noted that the teaching-suggestion-motivation (TSM) test was but one possible approach. The *2007 KSR Guidelines* identified six other rationales gleaned from the *KSR* decision as examples of appropriate lines of reasoning that could also be used. The six other rationales identified in the *2007 KSR Guidelines* are: (1) Combining prior art elements according to known methods to yield predictable results; (2) simple substitution of one known element for another to obtain predictable results; (3) use of a known technique to improve similar devices, methods, or products in the same way; (4) applying a known technique to a known device, method, or product ready for improvement to yield predictable results; (5) obvious to try—choosing from a finite number of identified, predictable solutions, with a reasonable expectation of success; and (6) known work in one field of endeavor may prompt variations of it for use in either the same field or a different one based on design incentives or other market forces if the variations are predictable to one of ordinary skill in the art. Any rationale employed must provide a link between the factual findings and the legal conclusion of obviousness.

It is important for Office personnel to recognize that when they do choose to formulate an obviousness rejection using one of the rationales suggested by the Supreme Court in *KSR* and discussed in the *2007 KSR Guidelines,* they are to adhere to the instructions provided in the MPEP regarding the necessary factual findings. However, the *2007 KSR Guidelines* also stressed that while the *Graham* inquiries and the associated reasoning are crucial to a proper obviousness determination, the Supreme Court in *KSR* did not place any limit on the particular approach to be taken to formulate the line of reasoning.

In other words, the *KSR* decision is not to be seen as replacing a single test for obviousness—the TSM test—with the seven rationales listed in the *2007 KSR Guidelines. See* MPEP §§ 2141 and 2143 (8th ed. 2001) (Rev. 8, July 2010) (references to the MPEP are to Revision 8 of the 8th Edition of the MPEP unless otherwise indicated). It remains Office policy that appropriate factual findings are required in order to apply the enumerated rationales properly. If a rejection has been made that omits one of the required factual findings, and in response to the rejection a practitioner or inventor points out the omission, Office personnel must either withdraw the rejection, or repeat the rejection including all required factual findings.

3. *The Impact of the KSR Decision. KSR's* renewed emphasis on the foundational principles of *Graham* coupled with its abrogation of the strict TSM test have clearly impacted the manner in which Office personnel and practitioners carry out the business of prosecuting patent applications with regard to issues of obviousness. However, Office personnel as well as practitioners should also recognize the significant extent to which the obviousness inquiry has remained constant in the aftermath of *KSR.*

In footnote 2 of the *2007 KSR Guidelines,* the Office acknowledged that ongoing developments in the law of obviousness were to be expected in the wake of the *KSR* decision. That footnote also stated that it was "not clear which Federal Circuit decisions will retain their viability" after *KSR.* See *2007 KSR Guidelines,* 72 FR at 57,528 n.2. The edition of the MPEP that was current when the *KSR* decision was handed down had made the following statement in § 2144:

> The rationale to modify or combine the prior art does not have to be expressly stated in the prior art; the rationale may be expressly or impliedly contained in the prior art or it may be reasoned from knowledge generally available to one of ordinary skill in the art, established scientific principles, or legal precedent established by prior case law.

MPEP § 2144 (8th ed. 2001) (Rev. 5, Aug. 2006) (citing five pre-*KSR* Federal Circuit opinions and two decisions of the Board). The *KSR* decision has reinforced those earlier decisions that validated a more flexible approach to providing reasons for obviousness. However, the Supreme Court's pronouncement in *KSR* has at the same time clearly undermined the continued viability of cases such as *In re Lee,* 277 F.3d 1338 (Fed. Cir. 2002), insofar as *Lee* appears to require a strict basis in record evidence as a reason to modify the prior art.

The Supreme Court's flexible approach to the obviousness inquiry is reflected in numerous pre-*KSR* decisions, as can be seen in a review of MPEP § 2144. This section provides many lines of reasoning to support a determination of obviousness based upon earlier legal precedent that had condoned the use of particular examples of what may be considered common sense or ordinary routine practice (*e.g.,* making integral, changes in shape, making adjustable). Thus, the type of reasoning sanctioned by the opinion in *KSR* has long been a part of the patent examination process. *See* MPEP § 2144.

Although the *KSR* approach is flexible with regard to the line of reasoning to be applied, the *2007 KSR Guidelines* and MPEP § 2143 state: "The Supreme Court in *KSR* noted that the analysis supporting a rejection under 35 U.S.C. 103 should be made explicit." MPEP § 2143. In *Ball Aerosol* v. *Limited Brands,* 555 F.3d 984 (Fed. Cir. 2009), the Federal Circuit offered additional instruction as to the need for an explicit analysis. The Federal Circuit explained, as is consistent with the *2007 KSR Guidelines,* that the Supreme Court's requirement for an explicit analysis does not require record evidence of an explicit teaching of a motivation to combine in the prior art.

> [T]he analysis that "should be made explicit" refers not to the teachings in the prior art of a motivation to combine, but to the court's analysis * * *. Under the flexible inquiry set forth by the Supreme Court, the district court therefore erred by failing to take account of "the inferences and creative steps," or even routine steps, that an inventor would employ and by failing to find a motivation to combine related pieces from the prior art.

*Ball Aerosol,* 555 F.3d at 993. The Federal Circuit's directive in *Ball Aerosol* was addressed to a lower court, but it applies to Office personnel as well. When setting forth a rejection, Office personnel are to continue to make appropriate findings of fact as explained in MPEP §§ 2141 and 2143, and must provide a reasoned explanation as to why the invention as claimed would have been obvious to a person of ordinary skill in the art at the time of the invention. This requirement for explanation remains even in situations in which Office personnel may properly rely on intangible realities such as common sense and ordinary ingenuity.

When considering obviousness, Office personnel are cautioned against treating any line of reasoning as a *per se* rule. MPEP § 2144 discusses supporting a rejection under 35 U.S.C. 103 by reliance on scientific theory and legal precedent. In keeping with the flexible approach and the requirement for explanation, Office personnel may invoke legal precedent as a source of supporting rationale when warranted and appropriately supported. *See* MPEP § 2144.04. So, for example, automating a manual activity, making portable, making separable, reversal or duplication of parts, or purifying an old product may form the basis of a rejection. However, such rationales should not be treated as *per se* rules, but rather must be explained and shown to apply to the facts at hand. A similar caveat applies to any obviousness analysis. Simply stating the principle (*e.g.,* "art recognized equivalent," "structural similarity") without providing an explanation of its applicability to the facts of the case at hand is generally not sufficient to establish a *prima facie* case of obviousness.

Many basic approaches that a practitioner may use to demonstrate nonobviousness also continue to apply in the post-*KSR* era. Since it is now clear that a strict TSM approach is not the only way to establish a *prima facie* case of obviousness, it is true that practitioners have been required to shift the emphasis of their nonobviousness arguments to a certain degree. However, familiar lines of argument still apply, including teaching away from the claimed invention by the prior art, lack of a reasonable expectation of success, and unexpected results. Indeed, they may have even taken on added importance in view of the recognition in *KSR* of a variety of possible rationales.

At the time the *KSR* decision was handed down, some observers questioned whether the principles discussed were intended by the Supreme Court to apply to all fields of inventive endeavor. Arguments were made that because the technology at issue in *KSR* involved the relatively well-developed and predictable field of vehicle pedal assemblies, the decision was relevant only to such fields. The Federal Circuit has soundly repudiated such a notion, stating that *KSR* applies across technologies:

> This court also declines to cabin *KSR* to the "predictable arts" (as opposed to the "unpredictable art" of biotechnology). In fact, this record shows that one of skill in this advanced art would find these claimed "results" profoundly "predictable."

*In re Kubin,* 561 F.3d 1351, 1360 (Fed. Cir. 2009). Thus, Office personnel should not withdraw any rejection solely on the basis that the invention lies in a technological area ordinarily considered to be unpredictable.

The decisions of the Federal Circuit discussed in this *2010 KSR Guidelines*

*Update* provide Office personnel as well as practitioners with additional examples of the law of obviousness. The purpose of the *2007 KSR Guidelines* was, as stated above, to help Office personnel to determine when a claimed invention is not obvious, and to provide an appropriate supporting rationale when an obviousness rejection is appropriate. Now that a body of case law is available to guide Office personnel and practitioners as to the boundaries between obviousness and nonobviousness, it is possible in this *2010 KSR Guidelines Update* to contrast situations in which the subject matter was found to have been obvious with those in which it was determined not to have been obvious. Thus, Office personnel may use this *2010 KSR Guidelines Update* in conjunction with the *2007 KSR Guidelines* (incorporated into MPEP §§ 2141 and 2143) to provide a more complete view of the state of the law of obviousness.

This *2010 KSR Guidelines Update* provides a "teaching point" for each discussed case. The "teaching point" may be used to quickly determine the relevance of the discussed case, but should not be used as a substitute for reading the remainder of the discussion of the case in this *2010 KSR Guidelines Update.* Nor should any case in this *2010 KSR Guidelines Update* be applied or cited in an Office action solely on the basis of what is stated in the "teaching point" for the case.

4. *Obviousness Examples from Federal Circuit Cases.* The impact of the Supreme Court's decision in *KSR* can be more readily understood in the context of factual scenarios. The cases in this *2010 KSR Guidelines Update* are broadly grouped according to obviousness concepts in order to provide persons involved with patent prosecution with ready access to the examples that are most pertinent to the issue at hand. The first three groups correspond directly with three of the rationales identified in the *2007 KSR Guidelines.* These rationales—combining prior art elements, substituting one known element for another, and obvious to try—have each been the subject of a significant number of post-*KSR* obviousness decisions. The fourth group focuses on issues concerning consideration of evidence during prosecution. Office personnel as well as practitioners are reminded of the technology-specific obviousness examples previously posted on the Office's Web site at *http://www.uspto.gov/web/offices/pac/dapp/opla/ksr/ksr_training_materials.htm.*

Although the other rationales discussed in the *2007 KSR Guidelines* are not the focus of separate discussions in this *2010 KSR Guidelines Update,* it will be noted that obviousness concepts such as applying known techniques, design choice, and market forces are addressed when they arise in the selected cases. The cases included in this *2010 KSR Guidelines Update* reinforce the idea, presented in the *2007 KSR Guidelines,* that there may be more than one line of reasoning that can properly be applied to a particular factual scenario. The selected decisions also illustrate the overlapping nature of the lines of reasoning that may be employed to establish a *prima facie* case of obviousness. Although the *2007 KSR Guidelines* presented the rationales as discrete, self-contained lines of reasoning, and they may indeed be employed that way, it is useful to recognize that real-world situations may require analyses that may not be so readily pigeon-holed into distinct categories.

A. *Combining Prior Art Elements.* In discussing the obviousness rationale concerning combining prior art elements, identified as Rationale A, the *2007 KSR Guidelines* quoted *KSR* and noted that "it can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does." *KSR,* 550 U.S. at 401. In view of the cases decided since *KSR,* one situation when it is important to identify a reason to combine known elements in a known manner to obtain predictable results is when the combination requires a greater expenditure of time, effort, or resources than the prior art teachings. Even though the components are known, the combining step is technically feasible, and the result is predictable, the claimed invention may nevertheless be nonobvious when the combining step involves such additional effort that no one of ordinary skill would have undertaken it without a recognized reason to do so. When a combination invention involves additional complexity as compared with the prior art, the invention may be nonobvious unless an examiner can articulate a reason for including the added features or steps. This is so even when the claimed invention could have been readily implemented.

*Example 4.1. In re Omeprazole Patent Litigation,* 536 F.3d 1361 (Fed. Cir. 2008). *Teaching point:* Even where a general method that could have been applied to make the claimed product was known and within the level of skill of the ordinary artisan, the claim may nevertheless be nonobvious if the problem which had suggested use of the method had been previously unknown.

The case of *In re Omeprazole Patent Litigation* is one in which the claims in question were found to be nonobvious in the context of an argument to combine prior art elements. The invention involved applying enteric coatings to a drug in pill form for the purpose of ensuring that the drug did not disintegrate before reaching its intended site of action. The drug at issue was omeprazole, the generic name for gastric acid inhibitor marketed as Prilosec®. The claimed formulation included two layers of coatings over the active ingredient.

The district court found that Astra's patent in suit was infringed by defendants Apotex and Impax. The district court rejected Apotex's defense that the patents were invalid for obviousness. Apotex had argued that the claimed invention was obvious because coated omeprazole tablets were known from a prior art reference, and because secondary subcoatings in pharmaceutical preparations generally were also known. There was no evidence of unpredictability associated with applying two different enteric coatings to omeprazole. However, Astra's reason for applying an intervening subcoating between the prior art coating and omeprazole had been that the prior art coating was actually interacting with omeprazole, thereby contributing to undesirable degradation of the active ingredient. This degradation of omeprazole by interaction with the prior art coating had not been recognized in the prior art. Therefore, the district court reasoned that based on the evidence available, a person of ordinary skill in the art would have had no reason to include a subcoating in an omeprazole pill formulation.

The Federal Circuit affirmed the district court's decision that the claimed invention was not obvious. Even though subcoatings for enteric drug formulation were known, and there was no evidence of undue technical hurdles or lack of a reasonable expectation of success, the formulation was nevertheless not obvious because the flaws in the prior art formulation that had prompted the modification had not been recognized. Thus there would have been no reason to modify the initial formulation, even though the modification could have been done. Moreover, a person of skill in the art likely would have chosen a different modification even if he or she had recognized the problem.

Office personnel should note that in this case the modification of the prior art that had been presented as an

argument for obviousness was an extra process step that added an additional component to a known, successfully marketed formulation. The proposed modification thus amounted to extra work and greater expense for no apparent reason. This is not the same as combining known prior art elements A and B when each would have been expected to contribute its own known properties to the final product. In the *Omeprazole* case, in view of the expectations of those of ordinary skill in the art, adding the subcoating would not have been expected to confer any particular desirable property on the final product. Rather, the final product obtained according to the proposed modifications would merely have been expected to have the same functional properties as the prior art product.

The *Omeprazole* case can also be analyzed in view of the discovery of a previously unknown problem by the patentee. If the adverse interaction between active agent and coating had been known, it might well have been obvious to use a subcoating. However, since the problem had not been previously known, there would have been no reason to incur additional time and expense to add another layer, even though the addition would have been technologically possible. This is true because the prior art of record failed to mention any stability problem, despite the acknowledgment during testimony at trial that there was a known theoretical reason that omeprazole might be subject to degradation in the presence of the known coating material.

*Example 4.2. Crocs, Inc.* v. *U.S. International Trade Commission,* 598 F.3d 1294 (Fed. Cir. 2010). *Teaching point:* A claimed combination of prior art elements may be nonobvious where the prior art teaches away from the claimed combination and the combination yields more than predictable results.

The case of *Crocs, Inc.* v. *U.S. International Trade Commission* is a decision in which the claimed foam footwear was held by the Federal Circuit to be nonobvious over a combination of prior art references.

The claims involved in the obviousness issue were from Crocs' U.S. Patent No. 6,993,858, and were drawn to footwear in which a one-piece molded foam base section formed the top of the shoe (the upper) and the sole. A strap also made of foam was attached to the foot opening of the upper, such that the strap could provide support to the Achilles portion of the wearer's foot. The strap was attached via connectors that allowed it to be in contact with the base section, and to pivot relative to the base section. Because both the base portion and the strap were made of foam, friction between the strap and the base section allowed the strap to maintain its position after pivoting. In other words, the foam strap did not fall under the force of gravity to a position adjacent to the heel of the base section.

The International Trade Commission (ITC) determined that the claims were obvious over the combination of two pieces of prior art. The first was the Aqua Clog, which was a shoe that corresponded to the base section of the footwear of the '858 patent. The second was the Aguerre patent, which taught heel straps made of elastic or another flexible material. In the ITC's view, the claimed invention was obvious because the prior art Aqua Clog differed from the claimed invention only as to the presence of the strap, and a suitable strap was taught by Aguerre.

The Federal Circuit disagreed. The Federal Circuit stated that the prior art did not teach foam heel straps, or that a foam heel strap should be placed in contact with a foam base. The Federal Circuit pointed out that the prior art actually counseled against using foam as a material for the heel strap of a shoe.

> The record shows that the prior art would actually discourage and teach away from the use of foam straps. An ordinary artisan in this field would not add a foam strap to the foam Aqua Clog because foam was likely to stretch and deform, in addition to causing discomfort for a wearer. The prior art depicts foam as unsuitable for straps.

*Id.* at 1309.

The Federal Circuit continued, stating that even if—contrary to fact—the claimed invention had been a combination of elements that were known in the prior art, the claims still would have been nonobvious. There was testimony in the record that the loose fit of the heel strap made the shoe more comfortable for the wearer than prior art shoes in which the heel strap was constantly in contact with the wearer's foot. In the claimed footwear, the foam heel strap contacted the wearer's foot only when needed to help reposition the foot properly in the shoe, thus reducing wearer discomfort that could arise from constant contact. This desirable feature was a result of the friction between the base section and the strap that kept the strap in place behind the Achilles portion of the wearer's foot. The Federal Circuit pointed out that this combination "yielded more than predictable results." *Id.* at 1310. Aguerre had taught that friction between the base section and the strap was a problem rather than an advantage, and had suggested the use of nylon washers to reduce friction. Thus the Federal Circuit stated that even if all elements of the claimed invention had been taught by the prior art, the claims would not have been obvious because the combination yielded more than predictable results.

The Federal Circuit's discussion in *Crocs* serves as a reminder to Office personnel that merely pointing to the presence of all claim elements in the prior art is not a complete statement of a rejection for obviousness. In accordance with MPEP § 2143 A(3), a proper rejection based on the rationale that the claimed invention is a combination of prior art elements also includes a finding that results flowing from the combination would have been predictable to a person of ordinary skill in the art. MPEP § 2143 A(3). If results would not have been predictable, Office personnel should not enter an obviousness rejection using the combination of prior art elements rationale, and should withdraw such a rejection if it has been made.

*Example 4.3. Sundance, Inc.* v. *DeMonte Fabricating Ltd.,* 550 F.3d 1356 (Fed. Cir. 2008). *Teaching point:* A claimed invention is likely to be obvious if it is a combination of known prior art elements that would reasonably have been expected to maintain their respective properties or functions after they have been combined.

*Sundance* involved a segmented and mechanized cover for trucks, swimming pools, or other structures. The claim was found to be obvious over the prior art applied.

A first prior art reference taught that a reason for making a segmented cover was ease of repair, in that a single damaged segment could be readily removed and replaced when necessary. A second prior art reference taught the advantages of a mechanized cover for ease of opening. The Federal Circuit noted that the segmentation aspect of the first reference and the mechanization function of the second perform in the same way after combination as they had before. The Federal Circuit further observed that a person of ordinary skill in the art would have expected that adding replaceable segments as taught by the first reference to the mechanized cover of the other would result in a cover that maintained the advantageous properties of both of the prior art covers.

Thus, the *Sundance* case points out that a hallmark of a proper obviousness rejection based on combining known prior art elements is that one of ordinary skill in the art would reasonably have expected the elements to maintain their respective properties or functions after they have been combined.

*Example 4.4. Ecolab, Inc.* v. *FMC Corp.,* 569 F.3d 1335 (Fed Cir. 2009). *Teaching point:* A combination of known elements would have been *prima facie* obvious if an ordinarily skilled artisan would have recognized an apparent reason to combine those elements and would have known how to do so.

In the case of *Ecolab, Inc.* v. *FMC Corp.,* an "apparent reason to combine" in conjunction with the technical ability to optimize led to the conclusion that the claimed invention would have been obvious.

The invention in question was a method of treating meat to reduce the incidence of pathogens, by spraying the meat with an antibacterial solution under specified conditions. The parties did not dispute that a single prior art reference had taught all of the elements of the claimed invention, except for the pressure limitation of "at least 50 psi."

FMC had argued at the district court that the claimed invention would have been obvious in view of the first prior art reference mentioned above in view of a second reference that had taught the advantages of spray-treating at pressures of 20 to 150 psi when treating meat with a different antibacterial agent. The district court did not find FMC's argument to be convincing, and denied the motion for judgment as a matter of law that the claim was obvious.

Disagreeing with the district court, the Federal Circuit stated that "there was an apparent reason to combine these known elements—namely to increase contact between the [antibacterial solution] and the bacteria on the meat surface and to use the pressure to wash additional bacteria off the meat surface." *Id.* at 1350. The Federal Circuit explained that because the second reference had taught "using high pressure to improve the effectiveness of an antimicrobial solution when sprayed onto meat, and because an ordinarily skilled artisan would have recognized the reasons for applying [the claimed antibacterial solution] using high pressure and would have known how to do so, Ecolab's claims combining high pressure with other limitations disclosed in FMC's patent are invalid as obvious." *Id.*

When considering the question of obviousness, Office personnel should keep in mind the capabilities of a person of ordinary skill. In *Ecolab,* the Federal Circuit stated:

> Ecolab's expert admitted that one skilled in the art would know how to adjust application parameters to determine the optimum parameters for a particular solution. The question then is whether it would have been obvious to combine the high pressure parameter disclosed in the Bender patent with the PAA methods disclosed in FMC's '676 patent. The answer is yes.

*Id.* If optimization of the application parameters had not been within the level of ordinary skill in the art, the outcome of the *Ecolab* case may well have been different.

*Example 4.5. Wyers* v. *Master Lock Co.,* No. 2009–1412, —F.3d—, 2010 WL 2901839 (Fed. Cir. July 22, 2010). *Teaching point:* The scope of analogous art is to be construed broadly and includes references that are reasonably pertinent to the problem that the inventor was trying to solve. Common sense may be used to support a legal conclusion of obviousness so long as it is explained with sufficient reasoning.

In the case of *Wyers* v. *Master Lock Co.,* the Federal Circuit held that the claimed barbell-shaped hitch pin locks used to secure trailers to vehicles were obvious.

The court discussed two different sets of claims in *Wyers,* both drawn to improvements over the prior art hitch pin locks. The first improvement was a removable sleeve that could be placed over the shank of the hitch pin lock so that the same lock could be used with towing apertures of varying sizes. The second improvement was an external flat flange seal adapted to protect the internal lock mechanism from contaminants. Wyers had admitted that each of several prior art references taught every element of the claimed inventions except for the removable sleeve and the external covering. Master Lock had argued that these references, in combination with additional references teaching the missing elements, would have rendered the claims obvious.

The court first addressed the question of whether the additional references relied on by Master Lock were analogous prior art. As to the reference teaching the sleeve improvement, the court concluded that it dealt specifically with using a vehicle to tow a trailer, and was therefore in the same field of endeavor as Wyers' sleeve improvement. The reference teaching the sealing improvement dealt with a padlock rather than a lock for a tow hitch. The court noted that Wyers' specification had characterized the claimed invention as being in the field of locking devices, thus at least suggesting that the sealed padlock reference was in the same field of endeavor. However, the court also observed that even if sealed padlocks were not in the same field of endeavor, they were nevertheless reasonably pertinent to the problem of avoiding contamination of a locking mechanism for tow hitches. The court explained that the Supreme Court's decision in *KSR* "directs [it] to construe the scope of analogous art broadly." *Wyers,* slip. op. at 12. For these reasons, the court found that Master Lock's asserted references were analogous prior art, and therefore relevant to the obviousness inquiry.

The court then turned to the question of whether there would have been adequate motivation to combine the prior art elements as had been urged by Master Lock. The court recalled the *Graham* inquiries, and also emphasized the "expansive and flexible" post-*KSR* approach to obviousness that must not "deny factfinders recourse to common sense." *Wyers,* slip op. at 13 (quoting *KSR,* 550 U.S. at 415 and 421). The court stated:

> *KSR* and our later cases establish that the legal determination of obviousness may include recourse to logic, judgment, and common sense, in lieu of expert testimony * * *.
>
> Thus, in appropriate cases, the ultimate inference as to the existence of a motivation to combine references may boil down to a question of "common sense," appropriate for resolution on summary judgment or JMOL.

*Id.* at 15 (citing *Perfect Web Techs., Inc.* v. *InfoUSA, Inc.,* 587 F.3d 1324, 1329 (Fed. Cir. 2009); *Ball Aerosol,* 555 F.3d at 993).

After reviewing these principles, the court proceeded to explain why adequate motivation to combine had been established in this case. With regard to the sleeve improvement, it pointed out that the need for different sizes of hitch pins was well known in the art, and that this was a known source of inconvenience and expense for users. The court also mentioned the marketplace aspect of the issue, noting that space on store shelves was at a premium, and that removable sleeves addressed this economic concern. As to the sealing improvement, the court pointed out that both internal and external seals were well-known means to protect locks from contaminants. The court concluded that the constituent elements were being employed in accordance with their recognized functions, and would have predictably retained their respective functions when combined as suggested by Master Lock. The court cited *In re O'Farrell,* 853 F.2d 894, 904 (Fed. Cir. 1988) for the proposition that a reasonable expectation of success is a requirement for a proper determination of obviousness.

Office personnel should note that although the Federal Circuit invoked the idea of common sense in support of a conclusion of obviousness, it did not end its explanation there. Rather, the

court explained why a person of ordinary skill in the art at the time of the invention, in view of the facts relevant to the case, would have found the claimed inventions to have been obvious. As stated in the MPEP:

> The key to supporting any rejection under 35 U.S.C. 103 is the clear articulation of the reason(s) why the claimed invention would have been obvious. The Supreme Court in *KSR* noted that the analysis supporting a rejection under 35 U.S.C. 103 should be made explicit. The Court quoting *In re Kahn,* 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006), stated that "[R]ejections on obviousness cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness."

MPEP § 2141 III. Office personnel should continue to provide a reasoned explanation for every obviousness rejection.

*Example 4.6. DePuy Spine, Inc.* v. *Medtronic Sofamor Danek, Inc.,* 567 F.3d 1314 (Fed. Cir. 2009). *Teaching point:* Predictability as discussed in *KSR* encompasses the expectation that prior art elements are capable of being combined, as well as the expectation that the combination would have worked for its intended purpose. An inference that a claimed combination would not have been obvious is especially strong where the prior art's teachings undermine the very reason being proffered as to why a person of ordinary skill would have combined the known elements.

The claim in *DePuy Spine* was directed to a polyaxial pedicle screw used in spinal surgeries that included a compression member for pressing a screw head against a receiver member. A prior art reference (Puno) disclosed all of the elements of the claim except for the compression member. Instead, the screw head in Puno was separated from the receiver member to achieve a shock absorber effect, allowing some motion between receiver member and the vertebrae. The missing compression member was readily found in another prior art reference (Anderson), which disclosed an external fracture immobilization splint for immobilizing long bones with a swivel clamp capable of polyaxial movement until rigidly secured by a compression member. It was asserted during trial that a person of ordinary skill would have recognized that the addition of Anderson's compression member to Puno's device would have achieved a rigidly locked polyaxial pedicle screw covered by the claim.

In conducting its analysis, the Federal Circuit noted that the "predictable result" discussed in *KSR* refers not only to the expectation that prior art elements are capable of being physically combined, but also that the combination would have worked for its intended purpose. In this case, it was successfully argued that Puno "teaches away" from a rigid screw because Puno warned that rigidity increases the likelihood that the screw will fail within the human body, rendering the device inoperative for its intended purpose. In fact, the reference did not merely express a general preference for pedicle screws having a "shock absorber" effect, but rather expressed concern for failure and stated that the shock absorber feature "decrease[s] the chance of failure of the screw of the bone-screw interface" because "it prevent[s] direct transfer of load from the rod to the bone-screw interface." Thus, the alleged reason to combine the prior art elements of Puno and Anderson—increasing the rigidity of the screw—ran contrary to the prior art that taught that increasing rigidity would result in a greater likelihood of failure. In view of this teaching and the backdrop of collective teachings of the prior art, the Federal Circuit determined that Puno teaches away from the proposed combination such that a person of ordinary skill would have been deterred from combining the references as proposed. Secondary considerations evaluated by the Federal Circuit relating to failure by others and copying also supported the view that the combination would not have been obvious at the time of the invention.

B. *Substituting One Known Element for Another.* As explained in the *2007 KSR Guidelines,* the substitution rationale applies when the claimed invention can be viewed as resulting from substituting a known element for an element of a prior art invention. The rationale applies when one of ordinary skill in the art would have been technologically capable of making the substitution, and the result obtained would have been predictable. *See* MPEP § 2143(B).

*Example 4.7. In re ICON Health & Fitness, Inc.,* 496 F.3d 1374 (Fed. Cir. 2007). *Teaching point:* When determining whether a reference in a different field of endeavor may be used to support a case of obviousness (*i.e.,* is analogous), it is necessary to consider the problem to be solved.

The claimed invention in *ICON* was directed to a treadmill with a folding tread base that swivels into an upright storage position, including a gas spring connected between the tread base and the upright structure to assist in stably retaining the tread base in the storage position. On reexamination, the examiner rejected the claims as obvious based on a combination of references including an advertisement (Damark) for a folding treadmill demonstrating all of the claim elements other than the gas spring, and a patent (Teague) with a gas spring. Teague was directed to a bed that folds into a cabinet using a novel dual-action spring that reverses force as the mechanism passes a neutral position, rather than a single-action spring that would provide a force pushing the bed closed at all times. The dual-action spring reduced the force required to open the bed from the closed position, while reducing the force required to lift the bed from the open position.

The Federal Circuit addressed the propriety of making the combination since Teague comes from a different field than the application. Teague was found to be reasonably pertinent to the problem addressed in the application because the folding mechanism did not require any particular focus on treadmills, but rather generally addressed problems of supporting the weight of such a mechanism and providing a stable resting position.

Other evidence was considered concerning whether one skilled in the art would have been led to combine the teachings of Damark and Teague. Appellant argued that Teague teaches away from the invention because it directs one skilled in the art not to use single-action springs and does not satisfy the claim limitations as the dual-action springs would render the invention inoperable. The Federal Circuit considered the arguments and found that while Teague at most teaches away from using single-action springs to decrease the opening force, it actually instructed that single-action springs provide the result desired by the inventors, which was to increase the opening force provided by gravity. As to inoperability, the claims were not limited to single-action springs and were so broad as to encompass anything that assists in stably retaining the tread base, which is the function that Teague accomplished. Additionally, the fact that the counterweight mechanism from Teague used a large spring, which appellant argued would overpower the treadmill mechanism, ignores the modifications that one skilled in the art would make to a device borrowed from the prior art. One skilled in the art would size the components from Teague appropriately for the application.

*ICON* is another useful example for understanding the scope of analogous art. The art applied concerned retaining mechanisms for folding beds, not treadmills. When determining whether a

reference may properly be applied to an invention in a different field of endeavor, it is necessary to consider the problem to be solved. It is certainly possible that a reference may be drawn in such a way that its usefulness as a teaching is narrowly restricted. However, in *ICON,* the "treadmill" concept was too narrow a lens through which to view the art in light of the prior art teachings concerning the problem to be solved. The Teague reference was analogous art because "Teague and the current application both address the need to stably retain a folding mechanism," *id.* at 1378, and because "nothing about ICON's folding mechanism requires any particular focus on treadmills," *id.* at 1380.

*ICON* is also informative as to the relationship between the problem to be solved and existence of a reason to combine. "Indeed, while perhaps not dispositive of the issue, the finding that Teague, by addressing a similar problem, provides analogous art to ICON's application goes a long way towards demonstrating a reason to combine the two references. Because ICON's broad claims read on embodiments addressing that problem as described by Teague, the prior art here indicates a reason to incorporate its teachings." *Id.* at 1380–81.

The Federal Circuit's discussion in *ICON* also makes clear that if the reference does not teach that a combination is undesirable, then it cannot be said to teach away. An assessment of whether a combination would render the device inoperable must not "ignore the modifications that one skilled in the art would make to a device borrowed from the prior art." *Id.* at 1382.

*Example 4.8. Agrizap, Inc.* v. *Woodstream Corp.,* 520 F.3d 1337 (Fed. Cir. 2008). *Teaching point:* Analogous art is not limited to references in the field of endeavor of the invention, but also includes references that would have been recognized by those of ordinary skill in the art as useful for applicant's purpose.

*Agrizap* involved a stationary pest control device for electrocution of pests such as rats and gophers, in which the device is set in an area where the pest is likely to encounter it. The only difference between the claimed device and the prior art stationary pest control device was that the claimed device employed a resistive electrical switch, while the prior art device used a mechanical pressure switch. A resistive electrical switch was taught in two prior art patents, in the contexts of a hand-held pest control device and a cattle prod.

In determining that the claimed invention was obvious, the Federal Circuit noted that "[t]he asserted claims simply substitute a resistive electrical switch for the mechanical pressure switch" employed in the prior art device. *Id.* at 1344. In this case, the prior art concerning the hand-held devices revealed that the function of the substituted resistive electrical switch was well known and predictable, and that it could be used in a pest control device. According to the Federal Circuit, the references that taught the hand-held devices showed that "the use of an animal body as a resistive switch to complete a circuit for the generation of an electric charge was already well known in the prior art." *Id.* Finally, the Federal Circuit noted that the problem solved by using the resistive electrical switch in the prior art hand-held devices—malfunction of mechanical switches due to dirt and dampness—also pertained to the prior art stationary pest control device.

The Federal Circuit recognized *Agrizap* as "a textbook case of when the asserted claims involve a combination of familiar elements according to known methods that does no more than yield predictable results." *Id. Agrizap* exemplifies a strong case of obviousness based on simple substitution that was not overcome by the objective evidence of nonobviousness offered. It also demonstrates that analogous art is not limited to the field of applicant's endeavor, in that one of the references that used an animal body as a resistive switch to complete a circuit for the generation of an electric charge was not in the field of pest control.

*Example 4.9. Muniauction, Inc.* v. *Thomson Corp.,* 532 F.3d 1318 (Fed. Cir. 2008). *Teaching point:* Because Internet and Web browser technologies had become commonplace for communicating and displaying information, it would have been obvious to adapt existing processes to incorporate them for those functions.

The invention at issue in *Muniauction* was a method for auctioning municipal bonds over the Internet. A municipality could offer a package of bond instruments of varying principal amounts and maturity dates, and an interested buyer would then submit a bid comprising a price and interest rate for each maturity date. It was also possible for the interested buyer to bid on a portion of the offering. The claimed invention considered all of the noted parameters to determine the best bid. It operated on conventional Web browsers and allowed participants to monitor the course of the auction.

The only difference between the prior art bidding system and the claimed invention was the use of a conventional Web browser. At trial, the district court had determined that Muniauction's claims were not obvious. Thomson argued that the claimed invention amounted to incorporating a Web browser into a prior art auction system, and was therefore obvious in light of *KSR.* Muniauction rebutted the argument by offering evidence of skepticism by experts, copying, praise, and commercial success. Although the district court found the evidence to be persuasive of nonobviousness, the Federal Circuit disagreed. It noted that a nexus between the claimed invention and the proffered evidence was lacking because the evidence was not coextensive with the claims at issue. For this reason, the Federal Circuit determined that Muniauction's evidence of secondary considerations was not entitled to substantial weight.

The Federal Circuit analogized this case to *Leapfrog Enterprises, Inc.* v. *Fisher-Price, Inc.,* 485 F.3d 1157 (Fed. Cir. 2007), cited in the *2007 KSR Guidelines.* The *Leapfrog* case involved a determination of obviousness based on application of modern electronics to a prior art mechanical children's learning device. In *Leapfrog,* the court had noted that market pressures would have prompted a person of ordinary skill to use modern electronics in the prior art device. Similarly in *Muniauction,* market pressures would have prompted a person of ordinary skill to use a conventional Web browser in a method of auctioning municipal bonds.

Example 4.10. *Aventis Pharma Deutschland* v. *Lupin Ltd.,* 499 F.3d 1293 (Fed. Cir. 2007). *Teaching point:* A chemical compound would have been obvious over a mixture containing that compound as well as other compounds where it was known or the skilled artisan had reason to believe that some desirable property of the mixture was derived in whole or in part from the claimed compound, and separating the claimed compound from the mixture was routine in the art.

In *Aventis,* the claims were drawn to the 5(S) stereoisomer of the blood pressure drug ramipril in stereochemically pure form, and to compositions and methods requiring 5(S) ramipril. The 5(S) stereoisomer is one in which all five stereocenters in the ramipril molecule are in the S rather than the R configuration. A mixture of various stereoisomers including 5(S) ramipril had been taught by the prior art. The question before the court was whether the purified single stereoisomer

would have been obvious over the known mixture of stereoisomers.

The record showed that the presence of multiple S stereocenters in drugs similar to ramipril was known to be associated with enhanced therapeutic efficacy. For example, when all of the stereocenters were in the S form in the related drug enalapril (SSS enalapril) as compared with only two stereocenters in the S form (SSR enalapril), the therapeutic potency was 700 times as great. There was also evidence to indicate that conventional methods could be used to separate the various stereoisomers of ramipril.

The district court saw the issue as a close case, because, in its view, there was no clear motivation in the prior art to isolate 5(S) ramipril. However, the Federal Circuit disagreed, and found that the claims would have been obvious. The Federal Circuit cautioned that requiring such a clearly stated motivation in the prior art to isolate 5(S) ramipril ran counter to the Supreme Court's decision in *KSR.* The court stated:

> Requiring an explicit teaching to purify the 5(S) stereoisomer from a mixture in which it is the active ingredient is precisely the sort of rigid application of the TSM test that was criticized in *KSR.*

*Id.* at 1301. The *Aventis* court also relied on the settled principle that in chemical cases, structural similarity can provide the necessary reason to modify prior art teachings. The Federal Circuit also addressed the kind of teaching that would be sufficient in the absence of an explicitly stated prior art-based motivation, explaining that an expectation of similar properties in light of the prior art can be sufficient, even without an explicit teaching that the compound will have a particular utility.

In the chemical arts, the cases involving so-called "lead compounds" form an important subgroup of the obviousness cases that are based on substitution. The Federal Circuit has had a number of opportunities since the *KSR* decision to discuss the circumstances under which it would have been obvious to modify a known compound to arrive at a claimed compound. The following cases explore the selection of a lead compound, the need to provide a reason for any proposed modification, and the predictability of the result.

*Example 4.11. Eisai Co. Ltd.* v. *Dr. Reddy's Labs., Ltd.,* 533 F.3d 1353 (Fed. Cir. 2008). *Teaching point:* A claimed compound would not have been obvious where there was no reason to modify the closest prior art lead compound to obtain the claimed compound and the prior art taught that modifying the lead compound would destroy its advantageous property. Any known compound may serve as a lead compound when there is some reason for starting with that lead compound and modifying it to obtain the claimed compound.

*Eisai* concerns the pharmaceutical compound rabeprazole. Rabeprazole is a proton pump inhibitor for treating stomach ulcers and related disorders. The Federal Circuit affirmed the district court's summary judgment of nonobviousness, stating that no reason had been advanced to modify the prior art compound in a way that would destroy an advantageous property.

Co-defendant Teva based its obviousness argument on the structural similarity between rabeprazole and lansoprazole. The compounds were recognized as sharing a common core, and the Federal Circuit characterized lansoprazole as a "lead compound." The prior art compound lansoprazole was useful for the same indications as rabeprazole, and differed from rabeprazole only in that lansoprazole has a trifluoroethoxy substituent at the 4-position of the pyridine ring, while rabeprazole has a methoxypropoxy substituent. The trifluoro substituent of lansoprazole was known to be a beneficial feature because it conferred lipophilicity to the compound. The ability of a person of ordinary skill to carry out the modification to introduce the methoxypropoxy substituent, and the predictability of the result were not addressed.

Despite the significant similarity between the structures, the Federal Circuit did not find any sufficient reason to modify the lead compound. According to the Federal Circuit:

> Obviousness based on structural similarity thus can be proved by identification of some motivation that would have led one of ordinary skill in the art to select and then modify a known compound (*i.e.* a lead compound) in a particular way to achieve the claimed compound. * * * In keeping with the flexible nature of the obviousness inquiry, *KSR Int'l Co.* v. *Teleflex Inc.,* 550 U.S. 398, 127 S.Ct. 1727, 1739, 167 L.Ed.2d 705 (2007), the requisite motivation can come from any number of sources and need not necessarily be explicit in the art. See *Aventis Pharma Deutschland GmbH* v. *Lupin, Ltd.,* 499 F.3d 1293, 1301 (Fed. Cir. 2007). Rather "it is sufficient to show that the claimed and prior art compounds possess a 'sufficiently close relationship * * * to create an expectation,' in light of the totality of the prior art, that the new compound will have 'similar properties' to the old." *Id.* (quoting *Dillon,* 919 F.2d at 692).

*Eisai,* 533 F.3d at 1357. The prior art taught that introducing a fluorinated substituent was known to increase lipophilicity, so a skilled artisan would have expected that replacing the trifluoroethoxy substituent with a methoxypropoxy substituent would have reduced the lipophilicity of the compound. Thus, the prior art created the expectation that rabeprazole would be less useful than lansoprazole as a drug for treating stomach ulcers and related disorders because the proposed modification would have destroyed an advantageous property of the prior art compound. The compound was not obvious as argued by Teva because, upon consideration of all of the facts of the case, a person of ordinary skill in the art at the time of the invention would not have had a reason to modify lansoprazole so as to form rabeprazole.

Office personnel are cautioned that the term "lead compound" in a particular opinion can have a contextual meaning that may vary from the way a pharmaceutical chemist might use the term. In the field of pharmaceutical chemistry, the term "lead compound" has been defined variously as "a chemical compound that has pharmacological or biological activity and whose chemical structure is used as a starting point for chemical modifications in order to improve potency, selectivity, or pharmacokinetic parameters;" "[a] compound that exhibits pharmacological properties which suggest its development;" and "a potential drug being tested for safety and efficacy." *See, e.g.,http://en.wikipedia.org/wiki/Lead_compound,* accessed January 13, 2010; *http://www.combichemistry.com/glossary_k.html,* accessed January 13, 2010; and *http://www.buildingbiotechnology.com/glossary4.php,* accessed January 13, 2010.

The Federal Circuit in *Eisai* makes it clear that from the perspective of the law of obviousness, any known compound might possibly serve as a lead compound: "Obviousness based on structural similarity thus can be proved by identification of some motivation that would have led one of ordinary skill in the art to select and then modify a known compound (*i.e.* a lead compound) in a particular way to achieve the claimed compound." *Eisai,* 533 F.3d at 1357. Thus, Office personnel should recognize that a proper obviousness rejection of a claimed compound that is useful as a drug might be made beginning with an inactive compound, if, for example, the reasons for modifying a prior art compound to arrive at the claimed compound have nothing to do with pharmaceutical activity. The inactive compound would not be considered to be a lead

compound by pharmaceutical chemists, but could potentially be used as such when considering obviousness. Office personnel might also base an obviousness rejection on a known compound that pharmaceutical chemists would not select as a lead compound due to expense, handling issues, or other business considerations. However, there must be some reason for starting with that lead compound other than the mere fact that the "lead compound" merely exists. *See Altana Pharma AG* v. *Teva Pharmaceuticals USA, Inc.,* 566 F.3d 999, 1007 (Fed. Cir. 2009) (holding that there must be some reason "to select and modify a known compound"); *Ortho-McNeil Pharmaceutical, Inc.* v. *Mylan Labs, Inc.,* 520 F.3d 1358, 1364 (Fed. Cir. 2008).

*Example 4.12. Procter & Gamble Co.* v. *Teva Pharmaceuticals USA, Inc.,* 566 F.3d 989 (Fed. Cir. 2009). *Teaching point:* It is not necessary to select a single compound as a "lead compound" in order to support an obviousness rejection. However, where there was reason to select and modify the lead compound to obtain the claimed compound, but no reasonable expectation of success, the claimed compound would not have been obvious.

A chemical compound was also found to be nonobvious in *Procter & Gamble.* The compound at issue was risedronate—the active ingredient of Procter & Gamble's osteoporosis drug Actonel®. Risedronate is an example of a bisphosphonate, which is a class of compounds known to inhibit bone resorption.

When Procter & Gamble sued Teva for infringement, Teva defended by arguing invalidity for obviousness over one of Procter & Gamble's earlier patents. The prior art patent did not teach risedronate, but instead taught thirty-six other similar compounds including 2-pyr EHDP that were potentially useful with regard to osteoporosis. Teva argued obviousness on the basis of structural similarity to 2-pyr EHDP, which is a positional isomer of risedronate.

The district court found no reason to select 2-pyr EHDP as a lead compound in light of the unpredictable nature of the art, and no reason to modify it so as to obtain risedronate. In addition, there were unexpected results as to potency and toxicity. Therefore the district court found that Teva had not made a *prima facie* case, and even if it had, it was rebutted by evidence of unexpected results.

The Federal Circuit affirmed the district court's decision. The Federal Circuit did not deem it necessary in this case to consider the question of whether 2-pyr EHDP had been appropriately selected as a lead compound. Rather, the Federal Circuit stated that if 2-pyr EHDP is presumed to be an appropriate lead compound, there must be both a reason to modify it so as to make risedronate, and a reasonable expectation of success. Here there was no evidence that the necessary modifications would have been routine, so there would have been no reasonable expectation of success.

*Procter & Gamble* is also informative in its discussion of the treatment of secondary considerations of non-obviousness. Although the court found that no *prima facie* case of obviousness had been presented, it proceeded to analyze Procter & Gamble's proffered evidence countering the alleged *prima facie* case in some detail, thus shedding light on the proper treatment of such evidence.

The Federal Circuit noted in dicta that even if a *prima facie* case of obviousness had been established, sufficient evidence of unexpected results was introduced to rebut such a showing. At trial, the witnesses consistently testified that the properties of risedronate were not expected, offering evidence that researchers did not predict either the potency or the low dose at which the compound was effective, and that the superior properties were unexpected and could not be predicted. Tests comparing risedronate to a compound in the prior art reference showed that risedronate outperformed the other compound by a substantial margin, could be administered in a greater amount without an observable toxic effect, and was not lethal at the same levels as the other compound. The weight of the evidence and the credibility of the witnesses were sufficient to show unexpected results that would have rebutted an obviousness determination. Thus, nonobviousness can be shown when a claimed invention is shown to have unexpectedly superior properties when compared to the prior art.

The court then addressed the evidence of commercial success of risedronate and the evidence that risedronate met a long-felt need. The court pointed out that little weight was to be afforded to the commercial success because the competing product was also assigned to Procter & Gamble. However, the Federal Circuit affirmed the district court's conclusion that risedronate met a long-felt, unsatisfied need. The court rejected Teva's contention that because the competing drug was available before Actonel®, there was no unmet need that the invention satisfied. The court emphasized that whether there was a long-felt unsatisfied need is to be evaluated based on the circumstances as of the filing date of the challenged invention—not as of the date that the invention is brought to market.

It should be noted that the lead compound cases do not stand for the proposition that identification of a single lead compound is necessary in every obviousness rejection of a chemical compound. For example, one might envision a suggestion in the prior art to formulate a compound having certain structurally defined moieties, or moieties with certain properties. If a person of ordinary skill would have known how to synthesize such a compound, and the structural and/or functional result could reasonably have been predicted, then a *prima facie* case of obviousness of the claimed chemical compound might exist even without identification of a particular lead compound. As a second example, it could be possible to view a claimed compound as consisting of two known compounds attached via a chemical linker. The claimed compound might properly be found to have been obvious if there would have been a reason to link the two, if one of ordinary skill would have known how to do so, and if the resulting compound would have been the predictable result of the linkage procedure. Thus, Office personnel should recognize that in certain situations, it may be proper to reject a claimed chemical compound as obvious even without identifying a single lead compound.

*Example 4.13. Altana Pharma AG* v. *Teva Pharmaceuticals USA, Inc.,* 566 F.3d 999 (Fed. Cir. 2009). *Teaching point:* Obviousness of a chemical compound in view of its structural similarity to a prior art compound may be shown by identifying some line of reasoning that would have led one of ordinary skill in the art to select and modify a prior art lead compound in a particular way to produce the claimed compound. It is not necessary for the reasoning to be explicitly found in the prior art of record, nor is it necessary for the prior art to point to only a single lead compound.

Although the decision reached by the Federal Circuit in *Altana* involved a motion for preliminary injunction and did not include a final determination of obviousness, the case is nevertheless instructive as to the issue of selecting a lead compound.

The technology involved in Altana was the compound pantoprazole, which is the active ingredient in Altana's antiulcer drug Protonix®. Pantoprazole belongs to a class of compounds known

as proton pump inhibitors that are used to treat gastric acid disorders in the stomach.

Altana accused Teva of infringement. The district court denied Altana's motion for preliminary injunction for failure to establish a likelihood of success on the merits, determining that Teva had demonstrated a substantial question of invalidity for obviousness in light of one of Altana's prior patents. Altana's patent discussed a compound referred to as compound 12, which was one of eighteen compounds disclosed. The claimed compound pantoprazole was structurally similar to compound 12. The district court found that one of ordinary skill in the art would have selected compound 12 as a lead compound for modification, and the Federal Circuit affirmed.

Obviousness of a chemical compound in view of its structural similarity to a prior art compound may be shown by identifying some line of reasoning that would have led one of ordinary skill in the art to select and modify the prior art compound in a particular way to produce the claimed compound. The necessary line of reasoning can be drawn from any number of sources and need not necessarily be explicitly found in the prior art of record. The Federal Circuit determined that ample evidence supported the district court's finding that compound 12 was a natural choice for further development. For example, Altana's prior art patent claimed that its compounds, including compound 12, were improvements over the prior art; compound 12 was disclosed as one of the more potent of the eighteen compounds disclosed; the patent examiner had considered the compounds of Altana's prior art patent to be relevant during the prosecution of the patent in suit; and experts had opined that one of ordinary skill in the art would have selected the eighteen compounds to pursue further investigation into their potential as proton pump inhibitors.

In response to Altana's argument that the prior art must point to only a single lead compound for further development, the Federal Circuit stated that a "restrictive view of the lead compound test would present a rigid test similar to the teaching-suggestion-motivation test that the Supreme Court explicitly rejected in *KSR* * * *. The district court in this case employed a flexible approach—one that was admittedly preliminary—and found that the defendants had raised a substantial question that one of skill in the art would have used the more potent compounds of [Altana's prior art] patent, including compound 12, as a starting point from which to pursue further development efforts. That finding was not clearly erroneous." *Id.* at 1008.

C. *The* "*Obvious to Try*" *Rationale.* The question of whether a claimed invention can be shown to be obvious based on an "obvious to try" line of reasoning has been explored extensively by the Federal Circuit in several cases since the *KSR* decision. The *2007 KSR Guidelines* explain, in view of the Supreme Court's instruction, that this rationale is only appropriate when there is a recognized problem or need in the art; there are a finite number of identified, predictable solutions to the recognized need or problem; and one of ordinary skill in the art could have pursued these known potential solutions with a reasonable expectation of success. The case law in this area is developing quickly in the chemical arts, although the rationale has been applied in other art areas as well.

Some commentators on the *KSR* decision have expressed a concern that because inventive activities are always carried out in the context of what has come before and not in a vacuum, few inventions will survive scrutiny under an obvious to try standard. The cases decided since *KSR* have proved this fear to have been unfounded. Courts appear to be applying the *KSR* requirement for "a finite number of identified predictable solutions" in a manner that places particular emphasis on predictability and the reasonable expectations of those of ordinary skill in the art.

In a recent Federal Circuit decision, the court pointed out the challenging nature of the task faced by the courts—and likewise by Office personnel—when considering the viability of an obvious to try argument: "The evaluation of the choices made by a skilled scientist, when such choices lead to the desired result, is a challenge to judicial understanding of how technical advance is achieved in the particular field of science or technology." *Abbott Labs.* v. *Sandoz, Inc.,* 544 F.3d 1341, 1352 (Fed. Cir. 2008). The Federal Circuit cautioned that an obviousness inquiry based on an obvious to try rationale must always be undertaken in the context of the subject matter in question, "including the characteristics of the science or technology, its state of advance, the nature of the known choices, the specificity or generality of the prior art, and the predictability of results in the area of interest." *Id.*

*Example 4.14. In re Kubin,* 561 F.3d 1351 (Fed. Cir. 2009). *Teaching point:* A claimed polynucleotide would have been obvious over the known protein that it encodes where the skilled artisan would have had a reasonable expectation of success in deriving the claimed polynucleotide using standard biochemical techniques, and the skilled artisan would have had a reason to try to isolate the claimed polynucleotide. *KSR* applies to all technologies, rather than just the "predictable" arts.

The Federal Circuit's decision in *In re Kubin* was an affirmance of the Board's decision in *Ex parte Kubin,* 83 USPQ2d 1410 (Bd. Pat. App. & Interf. 2007), and the Board in turn had affirmed the examiner's determination that the claims in question would have been obvious over the prior art applied. A discussion of *Ex parte Kubin* was included in the *2007 KSR Guidelines. See 2007 KSR Guidelines,* 72 FR at 57532. The claimed invention in *Kubin* was an isolated nucleic acid molecule. The claim stated that the nucleic acid encoded a particular polypeptide. The encoded polypeptide was identified in the claim by its partially specified sequence, and by its ability to bind to a specified protein. A prior art patent to Valiante taught the polypeptide encoded by the claimed nucleic acid, but did not disclose either the sequence of the polypeptide, or the claimed isolated nucleic acid molecule. However, Valiante did disclose that by employing conventional methods, such as those disclosed by a prior art laboratory manual by Sambrook, the sequence of the polypeptide could be determined, and the nucleic acid molecule could be isolated. In view of Valiante's disclosure of the polypeptide, and of routine prior art methods for sequencing the polypeptide and isolating the nucleic acid molecule, the Board found that a person of ordinary skill in the art would have had a reasonable expectation that a nucleic acid molecule within the claimed scope could have been successfully obtained.

Relying on *In re Deuel,* 51 F.3d 1552 (Fed. Cir. 1995), Appellant argued that it was improper for the Office to use the polypeptide of the Valiante patent together with the methods described in Sambrook to reject a claim drawn to a specific nucleic acid molecule without providing a reference showing or suggesting a structurally similar nucleic acid molecule. Citing *KSR,* the Board stated that "when there is motivation to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp. If this leads to anticipated success, it is likely the product not of innovation but of ordinary skill and common sense." The Board noted that

the problem facing those in the art was to isolate a specific nucleic acid, and there were a limited number of methods available to do so. The Board concluded that the skilled artisan would have had reason to try these methods with the reasonable expectation that at least one would be successful. Thus, isolating the specific nucleic acid molecule claimed was "the product not of innovation but of ordinary skill and common sense." The Board's reasoning was substantially adopted by the Federal Circuit. However, it is important to note that in the *Kubin* decision, the Federal Circuit held that "the Supreme Court in *KSR* unambiguously discredited" the Federal Circuit's decision in *Deuel,* insofar as it "implies the obviousness inquiry cannot consider that the combination of the claim's constituent elements was 'obvious to try.' " *Kubin,* 561 F.3d at 1358. Instead, *Kubin* stated that *KSR* "resurrects" the Federal Circuit's own wisdom in *O'Farrell,* in which "to differentiate between proper and improper applications of 'obvious to try,' " the Federal Circuit "outlined two classes of situations where 'obvious to try' is erroneously equated with obviousness under § 103." *Kubin,* 561 F.3d at 1359. These two classes of situations are: (1) When what would have been "obvious to try" would have been to vary all parameters or try each of numerous possible choices until one possibly arrived at a successful result, where the prior art gave either no indication of which parameters were critical or no direction as to which of many possible choices is likely to be successful; and (2) when what was "obvious to try" was to explore a new technology or general approach that seemed to be a promising field of experimentation, where the prior art gave only general guidance as to the particular form of the claimed invention or how to achieve it. *Id.* (citing *O'Farrell,* 853 F.2d at 903).

*Example 4.15. Takeda Chemical Industries, Ltd.* v. *Alphapharm Pty., Ltd.,* 492 F.3d 1350 (Fed. Cir. 2007). *Teaching point:* A claimed compound would not have been obvious where it was not obvious to try to obtain it from a broad range of compounds, any one of which could have been selected as the lead compound for further investigation, and the prior art taught away from using a particular lead compound, and there was no predictability or reasonable expectation of success in making the particular modifications necessary to transform the lead compound into the claimed compound.

*Takeda* is an example of a chemical case in which the Federal Circuit found that the claim was not obvious. The claimed compound was pioglitazone, a member of a class of drugs known as thiazolidinediones (TZDs) marketed by Takeda as a treatment for Type 2 diabetes. The *Takeda* case brings together the concept of a "lead compound" and the obvious-to-try argument.

Alphapharm had filed an Abbreviated New Drug Application with the Food and Drug Administration, which was a technical act of infringement of Takeda's patent. When Takeda brought suit, Alphapharm's defense was that Takeda's patent was invalid due to obviousness. Alphapharm argued that a two-step modification—involving homologation and ring-walking—of a known compound identified as "compound b" would have produced pioglitazone, and that it was therefore obvious.

The district court found that there would have been no reason to select compound b as a lead compound. There were a large number of similar prior art TZD compounds; fifty-four were specifically identified in Takeda's prior patent, and the district court observed that "hundreds of millions" were more generally disclosed. Although the parties agreed that compound b represented the closest prior art, one reference had taught certain disadvantageous properties associated with compound b, which according to the district court would have taught the skilled artisan not to select that compound as a lead compound. The district court found no *prima facie* case of obviousness, and stated that even if a *prima facie* case had been established, it would have been overcome in this case in view of the unexpected lack of toxicity of pioglitazone.

The Federal Circuit affirmed the decision of the district court, citing the need for a reason to modify a prior art compound. The Federal Circuit quoted *KSR,* stating:

> The *KSR* Court recognized that "[w]hen there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp." *KSR,* 127 S.Ct. at 1732. In such circumstances, "the fact that a combination was obvious to try might show that it was obvious under § 103." *Id.* That is not the case here. Rather than identify predictable solutions for antidiabetic treatment, the prior art disclosed a broad selection of compounds any one of which could have been selected as a lead compound for further investigation. Significantly, the closest prior art compound (compound b, the 6-methyl) exhibited negative properties that would have directed one of ordinary skill in the art away from that compound. Thus, this case fails to present the type of situation contemplated by the Court when it stated that an invention may be deemed obvious if it was "obvious to try." The evidence showed that it was not obvious to try.
>
> *Takeda,* 492 F.3d at 1359.

Accordingly, Office personnel should recognize that the obvious to try rationale does not apply when the appropriate factual findings cannot be made. In *Takeda,* there was a recognized need for treatment of diabetes. However, there was no finite number of identified, predictable solutions to the recognized need, and no reasonable expectation of success. There were numerous known TZD compounds, and although one clearly represented the closest prior art, its known disadvantages rendered it unsuitable as a starting point for further research, and taught the skilled artisan away from its use. Furthermore, even if there had been reason to select compound b, there had been no predictability or reasonable expectation of success associated with the particular modifications necessary to transform compound b into the claimed compound pioglitazone. Thus, an obviousness rejection based on an obvious to try rationale was not appropriate in this situation.

*Example 4.16. Ortho-McNeil Pharmaceutical, Inc.* v. *Mylan Labs, Inc.,* 520 F.3d 1358 (Fed. Cir. 2008). *Teaching point:* Where the claimed anti-convulsant drug had been discovered somewhat serendipitously in the course of research aimed at finding a new anti-diabetic drug, it would not have been obvious to try to obtain a claimed compound where the prior art did not present a finite and easily traversed number of potential starting compounds, and there was no apparent reason for selecting a particular starting compound from among a number of unpredictable alternatives.

The *Ortho-McNeil* case provides another example in which a chemical compound was determined not to be obvious. The claimed subject matter was topiramate, which is used as an anti-convulsant. As in *DePuy Spine,* whether the combination would predictably be effective for its intended purpose is part of the obviousness analysis.

In the course of working toward a new anti-diabetic drug, Ortho-McNeil's scientist had unexpectedly discovered that a reaction intermediate had anti-convulsant properties. Mylan's defense of invalidity due to obviousness rested on an obvious to try argument. However, Mylan did not explain why it would have been obvious to begin with an anti-diabetic drug precursor, especially the specific one that led to

topiramate, if one had been seeking an anti-convulsant drug. The district court ruled on summary judgment that Ortho-McNeil's patent was not invalid for obviousness.

The Federal Circuit affirmed. The Federal Circuit pointed out that there was no apparent reason why a person of ordinary skill would have chosen the particular starting compound or the particular synthetic pathway that led to topiramate as an intermediate. Furthermore, there would have been no reason to test that intermediate for anticonvulsant properties if treating diabetes had been the goal. The Federal Circuit recognized an element of serendipity in this case, which runs counter to the requirement for predictability. Summarizing their conclusion with regard to Mylan's obvious to try argument, the Federal Circuit stated:

> [T]his invention, contrary to Mylan's characterization, does not present a finite (and small in the context of the art) number of options easily traversed to show obviousness * * *. *KSR* posits a situation with a finite, and in the context of the art, small or easily traversed, number of options that would convince an ordinarily skilled artisan of obviousness* * * . [T]his clearly is not the easily traversed, small and finite number of alternatives that *KSR* suggested might support an inference of obviousness.

*Id.* at 1364. Thus, *Ortho-McNeil* helps to clarify the Supreme Court's requirement in *KSR* for "a finite number" of predictable solutions when an obvious to try rationale is applied: Under the Federal Circuit's case law "finite" means "small or easily traversed" in the context of the art in question. As taught in *Abbott,* discussed above, it is essential that the inquiry be placed in the context of the subject matter at issue, and each case must be decided on its own facts.

*Example 4.17. Bayer Schering Pharma A.G.* v. *Barr Labs., Inc.,* 575 F.3d 1341 (Fed. Cir. 2009). *Teaching point:* A claimed compound would have been obvious where it was obvious to try to obtain it from a finite and easily traversed number of options that was narrowed down from a larger set of possibilities by the prior art, and the outcome of obtaining the claimed compound was reasonably predictable.

In *Bayer* the claimed invention was an oral contraceptive containing micronized drospirenone marketed as Yasmin®.

The prior art compound drospirenone was known to be a poorly water-soluble, acid-sensitive compound with contraceptive effects. It was also known in the art that micronization improves the solubility of poorly water soluble drugs.

Based on the known acid sensitivity, Bayer had studied how effectively an enteric-coated drospirenone tablet delivered a formulation as compared to an intravenous injection of the same formulation to measure the "absolute bioavailability" of the drug. Bayer added an unprotected (normal) drospirenone tablet and compared its bioavailability to that of the enteric-coated formulation and the intravenous delivery. Bayer expected to find that the enteric-coated tablet would produce a lower bioavailability than an intravenous injection, while the normal pill would produce an even lower bioavailability than the enteric-coated tablet. However, they found that despite observations that drospirenone would quickly isomerize in a highly acidic environment (supporting the belief that an enteric coating would be necessary to preserve bioavailability), the normal pill and the enteric-coated pill resulted in the same bioavailability. Following this study, Bayer developed micronized drospirenone in a normal pill, the basis for the disputed patent.

The district court found that a person having ordinary skill in the art would have considered the prior art result that a structurally related compound, spirorenone, though acid-sensitive, would nevertheless absorb *in vivo,* would have suggested the same result for drospirenone. It also found that while another reference taught that drospirenone isomerizes *in vitro* when exposed to acid simulating the human stomach, a person of ordinary skill would have been aware of the study's shortcomings, and would have verified the findings as suggested by a treatise on the science of dosage form design, which would have then showed that no enteric coating was necessary.

The Federal Circuit held that the patent was invalid because the claimed formulation was obvious. The Federal Circuit reasoned that the prior art would have funneled the formulator toward two options. Thus, the formulator would not have been required to try all possibilities in a field unreduced by the prior art. The prior art was not vague in pointing toward a general approach or area of exploration, but rather guided the formulator precisely to the use of either a normal pill or an enteric-coated pill.

It is important for Office personnel to recognize that the mere existence of a large number of options does not in and of itself lead to a conclusion of nonobviousness. Where the prior art teachings lead one of ordinary skill in the art to a narrower set of options, then that reduced set is the appropriate one to consider when determining obviousness using an obvious to try rationale.

*Example 4.18. Sanofi-Synthelabo* v. *Apotex, Inc.,* 550 F.3d 1075 (Fed. Cir. 2008). *Teaching point:* A claimed isolated stereoisomer would not have been obvious where the claimed stereoisomer exhibits unexpectedly strong therapeutic advantages over the prior art racemic mixture without the correspondingly expected toxicity, and the resulting properties of the enantiomers separated from the racemic mixture were unpredictable.

The case of *Sanofi* also sheds light on the obvious to try line of reasoning. The claimed compound was clopidogrel, which is the dextrorotatory isomer of methyl alpha-5(4,5,6,7-tetrahydro(3,2-c)thienopyridyl)(2-chlorophenyl)-acetate. Clopidogrel is an anti-thrombotic compound used to treat or prevent heart attack or stroke. The racemate, or mixture of dextrorotatory and levorotatory (D- and L-) isomers of the compound, was known in the prior art. The two forms had not previously been separated, and although the mixture was known to have anti-thrombotic properties, the extent to which each of the individual isomers contributed to the observed properties of the racemate was not known and was not predictable.

The district court assumed that in the absence of any additional information, the D-isomer would have been *prima facie* obvious over the known racemate. However, in view of the evidence of unpredicted therapeutic advantages of the D-isomer presented in the case, the district court found that any *prima facie* case of obviousness had been overcome. At trial, the experts for both parties testified that persons of ordinary skill in the art could not have predicted the degree to which the isomers would have exhibited different levels of therapeutic activity and toxicity. Both parties' experts also agreed that the isomer with greater therapeutic activity would most likely have had greater toxicity. Sanofi witnesses testified that Sanofi's own researchers had believed that the separation of the isomers was unlikely to have been productive, and experts for both parties agreed that it was difficult to separate isomers at the time of the invention. Nevertheless, when Sanofi ultimately undertook the task of separating the isomers, it found that they had the "rare characteristic of 'absolute stereoselectivity,'" whereby the D-isomer provided all of the favorable therapeutic activity but no significant toxicity, while the L-isomer produced no therapeutic activity but

virtually all of the toxicity. Based on this record, the district court concluded that Apotex had not met its burden of proving by clear and convincing evidence that Sanofi's patent was invalid for obviousness. The Federal Circuit affirmed the district court's conclusion.

Office personnel should recognize that even when only a small number of possible choices exist, the obvious to try line of reasoning is not appropriate when, upon consideration of all of the evidence, the outcome would not have been reasonably predictable and the inventor would not have had a reasonable expectation of success. In *Bayer,* there were art-based reasons to expect that both the normal pill and the enteric-coated pill would be therapeutically suitable, even though not all prior art studies were in complete agreement. Thus, the result obtained was not unexpected. In *Sanofi,* on the other hand, there was strong evidence that persons of ordinary skill in the art, prior to the separation of the isomers, would have had no reason to expect that the D-isomer would have such strong therapeutic advantages as compared with the L-isomer. In other words, the result in *Sanofi* was unexpected.

*Example 4.19. Rolls-Royce, PLC* v. *United Technologies Corp.,* 603 F.3d 1325 (Fed. Cir. 2010). *Teaching point:* An obvious to try rationale may be proper when the possible options for solving a problem were known and finite. However, if the possible options were not either known or finite, then an obvious to try rationale cannot be used to support a conclusion of obviousness.

In *Rolls-Royce* the Federal Circuit addressed the obvious to try rationale in the context of a fan blade for jet engines. The case had arisen out of an interference proceeding. Finding that the district court had correctly determined that there was no interference-in-fact because Rolls-Royce's claims would not have been obvious in light of United's application, the Federal Circuit affirmed.

The Federal Circuit described the fan blade of the count as follows:

> Each fan blade has three regions—an inner, an intermediate, and an outer region. The area closest to the axis of rotation at the hub is the inner region. The area farthest from the center of the engine and closest to the casing surrounding the engine is the outer region. The intermediate region falls in between. The count defines a fan blade with a swept-forward inner region, a swept-rearward intermediate region, and forward-leaning outer region.

*Id.* at 1328.

United had argued that it would have been obvious for a person of ordinary skill in the art to try a fan blade design in which the sweep angle in the outer region was reversed as compared with prior art fan blades from rearward to forward sweep, in order to reduce endwall shock. The Federal Circuit disagreed with United's assessment that the claimed fan blade would have been obvious based on an obvious to try rationale. The Federal Circuit pointed out that in a proper obvious to try approach to obviousness, the possible options for solving a problem must have been "known and finite." *Id.* at 1339, citing *Abbott,* 544 F.3d at 1351. In this case, there had been no suggestion in the prior art that would have suggested that changing the sweep angle as Rolls-Royce had done would have addressed the issue of endwall shock. Thus, the Federal Circuit concluded that changing the sweep angle "would not have presented itself as an option at all, let alone an option that would have been obvious to try." *Rolls-Royce,* 603 F.3d at 1339. The decision in *Rolls-Royce* is a reminder to Office personnel that the obvious to try rationale can properly be used to support a conclusion of obviousness only when the claimed solution would have been selected from a finite number of potential solutions known to persons of ordinary skill in the art.

*Example 4.20. Perfect Web Technologies, Inc.* v. *InfoUSA, Inc.,* 587 F.3d 1324, 1328–29 (Fed. Cir. 2009). *Teaching point:* Where there were a finite number of identified, predictable solutions and there is no evidence of unexpected results, an obvious to try inquiry may properly lead to a legal conclusion of obviousness. Common sense may be used to support a legal conclusion of obviousness so long as it is explained with sufficient reasoning.

The *Perfect Web* case provides an example in which the Federal Circuit held that a claimed method for managing bulk e-mail distribution was obvious on the basis of an obvious to try argument. In *Perfect Web,* the method required selecting the intended recipients, transmitting the e-mails, determining how many of the e-mails had been successfully received, and repeating the first three steps if a pre-determined minimum number of intended recipients had not received the e-mail.

The Federal Circuit affirmed the district court's determination on summary judgment that the claimed invention would have been obvious. Failure to meet a desired quota of e-mail recipients was a recognized problem in the field of e-mail marketing. The prior art had also recognized three potential solutions: Increasing the size of the initial recipient list; resending e-mails to recipients who did not receive them on the first attempt; and selecting a new recipient list and sending e-mails to them. The last option corresponded to the fourth step of the invention as claimed.

The Federal Circuit noted that based on "simple logic," selecting a new list of recipients was more likely to result in the desired outcome than resending to those who had not received the e-mail on the first attempt. There had been no evidence of any unexpected result associated with selecting a new recipient list, and no evidence that the method would not have had a reasonable likelihood of success. Thus, the Federal Circuit concluded that, as required by *KSR,* there were a "finite number of identified, predictable solutions," and that the obvious to try inquiry properly led to the legal conclusion of obviousness.

The Federal Circuit in *Perfect Web* also discussed the role of common sense in the determination of obviousness. The district court had cited *KSR* for the proposition that "[a] person of ordinary skill is also a person of ordinary creativity, not an automaton," and found that "the final step [of the claimed invention] is merely the logical result of common sense application of the maxim 'try, try again.' " In affirming the district court, the Federal Circuit undertook an extended discussion of common sense as it has been applied to the obviousness inquiry, both before and since the *KSR* decision.

The Federal Circuit pointed out that application of common sense is not really an innovation in the law of obviousness when it stated, "Common sense has long been recognized to inform the analysis of obviousness **if explained with sufficient reasoning**." *Perfect Web,* 587 F.3d at 1328 (emphasis added). The Federal Circuit then provided a review of a number of precedential cases that inform the understanding of common sense, including *In re Bozek,* 416 F.2d 1385, 1390 (CCPA 1969) (explaining that a patent examiner may rely on "common knowledge and common sense of the person of ordinary skill in the art without any specific hint or suggestion in a particular reference") and *In re Zurko,* 258 F.3d 1379, 1383, 1385 (Fed. Cir. 2001) (clarifying that a factual foundation is needed in order for an examiner to invoke "good common sense" in a case in which "basic knowledge and common sense was not based on any evidence in the record").

The Federal Circuit implicitly acknowledged in *Perfect Web* that the kind of strict evidence-based teaching, suggestion, or motivation required in *In re Lee,* 277 F.3d 1338, 1344 (Fed. Cir. 2002), is not an absolute requirement for an obviousness rejection in light of the teachings of *KSR.* The Federal Circuit explained that "[a]t the time [of the *Lee* decision], we required the PTO to identify record evidence of a teaching, suggestion, or motivation to combine references." However, *Perfect Web* went on to state that even under *Lee,* common sense could properly be applied when analyzing evidence relevant to obviousness. Citing *DyStar Textilfarben GmbH* v. *C.H. Patrick Co.,* 464 F.3d 1356 (Fed. Cir. 2006), and *In re Kahn,* 441 F.3d 977 (Fed. Cir. 2006), two cases decided shortly before the Supreme Court's decision in *KSR,* the Federal Circuit noted that although "a reasoned explanation that avoids conclusory generalizations" is required to use common sense, identification of a "specific hint or suggestion in a particular reference" is not.

5. *Federal Circuit Cases Discussing Consideration of Evidence.* Office personnel should consider all rebuttal evidence that is timely presented by the applicants when reevaluating any obviousness determination. In the case of a claim rendered obvious by a combination of prior art references, applicants may submit evidence or argument to demonstrate that the results of the claimed combination were unexpected.

Another area that has thus far remained consistent with pre-*KSR* precedent is the consideration of rebuttal evidence and secondary considerations in the determination of obviousness. As reflected in the MPEP, such evidence should not be considered simply for its "knockdown" value; rather, all evidence must be reweighed to determine whether the claims are nonobvious.

Once the applicant has presented rebuttal evidence, Office personnel should reconsider any initial obviousness determination in view of the entire record. *See, e.g., In re Piasecki,* 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984); *In re Eli Lilly & Co.,* 90 F.2d 943, 945, 14 USPQ2d 1741, 1743 (Fed. Cir. 1990). All the rejections of record and proposed rejections and their bases should be reviewed to confirm their continued viability.

MPEP § 2141.

Office personnel should not evaluate rebuttal evidence for its "knockdown" value against the *prima facie* case, *Piasecki,* 745 F.2d at 1473, 223 USPQ at 788, or summarily dismiss it as not compelling or insufficient. If the evidence is deemed insufficient to rebut the *prima facie* case of obviousness, Office personnel should specifically set forth the facts and reasoning that justify this conclusion.

MPEP § 2145. The following cases exemplify the continued application of these principles both at the Federal Circuit and within the Office. Note that these principles were at issue in some of the cases previously discussed, and have been addressed there in a more cursory fashion.

*Example 5.1. PharmaStem Therapeutics, Inc.* v. *Viacell, Inc.,* 491 F.3d 1342 (Fed. Cir. 2007). *Teaching point:* Even though all evidence must be considered in an obviousness analysis, evidence of nonobviousness may be outweighed by contradictory evidence in the record or by what is in the specification. Although a reasonable expectation of success is needed to support a case of obviousness, absolute predictability is not required.

The claims at issue in *PharmaStem* were directed to compositions comprising hematopoietic stem cells from umbilical cord or placental blood, and to methods of using such compositions for treatment of blood and immune system disorders. The composition claims required that the stem cells be present in an amount sufficient to effect hematopoietic reconstitution when administered to a human adult. The trial court had found that PharmaStem's patents were infringed and not invalid on obviousness or other grounds. On appeal, the Federal Circuit reversed the district court, determining that the claims were invalid for obviousness.

The Federal Circuit discussed the evidence presented at trial. It pointed out that the patentee, PharmaStem, had not invented an entirely new procedure or new composition. Rather, PharmaStem's own specification acknowledged that it was already known in the prior art that umbilical cord and placental blood-based compositions contained hematopoietic stem cells, and that hematopoietic stem cells were useful for the purpose of hematopoietic reconstitution. PharmaStem's contribution was to provide experimental proof that umbilical cord and placental blood could be used to effect hematopoietic reconstitution in mice. By extrapolation, one of ordinary skill in the art would have expected this reconstitution method to work in humans as well.

The court rejected PharmaStem's expert testimony that hematopoietic stem cells had not been proved to exist in cord blood prior to the experiments described in PharmaStem's patents. The court explained that the expert testimony was contrary to the inventors' admissions in the specification, as well as prior art teachings that disclosed stem cells in cord blood. In this case, PharmaStem's evidence of nonobviousness was outweighed by contradictory evidence.

Despite PharmaStem's useful experimental validation of hematopoietic reconstitution using hematopoietic stem cells from umbilical cord and placental blood, the Federal Circuit found that the claims at issue would have been obvious. There had been ample suggestion in the prior art that the claimed method would have worked. Absolute predictability is not a necessary prerequisite to a case of obviousness. Rather, a degree of predictability that one of ordinary skill would have found to be reasonable is sufficient. The Federal Circuit concluded that "[g]ood science and useful contributions do not necessarily result in patentability." *Id.* at 1364.

*Example 5.2. In re Sullivan,* 498 F.3d 1345 (Fed. Cir. 2007). *Teaching point:* All evidence, including evidence rebutting a *prima facie* case of obviousness, must be considered when properly presented.

It was found to be an error in *Sullivan* for the Board to fail to consider evidence submitted to rebut a *prima facie* case of obviousness.

The claimed invention was directed to an antivenom composition comprising F(ab) fragments used to treat venomous rattlesnake bites. The composition was created from antibody molecules that include three fragments, $F(ab)_2$, F(ab) and F(c), which have separate properties and utilities. There have been commercially available antivenom products that consisted of whole antibodies and $F(ab)_2$ fragments, but researchers had not experimented with antivenoms containing only F(ab) fragments because it was believed that their unique properties would prevent them from decreasing the toxicity of snake venom. The inventor, Sullivan, discovered that F(ab) fragments are effective at neutralizing the lethality of rattlesnake venom, while reducing the occurrence of adverse immune reactions in humans. On appeal of the examiner's rejection, the Board held that the claim was obvious because all the elements of the claimed composition were accounted for in the prior art, and that the composition taught by that prior art would have been expected by a person of ordinary skill in the art at the time the invention was made to neutralize the lethality of the venom of a rattlesnake.

Rebuttal evidence had not been considered by the Board because it

considered the evidence to relate to the intended use of the claimed composition as an antivenom, rather than the composition itself. Appellant successfully argued that even if the Board had shown a *prima facie* case of obviousness, the extensive rebuttal evidence must be considered. The evidence included three expert declarations submitted to show that the prior art taught away from the claimed invention, an unexpected property or result from the use of F(ab) fragment antivenom, and why those having ordinary skill in the art expected antivenoms comprising F(ab) fragments to fail. The declarations related to more than the use of the claimed composition. While a statement of intended use may not render a known composition patentable, the claimed composition was not known, and whether it would have been obvious depends upon consideration of the rebuttal evidence. Appellant did not concede that the only distinguishing factor of its composition is the statement of intended use and extensively argued that its claimed composition exhibits the unexpected property of neutralizing the lethality of rattlesnake venom while reducing the occurrence of adverse immune reactions in humans. The Federal Circuit found that such a use and unexpected property cannot be ignored—the unexpected property is relevant and thus the declarations describing it should have been considered.

Nonobviousness can be shown when a person of ordinary skill in the art would not have reasonably predicted the claimed invention based on the prior art, and the resulting invention would not have been expected. All evidence must be considered when properly presented.

*Example 5.3. Hearing Components, Inc.* v. *Shure Inc.,* 600 F.3d 1357 (Fed. Cir. 2010). *Teaching point:* Evidence that has been properly presented in a timely manner must be considered on the record. Evidence of commercial success is pertinent where a nexus between the success of the product and the claimed invention has been demonstrated.

The case of *Hearing Components* involved a disposable protective covering for the portion of a hearing aid that is inserted into the ear canal. The covering was such that it could be readily replaced by a user as needed.

At the district court, Shure had argued that Hearing Components' patents were obvious over one or more of three different combinations of prior art references. The jury disagreed, and determined that the claims were nonobvious. The district court upheld the jury verdict, stating that in view of the conflicting evidence presented by the parties as to the teachings of the references, motivation to combine, and secondary considerations, the nonobviousness verdict was sufficiently grounded in the evidence.

Shure appealed to the Federal Circuit, but the Federal Circuit agreed with the district court that the jury's nonobviousness verdict had been supported by substantial evidence. Although Shure had argued before the jury that the Carlisle reference taught an ear piece positioned inside the ear canal, Hearing Components' credible witness countered that only the molded duct and not the ear piece itself was taught by Carlisle as being inside the ear canal. On the issue of combining references, Shure's witness had given testimony described as "rather sparse, and lacking in specific details." *Id.* at 1364. In contradistinction, Hearing Components' witness "described particular reasons why one skilled in the art would not have been motivated to combine the references." *Id.* Finally, as to secondary considerations, the Federal Circuit determined that Hearing Components had shown a nexus between the commercial success of its product and the patent by providing evidence that "the licensing fee for a covered product was more than cut in half immediately upon expiration" of the patent.

Although the *Hearing Components* case involves substantial evidence of nonobviousness in a jury verdict, it is nevertheless instructive for Office personnel on the matter of weighing evidence. Office personnel routinely must consider evidence in the form of prior art references, statements in the specification, or declarations under 37 CFR 1.131 or 1.132. Other forms of evidence may also be presented during prosecution. Office personnel are reminded that evidence that has been presented in a timely manner should not be ignored, but rather should be considered on the record. However, not all evidence need be accorded the same weight. In determining the relative weight to accord to rebuttal evidence, considerations such as whether a nexus exists between the claimed invention and the proffered evidence, and whether the evidence is commensurate in scope with the claimed invention, are appropriate. The mere presence of some credible rebuttal evidence does not dictate that an obviousness rejection must always be withdrawn. *See* MPEP § 2145. Office personnel must consider the appropriate weight to be accorded to each piece of evidence. An obviousness rejection should be made or maintained only if evidence of obviousness outweighs evidence of nonobviousness. *See* MPEP § 706(I) ("The standard to be applied in all cases is the 'preponderance of the evidence' test. In other words, an examiner should reject a claim if, in view of the prior art and evidence of record, it is more likely than not that the claim is unpatentable."). MPEP § 716.01(d) provides further guidance on weighing evidence in making a determination of patentability.

*Example 5.4. Asyst Techs., Inc.* v. *Emtrak, Inc.,* 544 F.3d 1310 (Fed. Cir. 2008). *Teaching point:* Evidence of secondary considerations of obviousness such as commercial success and long-felt need may be insufficient to overcome a *prima facie* case of obviousness if the *prima facie* case is strong. An argument for nonobviousness based on commercial success or long-felt need is undermined when there is a failure to link the commercial success or long-felt need to a claimed feature that distinguishes over the prior art.

The claims at issue in *Asyst* concerned a processing system for tracking articles such as silicon wafers which move from one processing station to the next in a manufacturing facility. The claims required that each processing station be in communication with a central control unit. The Federal Circuit agreed with the district court that the only difference between the claimed invention and the prior art to Hesser was that the prior art had taught the use of a bus for this communication, while the claims required a multiplexer. At trial, the jury had concluded that Hesser was not relevant prior art, but the district court overturned that conclusion and issued a judgment as a matter of law (JMOL) that the claims would have been obvious in view of Hesser. Because the evidence showed that persons of ordinary skill in the art would have been familiar with both the bus and the multiplexer, and that they could have readily selected and employed one or the other based on known considerations, the Federal Circuit affirmed the district court's conclusion that the claims were invalid for obviousness.

The Federal Circuit also discussed arguments that the district court had failed to consider the objective evidence of nonobviousness presented by Asyst. Asyst had offered evidence of commercial success of its invention. However, the Federal Circuit pointed out that Asyst had not provided the required nexus between the commercial success and the claimed invention, emphasizing that "Asyst's failure to link that commercial success to the features

of its invention that were not disclosed in Hesser undermines the probative force of the evidence * * *." *Id.* at 1316. Asyst had also offered evidence from others in the field praising the invention as addressing a long-felt need. Once again, the Federal Circuit found the argument to be unavailing in view of the prior art, stating that "[w]hile the evidence shows that the overall system drew praise as a solution to a felt need, there was no evidence that the success * * * was attributable to the substitution of a multiplexer for a bus, which was the only material difference between Hesser and the patented invention." *Id.* The Federal Circuit also reiterated, citing pre-*KSR* decisions, that "as we have often held, evidence of secondary considerations does not always overcome a strong *prima facie* showing of obviousness." *Id.* (citing *Pfizer, Inc.* v. *Apotex, Inc.,* 480 F.3d 1348, 1372 (Fed. Cir. 2007); *Ryko Mfg. Co.* v. *Nu-Star, Inc.,* 950 F.2d 714, 719–20 (Fed. Cir. 1991); *Newell Cos.* v. *Kenney Mfg. Co.,* 864 F.2d 757, 768 (Fed. Cir. 1988)).

When considering obviousness, Office personnel should carefully weigh any properly presented objective evidence of nonobviousness against the strength of the *prima facie* case. If the asserted evidence, such as commercial success or satisfaction of a long-felt need, is attributable to features already in the prior art, the probative value of the evidence is reduced.

6. *Conclusion.* This *2010 KSR Guidelines Update* is intended to be used by Office personnel in conjunction with the guidance provided in MPEP §§ 2141 and 2143 (which incorporates the *2007 KSR Guidelines)* to clarify the contours of obviousness after *KSR.* It addresses a number of issues that arise when Office personnel consider whether or not a claimed invention is obvious. While Office personnel are encouraged to make use of these tools, they are reminded that every question of obviousness must be decided on its own facts. The Office will continue to monitor the developing law of obviousness, and will provide additional guidance and updates as necessary.

Dated: August 20, 2010.

**David J. Kappos,**

*Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

## Appendix

The following table contains the cases set out as examples in this *2010 KSR Guidelines Update* and the teaching points of the case.

| Case | Teaching point |
|---|---|
| **Combining Prior Art Elements** | |
| *In re Omeprazole Patent Litigation,* 536 F.3d 1361 (Fed. Cir. 2008). | Even where a general method that could have been applied to make the claimed product was known and within the level of skill of the ordinary artisan, the claim may nevertheless be nonobvious if the problem which had suggested use of the method had been previously unknown. |
| *Crocs, Inc.* v. *U.S. Int'l Trade Comm'n.,* 598 F.3d 1294 (Fed. Cir. 2010). | A claimed combination of prior art elements may be nonobvious where the prior art teaches away from the claimed combination and the combination yields more than predictable results. |
| *Sundance, Inc.* v. *DeMonte Fabricating Ltd.,* 550 F.3d 1356 (Fed. Cir. 2008). | A claimed invention is likely to be obvious if it is a combination of known prior art elements that would reasonably have been expected to maintain their respective properties or functions after they have been combined. |
| *Ecolab, Inc.* v. *FMC Corp.,* 569 F.3d 1335 (Fed. Cir. 2009). | A combination of known elements would have been *prima facie* obvious if an ordinarily skilled artisan would have recognized an apparent reason to combine those elements and would have known how to do so. |
| *Wyers* v. *Master Lock Co.,* No. 2009–1412, —F.3d—, 2010 WL 2901839 (Fed. Cir. July 22, 2010). | The scope of analogous art is to be construed broadly and includes references that are reasonably pertinent to the problem that the inventor was trying to solve. Common sense may be used to support a legal conclusion of obviousness so long as it is explained with sufficient reasoning. |
| *DePuy Spine, Inc.* v. *Medtronic Sofamor Danek, Inc.,* 567 F.3d 1314 (Fed. Cir. 2009). | Predictability as discussed in *KSR* encompasses the expectation that prior art elements are capable of being combined, as well as the expectation that the combination would have worked for its intended purpose. An inference that a claimed combination would not have been obvious is especially strong where the prior art's teachings undermine the very reason being proffered as to why a person of ordinary skill would have combined the known elements. |
| **Substituting One Known Element for Another** | |
| *In re ICON Health & Fitness, Inc.,* 496 F.3d 1374 (Fed. Cir. 2007). | When determining whether a reference in a different field of endeavor may be used to support a case of obviousness (*i.e.,* is analogous), it is necessary to consider the problem to be solved. |
| *Agrizap, Inc.* v. *Woodstream Corp.,* 520 F.3d 1337 (Fed. Cir. 2008). | Analogous art is not limited to references in the field of endeavor of the invention, but also includes references that would have been recognized by those of ordinary skill in the art as useful for applicant's purpose. |
| *Muniauction, Inc.* v. *Thomson Corp.,* 532 F.3d 1318 (Fed. Cir. 2008). | Because Internet and Web browser technologies had become commonplace for communicating and displaying information, it would have been obvious to adapt existing processes to incorporate them for those functions. |
| *Aventis Pharma Deutschland* v. *Lupin, Ltd.,* 499 F.3d 1293 (Fed. Cir. 2007). | A chemical compound would have been obvious over a mixture containing that compound as well as other compounds where it was known or the skilled artisan had reason to believe that some desirable property of the mixture was derived in whole or in part from the claimed compound, and separating the claimed compound from the mixture was routine in the art. |
| *Eisai Co. Ltd.* v. *Dr. Reddy's Labs., Ltd.,* 533 F.3d 1353 (Fed. Cir. 2008). | A claimed compound would not have been obvious where there was no reason to modify the closest prior art lead compound to obtain the claimed compound and the prior art taught that modifying the lead compound would destroy its advantageous property. Any known compound may serve as a lead compound when there is some reason for starting with that lead compound and modifying it to obtain the claimed compound. |
| *Procter & Gamble Co.* v. *Teva Pharmaceuticals USA, Inc.,* 566 F.3d 989 (Fed. Cir. 2009). | It is not necessary to select a single compound as a "lead compound" in order to support an obviousness rejection. However, where there was reason to select and modify the lead compound to obtain the claimed compound, but no reasonable expectation of success, the claimed compound would not have been obvious. |

| Case | Teaching point |
|---|---|
| *Altana Pharma AG* v. *Teva Pharms. USA, Inc.,* 566 F.3d 999 (Fed. Cir. 2009). | Obviousness of a chemical compound in view of its structural similarity to a prior art compound may be shown by identifying some line of reasoning that would have led one of ordinary skill in the art to select and modify a prior art lead compound in a particular way to produce the claimed compound. It is not necessary for the reasoning to be explicitly found in the prior art of record, nor is it necessary for the prior art to point to only a single lead compound. |
| **The Obvious To Try Rationale** | |
| *In re Kubin,* 561 F.3d 1351 (Fed. Cir. 2009). | A claimed polynucleotide would have been obvious over the known protein that it encodes where the skilled artisan would have had a reasonable expectation of success in deriving the claimed polynucleotide using standard biochemical techniques, and the skilled artisan would have had a reason to try to isolate the claimed polynucleotide. *KSR* applies to all technologies, rather than just the "predictable" arts. |
| *Takeda Chem. Indus.* v. *Alphapharm Pty., Ltd.,* 492 F.3d 1350 (Fed. Cir. 2007). | A claimed compound would not have been obvious where it was not obvious to try to obtain it from a broad range of compounds, any one of which could have been selected as the lead compound for further investigation, and the prior art taught away from using a particular lead compound, and there was no predictability or reasonable expectation of success in making the particular modifications necessary to transform the lead compound into the claimed compound. |
| *Ortho-McNeil Pharmaceutical, Inc.* v. *Mylan Labs, Inc.,* 520 F.3d 1358 (Fed. Cir. 2008). | Where the claimed anti-convulsant drug had been discovered somewhat serendipitously in the course of research aimed at finding a new anti-diabetic drug, it would not have been obvious to try to obtain a claimed compound where the prior art did not present a finite and easily traversed number of potential starting compounds, and there was no apparent reason for selecting a particular starting compound from among a number of unpredictable alternatives. |
| *Bayer Schering Pharma A.G.* v. *Barr Labs., Inc.,* 575 F.3d 1341 (Fed. Cir. 2009). | A claimed compound would have been obvious where it was obvious to try to obtain it from a finite and easily traversed number of options that was narrowed down from a larger set of possibilities by the prior art, and the outcome of obtaining the claimed compound was reasonably predictable. |
| *Sanofi-Synthelabo* v. *Apotex, Inc.,* 550 F.3d 1075 (Fed. Cir. 2008). | A claimed isolated stereoisomer would not have been obvious where the claimed stereoisomer exhibits unexpectedly strong therapeutic advantages over the prior art racemic mixture without the correspondingly expected toxicity, and the resulting properties of the enantiomers separated from the racemic mixture were unpredictable. |
| *Rolls-Royce, PLC* v. *United Technologies Corp.,* 603 F.3d 1325 (Fed. Cir. 2010). | An obvious to try rationale may be proper when the possible options for solving a problem were known and finite. However, if the possible options were not either known or finite, then an obvious to try rationale cannot be used to support a conclusion of obviousness. |
| *Perfect Web Techs., Inc.* v. *InfoUSA, Inc.,* 587 F.3d 1324 (Fed. Cir. 2009). | Where there were a finite number of identified, predictable solutions and there is no evidence of unexpected results, an obvious to try inquiry may properly lead to a legal conclusion of obviousness. Common sense may be used to support a legal conclusion of obviousness so long as it is explained with sufficient reasoning. |
| **Consideration of Evidence** | |
| *PharmaStem Therapeutics, Inc.* v. *ViaCell, Inc.,* 491 F.3d 1342 (Fed. Cir. 2007). | Even though all evidence must be considered in an obviousness analysis, evidence of nonobviousness may be outweighed by contradictory evidence in the record or by what is in the specification. Although a reasonable expectation of success is needed to support a case of obviousness, absolute predictability is not required. |
| *In re Sullivan*, 498 F.3d 1345 (Fed. Cir. 2007). | All evidence, including evidence rebutting a *prima facie* case of obviousness, must be considered when properly presented. |
| *Hearing Components, Inc.* v. *Shure Inc.,* 600 F.3d 1357 (Fed. Cir. 2010). | Evidence that has been properly presented in a timely manner must be considered on the record. Evidence of commercial success is pertinent where a nexus between the success of the product and the claimed invention has been demonstrated. |
| *Asyst Techs., Inc.* v. *Emtrak, Inc.,* 544 F.3d 1310 (Fed. Cir. 2008). | Evidence of secondary considerations of obviousness such as commercial success and long-felt need may be insufficient to overcome a *prima facie* case of obviousness if the *prima facie* case is strong. An argument for nonobviousness based on commercial success or long-felt need is undermined when there is a failure to link the commercial success or long-felt need to a claimed feature that distinguishes over the prior art. |

[FR Doc. 2010–21646 Filed 8–31–10; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–427–801, A–428–801, A–475–801, A–588–804, A–412–801]**

### Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** On April 28, 2010, the Department of Commerce published the preliminary results of the administrative reviews of the antidumping duty orders on ball bearings and parts thereof from France, Germany, Italy, Japan, and the United Kingdom. The reviews cover 22 manufacturers/exporters. The period of review is May 1, 2008, through April 30, 2009.

Based on our analysis of the comments received, we have made changes, including corrections of certain programming and other ministerial errors, in the margin calculations. Therefore, the final results are different from the preliminary results for certain companies. The final weighted-average dumping margins for the reviewed firms are listed below in the section entitled "Final Results of the Reviews." We have also determined that myonic GmbH, a firm which is subject to the order on ball bearings and parts thereof from Germany, is the successor-in-interest to the pre-acquisition myonic GmbH. Finally, we are announcing our revocation of the order on ball bearings and parts thereof from the United Kingdom in part with respect to subject merchandise exported and/or sold by Barden/Schaeffler UK [1] to the United States.

**DATES:** *Effective Date:* September 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** Thomas Schauer or Richard Rimlinger, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0410 or (202) 482–4477, respectively.

**SUPPLEMENTARY INFORMATION:**

#### Background

On April 28, 2010, the Department of Commerce (the Department) published the preliminary results of the administrative reviews of the antidumping duty orders on ball bearings and parts thereof from France, Germany, Italy, Japan, and the United Kingdom. *See Ball Bearings and Parts Thereof From France, et al.: Preliminary Results of Antidumping Duty Administrative Reviews, Preliminary Results of Changed-Circumstances Review, Rescission of Antidumping Duty Administrative Reviews In Part, and Intent To Revoke Order In Part,* 75 FR 22384 (April 28, 2010), and *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Preliminary Results of Antidumping Duty Administrative Reviews, Preliminary Results of Changed-Circumstances Review, Rescission of Antidumping Duty Administrative Reviews in Part, and Intent To Revoke Order In Part,* 75 FR 26920 (May 13, 2010) (collectively, *Preliminary Results*). For these administrative reviews, the period of review is May 1, 2008, through April 30, 2009.

We invited interested parties to comment on the *Preliminary Results.* We received case and rebuttal briefs from various parties to the proceedings. No hearing was requested.

The Department has conducted these administrative reviews in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

#### Scope of the Orders

The products covered by the orders are ball bearings and parts thereof. These products include all antifriction bearings that employ balls as the rolling element. Imports of these products are classified under the following categories: antifriction balls, ball bearings with integral shafts, ball bearings (including radial ball bearings) and parts thereof, and housed or mounted ball bearing units and parts thereof.

Imports of these products are classified under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 3926.90.45, 4016.93.10, 4016.93.50, 6909.19.50.10, 8431.20.00, 8431.39.00.10, 8482.10.10, 8482.10.50, 8482.80.00, 8482.91.00, 8482.99.05, 8482.99.35, 8482.99.25.80, 8482.99.65.95, 8483.20.40, 8483.20.80, 8483.30.40, 8483.30.80, 8483.50.90, 8483.90.20, 8483.90.30, 8483.90.70, 8708.50.50, 8708.60.50, 8708.60.80, 8708.93.30, 8708.93.60.00, 8708.99.06, 8708.99.31.00, 8708.99.40.00, 8708.99.49.60, 8708.99.58, 8708.99.80.15, 8708.99.80.80, 8803.10.00, 8803.20.00, 8803.30.00, 8803.90.30, 8803.90.90, 8708.30.50.90, 8708.40.75.70, 8708.40.75.80, 8708.50.79.00, 8708.50.89.00, 8708.50.91.50, 8708.50.99.00, 8708.70.60.60, 8708.80.65.90, 8708.93.75.00, 8708.94.75, 8708.95.20.00, 8708.99.55.00, 8708.99.68, and 8708.99.81.80.

Although the HTSUS item numbers above are provided for convenience and customs purposes, the written descriptions of the scope of the orders remain dispositive.

The size or precision grade of a bearing does not influence whether the bearing is covered by one of the orders. The orders cover all the subject bearings and parts thereof (inner race, outer race, cage, rollers, balls, seals, shields, *etc.*) outlined above with certain limitations. With regard to finished parts, all such parts are included in the scope of the orders. For unfinished parts, such parts are included if they have been heat-treated or if heat treatment is not required to be performed on the part. Thus, the only unfinished parts that are not covered by the orders are those that will be subject to heat treatment after importation. The ultimate application of a bearing also does not influence whether the bearing is covered by the orders. Bearings designed for highly specialized applications are not excluded. Any of the subject bearings, regardless of whether they may ultimately be utilized in aircraft, automobiles, or other equipment, are within the scope of the orders.

For a list of scope determinations which pertain to the orders, see the "Memorandum to Laurie Parkhill" regarding scope determinations for the 2008/2009 reviews, dated April 21, 2010, which is on file in the Central Records Unit (CRU) of the main Department of Commerce building, room 1117, in the General Issues record (A–100–001).

#### Analysis of the Comments Received

All issues raised in the case briefs by parties to these administrative reviews of the antidumping duty orders on ball bearings and parts thereof are addressed in the "Issues and Decision Memorandum" (Decision Memorandum) from Edward C. Yang, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, dated concurrently with this notice, which is hereby adopted by this notice. A list of the issues which parties have raised and to which we have responded is in the Decision Memorandum and attached to this notice as an Appendix. The Decision Memorandum, which is a

[1] The Barden Corporation (UK) Limited/ Schaeffler Group (UK) Limited.

public document, is on file in the CRU of the main Department of Commerce building, Room 1117, and is accessible on the Web at *http://ia.ita.doc.gov/frn/index.html.* The paper copy and electronic version of the Decision Memorandum are identical in content.

**Revocation of Order in Part**

In the *Preliminary Results,* we preliminarily determined that Barden/Schaeffler UK qualifies for revocation from the order on ball bearings and parts thereof from the United Kingdom pursuant to 19 CFR 351.222(b)(2)(i). Accordingly, in accordance with 19 CFR 351.222(b)(2)(ii), we preliminarily determined to revoke the order with respect to ball bearings and parts thereof from the United Kingdom exported and/or sold by Barden/Schaeffler UK to the United States.

We have received comments concerning our intent to revoke the order on ball bearings and parts thereof from the United Kingdom exported and/or sold by Barden/Schaeffler UK to the United States. See the Decision Memorandum at Comment 4 for further discussion of this issue. In accordance with 19 CFR 351.222(b)(2)(ii), we are revoking the order on ball bearings and parts thereof from the United Kingdom exported and/or sold by Barden/Schaeffler UK to the United States, effective May 1, 2009.

**Final Results of Changed-Circumstances Review**

In the *Preliminary Results,* we preliminarily determined that myonic GmbH is the successor-in-interest to the pre-acquisition myonic GmbH and invited interested parties to comment. We received no comments from interested parties. For the reasons we stated in the *Preliminary Results* and because we received no comments to the contrary from interested parties, we continue to determine that the post-acquisition myonic GmbH is the successor-in-interest to the pre-acquisition myonic GmbH. Consequently, we will instruct U.S. Customs and Border Protection (CBP) to continue to apply the cash-deposit rate in effect for myonic GmbH to all entries of the subject merchandise from myonic GmbH that were entered, or withdrawn from warehouse, for consumption on or after the date of publication of these final results of changed-circumstances review.

**Rates for Non-Selected Companies**

Based on our analysis of the responses and our available resources, we selected certain companies for individual examination of their sales of the subject merchandise to the United States during the period of review as permitted under section 777A(c)(2) of the Act. For a detailed discussion on the selection of the respondents for individual examination, see *Preliminary Results,* 75 FR at 22385. For the final results, we have not changed the basis of the rate we applied to respondents not selected for individual examination. With respect to the sole company not selected in the Germany proceeding, however, we have used publicly available ranged sales values submitted by myonic GmbH and Schaeffler KG to calculate a weighted-average margin to assign to SKF GmbH instead of assigning the simple-average margin calculated using the margins we determined for myonic GmbH and Schaeffler KG, as announced in the *Preliminary Results.* For a discussion of this issue, see the Decision Memorandum at Comment 1. See also the memorandum to the file, dated concurrently with this notice, entitled "Ball Bearings and Parts Thereof from Germany: Final Calculation of the Margin for Respondent Not Selected for Individual Examination" on the record of the Germany proceeding (A–428–801).

Our calculation of the final margin for the sole non-selected company in the Germany administrative review represents a change in our practice concerning the margin applicable to companies not selected for individual examination in an administrative review of an antidumping duty order. In situations where we cannot apply our normal methodology of calculating a weighted-average margin due to requests to protect business-proprietary information but where use of a simple average does not yield the best proxy of the weighted-average margin relative to publicly available data, normally we will use the publicly available figures as a matter of practice in future cases.

With respect to the Japan proceeding, one company selected for individual examination used the indexing method permitted under 19 CFR 351.304(c) in the public version of its response to our request for information concerning the quantity and value of U.S. sales during the period of review. Therefore, unlike in the Germany proceeding where public, ranged data are available for all of the companies that were selected for individual examination, similar information is not available for all such companies in the Japan proceeding. Accordingly, we cannot calculate a weighted-average margin to consider applying to the non-selected respondents in the Japan proceeding as we have calculated for the Germany proceeding. Instead, as explained in the *Preliminary Results,* we have determined to apply the simple average of the margins we calculated for the selected companies to the companies not selected for individual examination in the Japan proceeding.

**Changes Since the Preliminary Results**

Based on our analysis of comments received and based on our own analysis of the *Preliminary Results,* we have made revisions that have changed the results for certain companies. We have corrected programming and ministerial errors in the margins we included in the *Preliminary Results,* where applicable. A detailed discussion of each correction we made is in the company-specific analysis memoranda dated concurrently with this notice, which are on file in the CRU of the main Department of Commerce building, Room 1117.

**Final Results of the Reviews**

We determine that the following percentage weighted-average dumping margins on ball bearings and parts thereof exist for the period May 1, 2008, through April 30, 2009:

| Company | Margin (percent) |
|---|---|
| FRANCE | |
| SKF France S.A. | 6.86 |
| Microturbo SAS | 6.86 |
| GERMANY | |
| myonic GmbH | 21.72 |
| Schaeffler KG | 2.16 |
| SKF GmbH | 6.59 |
| ITALY | |
| SKF Industrie S.p.A. | 13.04 |
| Schaeffler Italia S.r.l. | 1.98 |
| JAPAN | |
| Aisin Seiki Company, Ltd. | 10.97 |
| JTEKT Corporation | 10.97 |
| Makino Milling Machine Company Limited | 10.97 |
| Mazda Motor Corporation | 10.97 |
| Nachi-Fujikoshi Corporation | 10.97 |
| Nissan Motor Company, Ltd. | 10.97 |
| NSK Ltd. | 8.48 |
| NTN Corporation | 13.46 |
| Sapporo Precision, Inc., and Tokyo Precision, Inc. | 10.97 |
| Univance Corporation | 10.97 |
| Yamazaki Mazak Trading Corporation | 10.97 |
| UNITED KINGDOM | |
| The Barden Corporation (UK) Limited/Schaeffler Group (UK) Limited | 0.00 |
| NSK Bearings Europe Ltd. | 10.04 |
| SKF (UK) Limited | 10.04 |

| Company | Margin (percent) |
|---|---|
| Timken UK Ltd. and Timken Aerospace UK Ltd. ..... | 10.04 |

**Assessment Rates**

The Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we have calculated, whenever possible, an exporter/importer- (or customer-) specific assessment rate or value for merchandise subject to these reviews as described below.

The Department clarified its "automatic assessment" regulation on May 6, 2003. This clarification will apply to entries of subject merchandise during the period of review produced by companies selected for individual examination in the reviews for which the reviewed companies did not know their merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the country-specific all-others rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

For the companies which were not selected for individual examination, we will instruct CBP to apply the rates listed above to all entries of subject merchandise produced and/or exported by such firms.

We intend to issue liquidation instructions to CBP 15 days after publication of these final results of reviews.

**Export Price**

With respect to export-price (EP) sales, we divided the total dumping margins (calculated as the difference between normal value and EP) for each exporter's importer or customer by the total number of units the exporter sold to that importer or customer. We will direct CBP to assess the resulting per-unit dollar amount against each unit of merchandise in each of that importer's/customer's entries under the relevant order during the review period.

**Constructed Export Price**

For constructed export-price (CEP) sales, we divided the total dumping margins for the reviewed sales by the total entered value of those reviewed sales for each importer. We will direct CBP to assess the resulting percentage margin against the entered customs values for the subject merchandise on each of that importer's entries under the relevant order during the review period. *See* 19 CFR 351.212(b).

**Cash-Deposit Requirements**

To calculate the cash-deposit rate for each respondent, *i.e.,* each exporter and/or manufacturer included in these reviews, we divided the total dumping margins for each company by the total net value of that company's sales of merchandise during the period of review subject to each order.

To derive a single deposit rate for each respondent, we weight-averaged the EP and CEP deposit rates (using the EP and CEP, respectively, as the weighting factors). To accomplish this when we sampled CEP sales (*see Preliminary Results,* 75 FR at 22385), we first calculated the total dumping margins for all CEP sales during the period of review by multiplying the sample CEP margins by the ratio of total days in the period of review to days in the sample weeks. We then calculated a total net value for all CEP sales during the period of review by multiplying the sample CEP total net value by the same ratio. Finally, we divided the combined total dumping margins for both EP and CEP sales by the combined total value of both EP and CEP sales to obtain the deposit rate.

We will direct CBP to collect the resulting percentage deposit rate against the entered customs value of each of the exporter's entries of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice. Entries of parts incorporated into finished bearings before sales to an unaffiliated customer in the United States will receive the respondent's deposit rate applicable to the order.

Furthermore, the following deposit requirements will be effective upon publication of this notice of final results of administrative reviews for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(1) of the Act: (1) The cash-deposit rates for the reviewed companies will be the rates shown above; (2) for previously reviewed or investigated companies not listed above, the cash-deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in these reviews, a prior review, or the less-than-fair-value investigations but the manufacturer is, the cash-deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; (4) the cash-deposit rate for all other manufacturers or exporters will continue to be the all-others rate for the relevant order made effective by the final results of reviews published on July 26, 1993. *See Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order,* 58 FR 39729 (July 26, 1993). For ball bearings and parts thereof from Italy, *see Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 61 FR 66472, 66521 (December 17, 1996). These rates are the all-others rates from the relevant less-than-fair-value investigations. These deposit requirements shall remain in effect until further notice.

**Notifications**

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely notification of the destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: August 26, 2010.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

**Appendix**

1. Rate Selection for SKF Germany.
2. SKF's Bearing Kits.
3. Short-Term U.S. Interest Rate for Inventory-Carrying Costs.
4. Barden's Request for Revocation.
5. Deduction of CEP Profit.
6. Freight and Packing Revenue Offset Caps.
7. Importer-Specific Assessment Rates.
8. 15–Day Issuance of Liquidation Instructions.

9. Zeroing of Negative Margins.

[FR Doc. 2010–21839 Filed 8–31–10; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Initiation of Five-Year ("Sunset") Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** In accordance with section 751(c) of the Tariff Act of 1930, as amended ("the Act"), the Department of Commerce ("the Department") is automatically initiating a five-year review ("Sunset Review") of the antidumping duty orders listed below. The International Trade Commission ("the Commission") is publishing concurrently with this notice its notice of *Institution of Five-Year Review* which covers the same orders.

**DATES:** *Effective Date:* September 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** The Department official identified in the *Initiation of Review* section below at AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. For information from the Commission contact Mary Messer, Office of Investigations, U.S. International Trade Commission at (202) 205–3193.

**SUPPLEMENTARY INFORMATION:**

### Background

The Department's procedures for the conduct of Sunset Reviews are set forth in its *Procedures for Conducting Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders,* 63 FR 13516 (March 20, 1998) and 70 FR 62061 (October 28, 2005). Guidance on methodological or analytical issues relevant to the Department's conduct of Sunset Reviews is set forth in the Department's Policy Bulletin 98.3 —*Policies Regarding the Conduct of Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin,* 63 FR 18871 (April 16, 1998).

### Initiation of Review

In accordance with 19 CFR 351.218(c), we are initiating the Sunset Review of the following antidumping duty orders:

| DOC Case No. | ITC Case No. | Country | Product | Department conctact |
|---|---|---|---|---|
| A–580–807 ..... | 731–TA–459 ..... | South Korea ..... | Polyethylene Terephthalate (PET) Film (3rd Review). | Dana Mermelstein, (202) 482–1391. |
| A–588–702 ..... | 731–TA–376 ..... | Japan ..... | Stainless Steel Butt-Weld Pipe Fittings (3rd Review). | Dana Mermelstein, (202) 492–1391. |
| A–580–813 ..... | 731–TA–563 ..... | South Korea ..... | Stainless Steel Butt-Weld Pipe Fittings (3rd Review). | Dana Mermelstein, (202) 492–1391. |
| A–583–816 ..... | 731–TA–564 ..... | Taiwan ..... | Stainless Steel Butt-Weld Pipe Fittings (3rd Review). | Dana Mermelstein, (202) 492–1391. |

### Filing Information

As a courtesy, we are making information related to Sunset Review proceedings, including copies of the pertinent statute and Department's regulations, the Department schedule for Sunset Reviews, a listing of past revocations and continuations, and current service lists, available to the public on the Department's Internet Web site at the following address: *http://ia.ita.doc.gov/sunset/.* All submissions in these Sunset Reviews must be filed in accordance with the Department's regulations regarding format, translation, service, and certification of documents. These rules can be found at 19 CFR 351.303.

Pursuant to 19 CFR 351.103(d), the Department will maintain and make available a service list for these proceedings. To facilitate the timely preparation of the service list(s), it is requested that those seeking recognition as interested parties to a proceeding contact the Department in writing within 10 days of the publication of the Notice of Initiation.

Because deadlines in Sunset Reviews can be very short, we urge interested parties to apply for access to proprietary information under administrative protective order ("APO") immediately following publication in the **Federal Register** of this notice of initiation by filing a notice of intent to participate. The Department's regulations on submission of proprietary information and eligibility to receive access to business proprietary information under APO can be found at 19 CFR 351.304–306.

### Information Required From Interested Parties

Domestic interested parties defined in section 771(9)(C), (D), (E), (F), and (G) of the Act and 19 CFR 351.102(b)) wishing to participate in a Sunset Review must respond not later than 15 days after the date of publication in the **Federal Register** of this notice of initiation by filing a notice of intent to participate. *See* 19 CFR 351.218(d)(1)(i). The required contents of the notice of intent to participate are set forth at 19 CFR 351.218(d)(1)(ii). In accordance with the Department's regulations, if we do not receive a notice of intent to participate from at least one domestic interested party by the 15-day deadline, the Department will automatically revoke the order without further review. *See* 19 CFR 351.218(d)(1)(iii).

If we receive an order-specific notice of intent to participate from a domestic interested party, the Department's regulations provide that *all parties* wishing to participate in the Sunset Review must file complete substantive responses not later than 30 days after the date of publication in the **Federal Register** of this notice of initiation. The required contents of a substantive response, on an order-specific basis, are set forth at 19 CFR 351.218(d)(3). Note that certain information requirements differ for respondent and domestic parties. Also, note that the Department's information requirements are distinct from the Commission's information requirements. Please consult the Department's regulations for information regarding the Department's conduct of Sunset Reviews.[1] Please consult the Department's regulations at 19 CFR part 351 for definitions of terms and for other general information

[1] In comments made on the interim final sunset regulations, a number of parties stated that the proposed five-day period for rebuttals to substantive responses to a notice of initiation was insufficient. This requirement was retained in the final sunset regulations at 19 CFR 351.218(d)(4). As provided in 19 CFR 351.302(b), however, the Department will consider individual requests to extend that five-day deadline based upon a showing of good cause.

concerning antidumping and countervailing duty proceedings at the Department.

This notice of initiation is being published in accordance with section 751(c) of the Act and 19 CFR 351.218 (c).

Dated: August 23, 2010.

**Edward C. Yang,**

*Acting Deputy Assistant Secretary for Antidumping and ountervailing Duty Operations.*

[FR Doc. 2010–21847 Filed 8–31–10; :45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Hydrographic Services Review Panel Meeting

**AGENCY:** National Ocean Service, National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

**ACTION:** Notice of public meeting (via teleconference call) on September 17, 2010.

**SUMMARY:** The Hydrographic Services Review Panel (HSRP), a Federal Advisory Committee, will be holding a public meeting via teleconference on September 17, 2010. The purpose of the meeting is to discuss and on vote on proposed revisions to an updated version of HSRP's Special Report entitled, "HSRP Most Wanted Hydrographic Services Improvements 2007."

*Date and Time:* The teleconference will commence at 2 p.m. Eastern Daylight Time on Friday, September 17, 2010, and will end on or about 3 p.m.

*Public Participation:* The teleconference will be open to the public and the last 15 minutes will be set aside for oral or written comments.

**FOR FURTHER INFORMATION CONTACT:** Captain John E. Lowell, Jr., Designated Federal Official (DFO), or Kathy Watson, HSRP Program Coordinator, Office of Coast Survey, National Ocean Service (NOS), NOAA (N/CS), 1315 East West Highway, Silver Spring, Maryland 20910; Telephone: (301) 713–2770 x158; Fax: (301) 713–4019; E-mail: *Hydroservices.panel@noaa.gov* or visit the NOAA HSRP Web site at *http://www.nauticalcharts.noaa.gov/ocs/hsrp/hsrp.htm.*

**SUPPLEMENTARY INFORMATION:** This teleconference is available to the public through the following, toll free call-in number: 1–866–658–4142; participant passcode: 8479431. Interested members of the public may call this number and listen to the meeting. Written public comments should be submitted to Captain John E. Lowell, Jr., Designated Federal Officer (DFO), by September 13, 2010.

Dated: August 27, 2010.

**John Lowell,**

*Director, Office of Coast Survey, National Ocean Service, National Oceanic and Atmospheric Administration.*

[FR Doc. 2010–21882 Filed 8–31–10; 8:45 am]

**BILLING CODE 3510–JE–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### National Sea Grant Advisory Board

**AGENCY:** National Oceanic and Atmospheric Administration, Commerce.

**ACTION:** Notice of cancellation of public meeting.

**SUMMARY:** This notice sets forth the cancellation of a forthcoming meeting of the Sea Grant Advisory Board.

**DATES:** The 8/30/10 meeting has been cancelled and will be rescheduled. Public notification of the new date will be made in the **Federal Register** and the NSGO Web site (*http://www.seagrant.noaa.gov*).

**ADDRESSES:** N/A.

**FOR FURTHER INFORMATION CONTACT:** Mr. Jim Murray, National Sea Grant College Program, National Oceanic and Atmospheric Administration, 1315 East-West Highway, Room 11837, Silver Spring, Maryland 20910, (301)734–1070.

**SUPPLEMENTARY INFORMATION:** The Board, which consists of a balanced representation from academia, industry, state government and citizens groups, was established in 1976 by section 209 of the Sea Grant Improvement Act (Pub. L. 94–461, 33 U.S.C. 1128). The Board advises the Secretary of Commerce and the Director of the National Sea Grant College Program with respect to operations under the Act, and such other matters as the Secretary refers to them for review and advice.

Dated: August 26, 2010.

**Mark E. Brown,**

*Chief Financial Officer, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration.*

[FR Doc. 2010–21814 Filed 8–31–10; 8:45 am]

**BILLING CODE 3510–KA–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XY59**

### Schedules for Atlantic Shark Identification Workshops and Protected Species Safe Handling, Release, and Identification Workshops

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

**ACTION:** Notice of public workshops.

**SUMMARY:** Free Atlantic Shark Identification Workshops and Protected Species Safe Handling, Release, and Identification Workshops will be held in October, November, and December of 2010. Certain fishermen and shark dealers are required to attend a workshop to meet regulatory requirements and maintain valid permits. Specifically, the Atlantic Shark Identification Workshop is mandatory for all federally permitted Atlantic shark dealers. The Protected Species Safe Handling, Release, and Identification Workshop is mandatory for vessel owners and operators who use bottom longline, pelagic longline, or gillnet gear, and who have also been issued shark or swordfish limited access permits. Additional free workshops will be held in 2011.

**DATES:** The Atlantic Shark Identification Workshops will be held October 7, October 14, November 3, and December 2, 2010.

The Protected Species Safe Handling, Release, and Identification Workshops will be held October 20, October 27, November 10, November 17, December 15, and December 22, 2010.

See **SUPPLEMENTARY INFORMATION** for further details.

**ADDRESSES:** The Atlantic Shark Identification Workshops will be held in Bohemia, NY; South Daytona, FL; Madeira Beach, FL; and Charleston, SC.

The Protected Species Safe Handling, Release, and Identification Workshops will be held in Panama City, FL; Kitty Hawk, NC; Warwick, RI; Gulfport, MS; Ronkonkoma, NY; and Port St. Lucie, FL.

See **SUPPLEMENTARY INFORMATION** for further details on workshop locations.

**FOR FURTHER INFORMATION CONTACT:** Richard A. Pearson by phone:(727) 824–5399, or by fax:(727) 824–5398.

**SUPPLEMENTARY INFORMATION:** The workshop schedules, registration information, and a list of frequently asked questions regarding these

workshops are posted on the Internet at: *http://www.nmfs.noaa.gov/sfa/hms/workshops/*.

**Atlantic Shark Identification Workshops**

Since January 1, 2008, Atlantic shark dealers have been prohibited from receiving, purchasing, trading, or bartering for Atlantic sharks unless a valid Atlantic Shark Identification Workshop certificate is on the premises of each business listed under the shark dealer permit which first receives Atlantic sharks (71 FR 58057; October 2, 2006). Dealers who attend and successfully complete a workshop are issued a certificate for each place of business that is permitted to receive sharks. These certificate(s) are valid for 3 years. Approximately 48 free Atlantic Shark Identification Workshops have been conducted since January 2007.

Currently permitted dealers may send a proxy to an Atlantic Shark Identification Workshop. However, if a dealer opts to send a proxy, the dealer must designate a proxy for each place of business covered by the dealer's permit which first receives Atlantic sharks. Only one certificate will be issued to each proxy. A proxy must be a person who is currently employed by a place of business covered by the dealer's permit; is a primary participant in the identification, weighing, and/or first receipt of fish as they are offloaded from a vessel; and who fills out dealer reports. Atlantic shark dealers are prohibited from renewing a Federal shark dealer permit unless a valid Atlantic Shark Identification Workshop certificate for each business location which first receives Atlantic sharks has been submitted with the permit renewal application. Additionally, trucks or other conveyances which are extensions of a dealer's place of business must possess a copy of a valid dealer or proxy Atlantic Shark Identification Workshop certificate.

*Workshop Dates, Times, and Locations*

1. October 7, 2010, 12 p.m. - 4 p.m., La Quinta Inn (at MacArthur Airport)-Room B, 10 Aero Road, Bohemia, NY 11716.

2. October 14, 2010, 12 p.m. - 4 p.m., Piggotte Community Center, 504 Big Tree Road, South Daytona, FL 32119.

3. November 3, 2010, 12 p.m. - 4 p.m., Madeira Beach Town Hall, 300 Municipal Drive, Madeira Beach, FL 33708.

4. December 2, 2010, 12 p.m. - 4 p.m., Center for Coastal Environmental Health and Biomolecular Research Auditorium, 219 Fort Johnson Road, Charleston, SC 29412.

*Registration*

To register for a scheduled Atlantic Shark Identification Workshop, please contact Eric Sander at *esander@peoplepc.com* or at (386) 852–8588.

*Registration Materials*

To ensure that workshop certificates are linked to the correct permits, participants will need to bring specific items to the workshop:

- Atlantic shark dealer permit holders must bring proof that the attendee is an owner or agent of the business (such as articles of incorporation), a copy of the applicable permit, and proof of identification.
- Atlantic shark dealer proxies must bring documentation from the permitted dealer acknowledging that the proxy is attending the workshop on behalf of the permitted Atlantic shark dealer for a specific business location, a copy of the appropriate valid permit, and proof of identification.

*Workshop Objectives*

The Atlantic Shark Identification Workshops are designed to reduce the number of unknown and improperly identified sharks reported in the dealer reporting form and increase the accuracy of species-specific dealer-reported information. Reducing the number of unknown and improperly identified sharks will improve quota monitoring and the data used in stock assessments. These workshops will train shark dealer permit holders or their proxies to properly identify Atlantic shark carcasses.

**Protected Species Safe Handling, Release, and Identification Workshops**

Since January 1, 2007, shark limited-access and swordfish limited-access permit holders who fish with longline or gillnet gear have been required to submit a copy of their Protected Species Safe Handling, Release, and Identification Workshop certificate in order to renew either permit (71 FR 58057; October 2, 2006). These certificate(s) are valid for 3 years. As such, vessel owners who have not already attended a workshop and received a NMFS certificate, or vessel owners whose certificate(s) will expire prior to the next permit renewal, must attend a workshop to fish with, or renew, their swordfish and shark limited-access permits. Additionally, new shark and swordfish limited-access permit applicants who intend to fish with longline or gillnet gear must attend a Protected Species Safe Handling, Release, and Identification Workshop and submit a copy of their workshop certificate before either of the permits will be issued. Approximately 94 free Protected Species Safe Handling, Release, and Identification Workshops have been conducted since 2006.

In addition to certifying vessel owners, at least one operator on board vessels issued a limited-access swordfish or shark permit that uses longline or gillnet gear is required to attend a Protected Species Safe Handling, Release, and Identification Workshop and receive a certificate. Vessels that have been issued a limited-access swordfish or shark permit and that use longline or gillnet gear may not fish unless both the vessel owner and operator have valid workshop certificates onboard at all times. The certificate(s) are valid for 3 years. As such, vessel operators who have not already attended a workshop and received a NMFS certificate, or vessel operators whose certificate(s) will expire prior to their next fishing trip, must attend a workshop to operate a vessel with swordfish and shark limited-access permits that uses with longline or gillnet gear.

*Workshop Dates, Times, and Locations*

1. October 20, 2010, 9 a.m. - 5 p.m., Holiday Inn Select, 2001 Martin Luther King Boulevard, Panama City, FL 32405.

2. October 27, 2010, 9 a.m. - 5 p.m., Hilton Garden Inn, 5353 N. Virginia Dare Trail, Kitty Hawk, NC 27949.

3. November 10, 2010, 9 a.m. - 5 p.m., Hilton Garden Inn, 1 Thurber Street, Warwick, RI 02886.

4. November 17, 2010, 9 a.m. - 5 p.m., Magnolia Plantation, 16391 Robinson Road, Gulfport, MS 39503.

5. December 15, 2010, 9 a.m. - 5 p.m., Holiday Inn, 3845 Veterans Memorial Highway, Ronkonkoma, NY 11779.

6. December 22, 2010, 9 a.m. - 5 p.m., Holiday Inn, 10120 S. Federal Highway (US 1), Port St. Lucie, FL 34952.

*Registration*

To register for a scheduled Protected Species Safe Handling, Release, and Identification Workshop, please contact Angler Conservation Education at (386) 682–0158.

*Registration Materials*

To ensure that workshop certificates are linked to the correct permits, participants will need to bring specific items with them to the workshop:

- Individual vessel owners must bring a copy of the appropriate swordfish and/or shark permit(s), a copy of the vessel registration or documentation, and proof of identification.

• Representatives of a business owned or co-owned vessel must bring proof that the individual is an agent of the business (such as articles of incorporation), a copy of the applicable swordfish and/or shark permit(s), and proof of identification.

• Vessel operators must bring proof of identification.

*Workshop Objectives*

The Protected Species Safe Handling, Release, and Identification Workshops are designed to teach longline and gillnet fishermen the required techniques for the safe handling and release of entangled and/or hooked protected species, such as sea turtles, marine mammals, and smalltooth sawfish. In an effort to improve reporting, the proper identification of protected species will also be taught at these workshops. Additionally, individuals attending these workshops will gain a better understanding of the requirements for participating in these fisheries. The overall goal of these workshops is to provide participants with the skills needed to reduce the mortality of protected species, which may prevent additional regulations on these fisheries in the future.

**Grandfathered Permit Holders**

Participants in the industry-sponsored workshops on safe handling and release of sea turtles that were held in Orlando, FL (April 8, 2005), and in New Orleans, LA (June 27, 2005), were issued a NOAA workshop certificate in December 2006 that was valid for 3 years. These workshop certificates have expired. Vessel owners and operators whose certificates expire prior to the next permit renewal or fishing trip must attend a workshop, successfully complete the course, and obtain a new certificate in order to fish with or renew their limited-access shark and limited-access swordfish permits. Failure to provide a valid NOAA workshop certificate could result in a permit denial.

Dated: August 27, 2010.

**Carrie Selberg,**

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

[FR Doc. 2010–21832 Filed 8–31–10; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### Economic Development Administration

**[Docket No.: 1008270400–0400–01]**

### Space Coast Regional Innovation Cluster Competition

**AGENCY:** Economic Development Administration (EDA), Department of Commerce.

**ACTION:** Notice and request for applications.

**SUMMARY:** This notice announces the upcoming availability of funding for the Space Coast Regional Innovation Cluster (RIC) Competition under EDA's Economic Adjustment Assistance (EAA) Program. EDA solicits competitive applications to catalyze the advancement of Central Florida's key regional industry clusters. Additional information can be found at the Space Coast RIC Web site at *http://www.eda.gov/SpaceCoastRIC.* Applicants are advised to read carefully the Federal funding opportunity (FFO) announcement for the Space Coast RIC Competition. For a copy of the FFO, please see the Web sites listed below under "Electronic Access."

**DATES:** To be considered timely, a completed application must be transmitted to and time-stamped at *http://www.grants.gov* no later than 5 p.m. Eastern Time on October 15, 2010. Any application time-stamped after 5 p.m. Eastern Time on October 15, 2010, will be considered non-responsive and will not be considered for funding. EDA will conduct an informational teleconference for prospective Space Coast RIC Competition applicants at 2 p.m. Eastern Time on September 8, 2010. For more information on the teleconference, please see the section titled "Informational Teleconference" below and section IV.F. of the FFO. Winning applicants should expect to receive awards in January 2011, subject to the availability of appropriations.

*Application Submission Requirements:* Applications must be submitted electronically in accordance with the instructions provided at *http://www.grants.gov.* EDA will not accept facsimile transmissions of applications and will accept e-mail transmission only in case of *http://www.grants.gov* systems issues as provided in section IV.E. of the FFO. Applicants may access the application package by following the instructions provided at *http://www.grants.gov.* The preferred electronic file format for attachments is portable document format (PDF); however, EDA will accept electronic files in Microsoft Word, WordPerfect, or Microsoft Excel.

Applicants are strongly encouraged to start early and not to wait until the approaching deadline before logging on and reviewing the application instructions at *http://www.grants.gov.* Applicants must register (which can take between three to five business days or as long as four weeks if all steps are not completed correctly), designate one or more Authorized Organizational Representatives (AOR) and ensure that an AOR submits the application, and verify that the submission was successful. Applicants should save and print written proof of an electronic submission made at *http://www.grants.gov.* If problems occur, the applicant is advised to (a) print any error message received, and (b) call the *http://www.grants.gov.* Contact Center at 1–800–518–4726 for assistance. The following link lists useful resources: *http://www.grants.gov/help/help.jsp.* Also, the following link lists frequently asked questions (FAQs): *http://www.grants.gov/applicants/resources.jsp#faqs.* If you do not find an answer to your question under the "Applicant FAQs," try consulting the "Applicant User Guide" or contacting *http://www.grants.gov* via e-mail at *support@grants.gov* or telephone at 1–800–518–4726. In addition, please read carefully section IV.E. of the FFO to ensure your application is received by EDA and for the alternative submission method in case of systems issues at *http://www.grants.gov.*

**FOR FURTHER INFORMATION CONTACT:** For additional information or for a paper copy of the FFO, contact Philip Trader by telephone at 404–730–3017 or via e-mail at *ptrader@eda.doc.gov.*

**SUPPLEMENTARY INFORMATION:**

*Program Information:* The Space Coast RIC Competition is a fast-track competitive grant process led by EDA, an agency within the U.S. Department of Commerce (DOC). The goal of this competition is to identify and fund promising job creation and economic development initiatives aligned with regional cluster and competitiveness analyses to sustain the coordinated economic development and diversification of Florida's Space Coast region. Only applications that EDA determines have successfully demonstrated this nexus will be considered responsive under the Space Coast RIC Competition.

EDA will coordinate this competition with members of the Presidential Taskforce on Space Industry Workforce and Economic Development, including the National Aeronautics and Space

Administration (NASA), the Small Business Administration (SBA), the Department of Labor (DOL), and other agencies, to leverage federal resources and expertise for the benefit of Space Coast RIC Competition winners.

The culmination of the Space Shuttle Program poses significant economic challenges for Florida's Space Coast region. However, the region is connected to a tremendous range of economic assets that can serve as the foundation for future business activity. The region's local economic development organizations, in coordination with Federal, State, and local officials; Space Shuttle Program contractors; and other key stakeholders, have worked collaboratively to develop strategies for retaining aerospace workers in the region. Investing in RICs is anticipated to promote a cohesive and reinforcing network of economic activity. A strategic plan developed by Enterprise Florida, a public-private partnership charged with promoting State-wide economic development, identified eight significant economic clusters, five of which this competition focuses on as having the potential to sustain and spur economic growth in the Space Coast region:

(1) Aviation and Aerospace,
(2) Cleantech,
(3) Homeland Security/Defense,
(4) Information Technology, and
(5) Life Sciences.

Please see Enterprise Florida's full strategy entitled "Roadmap to Florida's Future," which is available at *http://www.eflorida.com.*

These promising RICs offer tremendous opportunities to not only retain the Space Coast region's current workforce, but to accelerate the diversification of the regional economy. These industry clusters capitalize on the region's powerful and unique economic assets. By encouraging applicants to think of creative and workable ways to improve the region's economy, the Space Coast RIC Competition is designed to catalyze the advancement of Central Florida's key RICs to drive economic growth and job creation. This initiative will build on and complement existing efforts and ensure collaboration with public, private, and nonprofit partners in the region. Applicants are expected to leverage regional strengths, capabilities, and competitive advantages.

EDA's EAA Program, under which EDA expects to fund the Space Coast RIC Competition, can provide a wide range of technical, planning, and innovation infrastructure assistance, including technology transfer and commercialization. The EAA Program is designed to respond adaptively to pressing economic recovery issues and is well suited to help address the challenges faced by Florida's Space Coast region. Assistance can support the development of a strategy to alleviate economic dislocation or support strategy implementation projects, such as innovation infrastructure, entrepreneurial development support investments, and revolving loan funds (RLFs). EDA encourages the submission of applications focused on the development and implementation of long-term, regionally based, collaborative economic development strategies. In addition, EDA will regard applications for innovation infrastructure that are substantively supported by such a strategy as more competitive and worthy of funding than applications for infrastructure that are not so supported.

EDA strongly encourages applicants to review the full report of the Presidential Task Force on Space Industry Workforce and Economic Development, which may be accessed, along with other materials, at *http://www.nasa.gov/offices/spacecoasttaskforce/home/index.html.* More information on EDA and its programs may be found at *http://www.eda.dov* and EDA's Space Coast RIC webpage at *http://www.eda.gov/SpaceCoastRIC.*

*Electronic Access:* The FFO for the Space Coast RIC Competition is available at *http://www.grants.gov* and at *http://www.eda.gov.* EDA has created a Web page with additional information on the competition at *http://www.eda.gov/SpaceCoastRIC.*

*Funding Availability:* For FY 2011, EDA anticipates allocating $35,000,000 for the Space Coast RIC Competition. Funding for this competition has been included in the Administration's FY 2011 budget request and is contingent upon Congressional approval. Awards under this competition will be made pursuant to grant or cooperative agreements, and award funds are anticipated to be available until expended. EDA expects to award applications that include significant public-private capital investment, and individual awards may be as large as $10,000,000. Please note that if Congress fails to provide the appropriation, EDA will cancel this competition and make no awards.

Project periods are dependent on the nature of the proposed project and the scope of work. For example, the project period for a construction project may last for three or more years until construction is completed satisfactorily, while a strategic planning or technology transfer and commercialization project may allow for one to three years for completion of the scope of work. EDA expects that all projects will proceed expeditiously.

The project period and funding amounts for this competition are subject to the availability of funds at the time of award, as well as to DOC and EDA priorities at the time of award. The DOC and EDA will not be held responsible for application preparation costs. Publication of this notice does not obligate DOC or EDA to award any specific grant or cooperative agreement or to obligate all or any part of available funds. Although EDA expects to make grant awards, EDA may choose to make awards via cooperative agreements based on the anticipated amount of interaction between EDA and the recipient during the project period.

*Statutory Authority:* The authority for the EAA Program is section 209 of PWEDA (42 U.S.C. 3149). EDA's regulations, which will govern an award made under the Space Coast RIC Competition, are codified at 13 CFR chapter III. The regulations and PWEDA are accessible at *http://www.eda.gov/InvestmentsGrants/Lawsreg.xml.*

*Catalog of Federal Domestic Assistance (CFDA) Number:* 11.307, Economic Adjustment Assistance.

*Applicant Eligibility:* Pursuant to PWEDA, eligible applicants for and recipients of EDA investment assistance include a District Organization; an Indian Tribe or a consortium of Indian Tribes; a State; a city or other political subdivision of a State, including a special purpose unit of a State or local government engaged in economic or infrastructure development activities, or a consortium of political subdivisions; an institution of higher education or a consortium of institutions of higher education; and a public or private non-profit organization or association.

*Cost Sharing Requirement:* In general, projects may be eligible for up to an 80 percent Federal share, but as noted below, the amount of local match committed will be a competitive factor. *See* section 204(a) of PWEDA (42 U.S.C. 3144) and 13 CFR 301.4(b)(1). In the case of a(n) (i) Indian Tribe, (ii) State (or political subdivision of a State) that the Assistant Secretary determines has exhausted its effective taxing and borrowing capacity, or (iii) non-profit organization that the Assistant Secretary determines has exhausted its effective borrowing capacity, the Assistant Secretary has the discretion to establish a maximum EDA investment rate of up to 100 percent of the total project cost. *See* sections 204(c)(1) and (2) of PWEDA (42 U.S.C. 3144) and 13 CFR 301.4(b)(5).

In the application review process, EDA will consider the nature of the contribution (cash or in-kind) and the amount of the matching share funds. EDA will give preference to applications that include cash contributions (over in-kind contributions) as the matching share. While cash contributions are preferred, in-kind contributions, consisting of contributions of space, equipment, or services, or forgiveness or assumptions of debt, may provide the required non-federal share of the total project cost. *See* section 204(b) of PWEDA (42 U.S.C. 3144). EDA will fairly evaluate all in-kind contributions, which must be eligible project costs and meet applicable federal cost principles and uniform administrative requirements. Funds from other federal financial assistance awards are considered matching share funds only if authorized by statute, which may be determined by EDA's reasonable interpretation of the statute. *See* 13 CFR 300.3. In addition, the applicant must show that the matching share is committed to the project for the entire project period, will be available as needed, and is not conditioned or encumbered in any way that precludes its use consistent with the requirements of EDA investment assistance. *See* 13 CFR 301.5.

*Nonrelocation:* Applicants are advised that should an application be selected for award, the recipient will be required to adhere to a special award condition relating to EDA's nonrelocation policy as follows:

*In signing this award of financial assistance, Recipient(s) attests that EDA funding is not intended by the Recipient to assist its efforts to induce the relocation of existing jobs that are located outside of its jurisdiction to within its jurisdiction in competition with other jurisdictions for those same jobs. In the event that EDA determines that its assistance was used for those purposes, EDA retains the right to pursue appropriate enforcement action in accord with the Standard Terms and Conditions of the Award, including suspension of disbursements and termination of the award for convenience or cause.*

For purposes of ensuring that EDA assistance will not be used to merely transfer jobs from one location in the United States to another, each applicant must inform EDA of all employers that constitute primary beneficiaries of the project assisted by EDA. EDA will consider an employer to be a "primary beneficiary" if the applicant estimates that such employer will create or save 100 or more permanent jobs as a result of the investment assistance, provided that such employer also is specifically named in the application as benefiting from the project, or is or will be located in an EDA-assisted building, port, facility, or industrial, commercial, or business park constructed or improved in whole or in part with Investment Assistance prior to EDA's final disbursement of funds. In smaller communities, EDA may extend this policy to the relocation of 50 or more jobs.

*Application Requirements:* Please read carefully section IV. of the FFO to help ensure your application is complete and timely received by EDA. It is the sole responsibility of the applicant to ensure that the appropriate application package is complete and transmitted to and time-stamped at *http://www.grants.gov* no later than 5 p.m. Eastern Time on October 15, 2010.

*Construction Assistance:* An applicant seeking assistance for a project *with* construction components is required to complete and submit the following:

- Form ED–900 (*Application for Investment Assistance*). One form per project is required. Please read the paragraphs below under "Special Instructions for Completing Form ED–900" carefully for important information on submitting a complete Form ED–900.
- One Form SF–424 (*Application for Federal Assistance*) from *each* co-applicant, as applicable.
- Form SF–424C (*Budget Information—Construction Programs*). One form per project is required.
- One Form SF–424D (*Assurances—Construction Programs*) from *each* co-applicant, as applicable.
- One EDA Construction Investments Additional Assurances form (Exhibit D of Form ED–900) from *each* co-applicant, as applicable.
- One Form CD–511 (*Certification Regarding Lobbying*) from *each* co-applicant, as applicable.

*Non-Construction Assistance:* An applicant seeking assistance for a project *without* construction components is required to complete and submit the following:

- Form ED–900 (*Application for Investment Assistance*). One form per project is required. Please read the paragraphs below under "Special Instructions for Completing Form ED–900" carefully for important information on submitting a complete Form ED–900.
- One Form SF–424 (*Application for Federal Assistance*) from *each* co-applicant, as applicable.
- Form SF–424A (*Budget Information—Non-Construction Programs*). One form per project is required.
- One Form SF–424B (*Assurances—Non-Construction Programs*) from *each* co-applicant, as applicable.
- One EDA Capacity Building Investments Additional Assurances form (Exhibit D of ED 900) from each co-applicant; as applicable.
- One Form CD–511 (*Certification Regarding Lobbying*) from *each* co-applicant, as applicable.

In addition, applicants may be required to provide certain lobbying information using Form SF–LLL (*Disclosure of Lobbying Activities*). Form ED–900 provides detailed guidance to help the applicant assess whether Form SF–LLL is required and how to access it. Please note that, if applicable, one Form SF–LLL must be submitted for *each* co-applicant that has used or plans to use non-Federal funds for lobbying in connection with this competition. In addition, all non-profit applicants and applicants that are first-time recipients of EDA and/or DOC funding are required to provide required individual background screening forms (Form CD–346) for a complete application, but please note that EDA may require other applicants to submit Form CD–346 as well to comply with DOC requirements. EDA will inform applicants if this is required.

*Special Instructions for Completing Form ED–900:* Because of the unique nature of this competition, applicants are advised that modifications to the general application instructions for Form ED–900 are required for a complete application.

- The "Instructions for Electronic and Hardcopy Formats" in Form ED–900 inform applicants to complete the form in Adobe Acrobat Reader 8.1.1. or higher. Please note that the technical requirements of *http://www.grants.gov* have changed, and applicants should be careful to ensure they have downloaded and installed Adobe Acrobat Reader 8.1.3. (instead of 8.1.1.) to complete the application package. Adobe Acrobat Reader 8.1.3. may be downloaded at *http://www.grants.gov/help/download_software.jsp.*

In addition, there are a number of overall instructions and admonitions given in Form ED–900 that Space Coast RIC Competition applicants should disregard. Please read the instructions listed below:

- Applicants should disregard the reference to hardcopy submission in Form ED–900. As noted in this notice, the only method for application submission is through *http://www.grants.gov*.
- Space Coast RIC Competition applicants also should disregard the statement in the "Note on EDA's Application Process" that advises applicants that EDA will request the listed materials only after a project has

been determined to merit "further consideration."

For the Space Coast RIC Competition, all documentation that Form ED–900 advises may be submitted at a later date must be submitted by the competition deadline stated above under **DATES**. These items may be uploaded as attachments to the application package. The following list further details the required submissions for each type of EDA project.

*For all types of projects, the following are required:*

• Projects must be consistent with the region's Comprehensive Economic Development Strategy (CEDS) or alternate EDA-approved strategic planning document. *See* section A.3. of Form ED–900, which requires applicants to identify the relevant plan. If EDA does not already have the applicable plan, the applicant may be required to provide it. If you have any questions about this requirement, please contact the agency contact listed above under **FOR FURTHER INFORMATION CONTACT** and in section VIII. of the FFO.

• Letters of commitment to document non-EDA funding (*see* section A.9. of Form ED–900).

• Form CD–346 (*Applicant for Funding Assistance*) for each key individual of the applicant and co-applicant organization(s), if the organization is a non-profit or is a first-time recipient of EDA or DOC funding.

*For construction projects only, the following are required:*

• Maps of the project site (U.S. Geological Survey (USGS) map(s) and Federal Emergency Management Agency (FEMA) floodplain map (if applicable)) with project components and beneficiaries noted (*see* section A.2. of Form ED–900).

• Letters of commitment and assurances of compliance (Exhibit A to Form ED–900) from private beneficiaries of the proposed project (*see* section B.5. of Form ED–900).

• Comments from the metropolitan area review/clearinghouse agency (*see* section M.1. of Form ED–900).

• A legal opinion and other documentation, as necessary, verifying the applicant's answers to questions regarding project ownership, operation, maintenance, and management (*see* section M.6. of Form ED–900).

• A legal opinion regarding any use of eminent domain. Applicants should contact the agency contact listed above under **FOR FURTHER INFORMATION CONTACT** and in section VIII. of the FFO for guidance on this requirement.

• Any lease(s) encumbering the project property, if applicable. The applicant may provide lease copies.

• A preliminary engineering report (all required elements are listed in section M.3. of Form ED–900; special formatting is not required).

• An environmental narrative that will enable EDA to comply with its National Environmental Policy Act (NEPA) responsibilities. An environmental narrative outline that details requires components may be accessed at *http://www.eda.gov/PDF/single_app_narrrative_111008.pdf.* Applicants should include Appendix A to the environmental narrative signed by each co-applicant, as applicable.

• Project sign-off/approval from U.S. Army Corps of Engineers and the U.S. Fish and Wildlife Service, if applicable. Note the environmental narrative instructions (provided in the link above) state that approval comments from regulatory agencies should be obtained and submitted as an attachment to the environmental narrative. If an applicant has initiated environmental review processes, but is unable to receive final approval by the competition deadline, EDA will accept a letter from the applicable regulatory agency stating that the project has conditional approval. In such circumstances, EDA will include any conditions as part of the award. If the application does not include these sign-off/approvals and EDA subsequently determines that these are required, the applicant will be required to obtain and submit them after the competition deadline.

• Copies of any other environmental studies, if available.

• Comments from the State Clearinghouse in compliance with Executive Order 12372, "Intergovernmental Review of Federal Programs." Detailed information on the State Clearinghouse process can be accessed at *http://www.dep.state.fl.us/secretary/oip/state_clearinghouse/manual2.htm.*

• Documented approval from the State Historic Preservation Officer (SHPO), as applicable. Note that if the applicant has initiated the consultation process, but the SHPO is unable to give final approval by the competition deadline, EDA will accept a letter from the SHPO stating that the project has conditional approval or that the applicant has satisfactorily initiated the consultation process required under section 106 of the National Historic Preservation Act. EDA, after compliance with requirements for consultation with federally recognized Indian Tribes, may require applicants to participate in Tribal consultation, as necessary. EDA will include any conditions from the conditional approval or consultation process as part of the award.

*For Revolving Loan Fund projects only, the following is required:*

• RLF Plan for the RLF's financial management. *See* EDA's regulation at 13 CFR 307.9 for more information on requirements for RLF Plans.

*For non-profit applicants only, the following are required:*

• Certificate of good standing from the State in which the organization is incorporated.

• A copy of the organization's current Articles of Incorporation and By-Laws.

• Resolution (or letter) from a general purpose subdivision of State government acknowledging that the organization is acting in cooperation with officials of that political subdivision.

• Form CD–346 (*Applicant for Funding Assistance*) for each key individual of the non-profit, which includes the executive director, project manager, chief financial manager, and any other person or entity who has authority to speak for and/or commit the organization in the management of an award and/or expend funds.

*Informational Teleconference:* EDA will hold an informational teleconference for the Space Coast RIC Competition on September 8, 2010, at 2 p.m. Eastern Time. This teleconference will be used to provide general competition and application submission information and answer participant questions.

To ensure that enough incoming lines are available for each caller, interested parties planning to participate on the teleconference must register no later than 5 p.m. Eastern Time on September 7, 2010. To register, please send an e-mail to *SpaceCoast@eda.doc.gov* with "Space Coast RIC Competition Teleconference Registration" in the subject line, along with the names and addresses of the potential applicant(s). In addition, provide the name and title of the telephone participant along with the participant's telephone number and e-mail address. The telephone number and pass code for the teleconference will be provided upon receipt of registration.

Please be advised that the informational teleconference will be audio-taped and the actual recording (or a transcript) is to be made available for the benefit of prospective applicants unable to participate. Prospective applicants who choose to participate in the teleconference are deemed to consent to the taping. A recording of the teleconference may be accessed by calling 1–866–462–8979 and entering the pass code 0908. This recording will be available between 6 p.m. Eastern Time on September 8, 2010, and 5 p.m.

Eastern Time on October 16, 2010, the day after the competition deadline.

*Intergovernmental Review:* Applications for assistance under EDA's programs are subject to the State review requirements imposed by Executive Order 12372, "*Intergovernmental Review of Federal Programs.*"

*Evaluation and Selection Procedures:*

1. *Responsiveness Review.*

Staff in EDA's Atlanta regional office, which serves the State of Florida, will review all applications for responsiveness. Applications that are ineligible for EDA funding or that do not contain all forms and required documentation listed in section IV. of the FFO may be deemed non-responsive and excluded from further consideration. EDA expects all applicants to complete and include all required forms and documentation. However, EDA reserves the right to forward timely and otherwise complete applications that may contain a non-substantive technical deficiency to the Interagency Review Panel for further consideration. In addition, staff in the Atlanta Regional Office will conduct a statutory and regulatory compliance review for each responsive application and an initial merit review under the evaluation criteria set out below and in section V.A. of the FFO, both of which will be provided to the Interagency Review Panel.

2. *Interagency Federal Investment Review Panel.*

Upon completion of the responsiveness review, a Federal interagency investment review panel (Interagency Review Panel) that will be composed of senior officials from EDA and other federal agencies, which shall include NASA, SBA, and DOL, will review and evaluate all responsive applications according to the criteria set out below. The Interagency Review Panel will either forward its ranked list and any comments to the Selecting Official (defined below), or identify any deficiencies in the review process and convene a new EDA responsiveness review panel in the Atlanta Regional Office to restart the selection process.

3. *Selecting Official and Selecting Factors.*

Under this notice, the Regional Director in the Atlanta Regional Office is the Selecting Official. The Selecting Official may follow the recommendations of the Interagency Review Panel; however, the Selecting Official retains the discretion not to make a selection, or to select an application out of order for any of the following reasons:

a. Availability of program funding,

b. A determination that the application better meets the overall objectives of sections 2 and 209 of PWEDA (42 U.S.C. 3121 and 3149),

c. A determination that the application is more responsive to programmatic and/or policy considerations,

d. The applicant's non-compliance with statutory and regulatory requirements, including PWEDA, EDA's regulations set out at 13 CFR chapter III, and DOC regulations set out at 15 CFR parts 14 or 24, as applicable, or

e. The applicant's performance under previous federal financial assistance awards.

If the Selecting Official makes a selection out of order, he will document the rationale for the decision in writing. The Selecting Official will submit his decision to EDA headquarters for review before making the final selection.

*Evaluation Criteria:* The Interagency Review Panel will evaluate applications competitively based on the following criteria, which will be weighted equally:

1. *Collaborative Regional Innovation.* Initiatives that support the development and growth of Central Florida's Aviation and Aerospace, Cleantech, Homeland Security/Defense, Information Technology, and Life Sciences industry clusters. Initiatives must engage stakeholders; facilitate collaboration among urban, suburban and rural (including Tribal) areas; provide stability for economic development through long-term intergovernmental and public/private collaboration; and support the growth of existing and emerging industries.

2. *Public/Private Partnerships.* Investments that use both public and private sector resources and leverage complementary investments by other government/public entities and/or non-profits.

3. *Global Competitiveness.* Investments that support high-growth businesses and innovation-based entrepreneurs to expand and compete in global markets.

4. *Environmentally Sustainable Development.* Investments that encompass best practices in "environmentally sustainable development," broadly defined, to include projects that enhance environmental quality and develop and implement green products, processes, and buildings as part of the green economy.

5. *Economically Distressed and Underserved Communities.* Investments that strengthen diverse communities that have suffered disproportionate economic and job losses and/or are rebuilding to become more competitive in the global economy.

6. *Total Job Creation.* Investments that demonstrate a clear, comprehensive, and effective strategy for the recruitment, training, placement, and retention of a skilled workforce.

7. *Implementation Schedule.* Investments with demonstrated capacity to be implemented quickly and effectively, accelerating positive economic impacts.

8. *Feasibility of Budget and Value to the Federal Government.* Investments that demonstrate a high degree of local commitment through the amount and type of match committed. EDA also will evaluate the expected benefits of the proposed scope of work in light of the goals of this competition and the cost to the Federal Government.

*The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements:* The administrative and national policy requirements for all Department of Commerce awards, contained in the *Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements,* published in the **Federal Register** on February 11, 2008 (73 FR 7696), are applicable to this competition.

*Paperwork Reduction Act:* This document contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA). The use of Form ED–900 (*Application for Investment Assistance*) has been approved by the Office of Management and Budget (OMB) under the Control Number 0610–0094. The use of Forms SF–424 (*Application for Financial Assistance*), SF–424A (*Budget Information—Non-Construction Programs*), SF–424B (*Assurances—Non-Construction Programs*), SF–424C (*Budget Information—Construction Programs*), SF–424D (*Assurances—Construction Programs*), and Form SF–LLL (*Disclosure of Lobbying Activities*) has been approved under OMB Control Numbers 4040–0004, 0348–0044, 4040–0007, 4040–0008, 4040–0009, and 0348–0046 respectively. The Form CD–346 (*Applicant for Funding Assistance*) is approved under OMB Control Number 0605–0001. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB Control Number.

*Executive Order 12866 (Regulatory Planning and Review):* This notice has been determined to be not significant for purposes of Executive Order 12866.

*Executive Order 13132 (Federalism):* It has been determined that this notice does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

*Administrative Procedure Act/ Regulatory Flexibility Act:* Prior notice and an opportunity for public comments are not required by the Administrative Procedure Act or any other law for rules concerning grants, benefits, and contracts (5 U.S.C. 553(a)(2)). Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis has not been prepared.

Dated: August 27, 2010.

**Sean Cartwright,**

*Chief of Staff.*

[FR Doc. 2010–21905 Filed 8–31–10; 8:45 am]

**BILLING CODE 3510–24–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XX27**

### Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Operations of a Liquified Natural Gas Port Facility in Massachusetts Bay

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

**ACTION:** Notice of issuance of an incidental harassment authorization.

**SUMMARY:** In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that NMFS has issued an Incidental Harassment Authorization (IHA) to the Northeast Gateway Energy Bridge™ LP (Northeast Gateway or NEG) and its partner, Algonquin Gas Transmission, LLC (Algonquin), to incidentally harass, by Level B harassment only, small numbers of marine mammals during operation of an offshore liquefied natural gas (LNG) facility in the Massachusetts Bay for a period of 1 year.

**DATES:** This authorization is effective from August 31, 2010, until August 30, 2011.

**ADDRESSES:** A copy of the application, IHA, and a list of references used in this document may be obtained by writing to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. A copy of the application may be obtained by writing to this address or by telephoning the contact listed here and is also available at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.*

**FOR FURTHER INFORMATION CONTACT:** Shane Guan, Office of Protected Resources, NMFS, (301) 713–2289, ext 137.

**SUPPLEMENTARY INFORMATION:**

#### Background

Section 101(a)(5)(D) of the MMPA (16 U.S.C. 1371 (a)(5)(D)) directs the Secretary of Commerce to authorize, upon request, the incidental, but not intentional, taking by harassment of small numbers of marine mammals of a species or population stock, for periods of not more than one year, by United States citizens who engage in a specified activity (other than commercial fishing) within a specific geographic region if certain findings are made and a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined "negligible impact" in 50 CFR 216.103 as " * * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as:

any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

#### Summary of Request

On June 14, 2010, NMFS received an application from Excelerate Energy, LP (Excelerate) and Tetra Tech EC, Inc., on behalf of Northeast Gateway and Algonquin for an authorization to take 12 species of marine mammals by Level B harassment incidental to operations of an LNG port facility in Massachusetts Bay. Since LNG Port operation and maintenance activities have the potential to take marine mammals, a marine mammal take authorization under the MMPA is warranted. NMFS has already issued a one-year incidental harassment authorization for this activity pursuant to section 101(a)(5)(D) of the MMPA (74 FR 45613; September 3, 2009), which expires on August 31, 2010. In order for Northeast Gateway and Algonquin to continue their operations of the LNG port facility in Massachusetts Bay, both companies are seeking a renewal of their IHA.

#### Description of the Activity

The Northeast Gateway Port is located in Massachusetts Bay and consists of a submerged buoy system to dock specially designed LNG carriers approximately 13 mi (21 km) offshore of Massachusetts in Federal waters approximately 270 to 290 ft (82 to 88 m) in depth. This facility delivers regasified LNG to onshore markets via a 16.06-mi (25.8-km) long, 24-in (61-cm) outside diameter natural gas pipeline lateral (Pipeline Lateral) owned and operated by Algonquin and interconnected to Algonquin's existing offshore natural gas pipeline system in Massachusetts Bay (HubLine).

The Northeast Gateway Port consists of two subsea Submerged Turret Loading™ (STLJ™) buoys, each with a flexible riser assembly and a manifold connecting the riser assembly, via a steel flowline, to the subsea Pipeline Lateral. Northeast Gateway utilizes vessels from its current fleet of specially designed Energy Bridge Regasification Vessels™ (EBRVs™), each capable of transporting approximately 2.9 billion $ft^3$ (82 million $m^3$) of natural gas condensed to 4.9 million $feet^3$ (138,000 $m^3$) of LNG. Northeast Gateway would also be adding vessels to its fleet that will have a cargo capacity of approximately 151,000 cubic $m^3$. The

mooring system installed at the Northeast Gateway Port is designed to handle both the existing vessels and any of the larger capacity vessels that may come into service in the future. The EBRVs would dock to the STL buoys, which would serve as both the single-point mooring system for the vessels and the delivery conduit for natural gas. Each of the STL buoys is secured to the seafloor using a series of suction anchors and a combination of chain/cable anchor lines.

The proposed activity includes Northeast Gateway LNG Port operations and maintenance. A detailed description of these activities is provided in the **Federal Register** notice for the proposed IHA (75 FR 42071; July 20, 2010), and is not repeated here.

**Comments and Responses**

A notice of receipt and request for public comment on the application and proposed authorization was published on July 20, 2010 (75 FR 42071). During the 30-day public comment period, NMFS received comments from the Marine Mammal Commission (Commission).

*Comment 1:* The Commission recommends that NMFS include in the authorization and in any proposed regulations issued by NMFS to govern the activities during the subsequent five-year period all marine mammal mitigation, monitoring, and reporting measures identified in NMFS **Federal Register** notice (75 FR 42071; July 20, 2010).

*Response:* NMFS concurs with the Commission's recommendation and will include in the authorization and in any proposed regulations issued in the future that govern activities during the subsequent five-year period all marine mammal mitigation, monitoring, and reporting measures identified in the **Federal Register** notice for the proposed IHA (75 FR 42071; July 20, 2010). Furthermore, additional mitigation and monitoring measures may be proposed if any proposed regulation issued in the future covers LNG port repair activities that are not addressed in this document.

*Comment 2:* The Commission recommends that NMFS issue the IHA provided that NMFS requires the applicants to halt activities and consult with NMFS regarding any seriously injured or dead marine mammals when the injury or death may have resulted from those activities and allow resumption of those activities only after steps to avoid additional serious injuries or deaths have been implemented or such takings have been authorized under section 101(a)(5)(A) of the MMPA.

*Response:* NMFS concurs with the Commission's recommendation raised in the above comment, and extends the suspension requirement to any type of injury, not just serious injury, if it could be attributable to LNG activities.

**Description of Marine Mammals in the Area of the Specified Activities**

Marine mammal species that potentially occur in the vicinity of the Northeast Gateway facility include several species of cetaceans and pinnipeds:

- North Atlantic right whale (*Eubalaena glacialis*),
- Humpback whale (*Megaptera novaeangliae*),
- Fin whale (*Balaenoptera physalus*),
- Minke whale (*B. acutorostrata*),
- Long-finned pilot whale (*Globicephala melas*),
- Atlantic white-sided dolphin (*Lagenorhynchus acutus*),
- Bottlenose dolphin (*Tursiops truncatus*),
- Common dolphin (*Delphinus delphis*),
- Killer whale (*Orcinus orca*),
- Harbor porpoise (*Phocoena phocoena*),
- Harbor seal (*Phoca vitulina*), and
- Gray seal (*Halichoerus grypus*).

General information on these marine mammal species can also be found in Wursig *et al.* (2000) and in the NMFS Stock Assessment Reports (Waring *et al.,* 2010). This latter document is available at: *http://www.nefsc.noaa.gov/publications/tm/tm213/.* An updated summary on several commonly sighted marine mammal species distribution and abundance in the vicinity of the proposed action area is provided below. Additional information on those species that may be affected by this activity is provided in detail in the **Federal Register** published on July 20, 2010 (75 FR 42071).

**Potential Effects of Noise on Marine Mammals**

Underwater noise from the LNG port operations is the only likely impact to marine mammals in the vicinity of the proposed activity area.

The effects of noise on marine mammals are highly variable, and can be categorized as follows (based on Richardson *et al.,* 1995): (1) The noise may be too weak to be heard at the location of the animal (*i.e.,* lower than the prevailing ambient noise level, the hearing threshold of the animal at relevant frequencies, or both); (2) the noise may be audible but not strong enough to elicit any overt behavioral response; (3) the noise may elicit reactions of variable conspicuousness and variable relevance to the well being of the marine mammal; these can range from temporary alert responses to active avoidance reactions such as vacating an area at least until the noise event ceases; (4) upon repeated exposure, a marine mammal may exhibit diminishing responsiveness (habituation), or disturbance effects may persist; the latter is most likely with sounds that are highly variable in characteristics, infrequent and unpredictable in occurrence, and associated with situations that a marine mammal perceives as a threat; (5) any anthropogenic noise that is strong enough to be heard has the potential to reduce (mask) the ability of a marine mammal to hear natural sounds at similar frequencies, including calls from conspecifics, and underwater environmental sounds such as surf noise; (6) if mammals remain in an area because it is important for feeding, breeding or some other biologically important purpose even though there is chronic exposure to noise, it is possible that there could be noise-induced physiological stress; this might in turn have negative effects on the well-being or reproduction of the animals involved; and (7) very strong sounds have the potential to cause temporary or permanent reduction in hearing sensitivity. In terrestrial mammals, and presumably marine mammals, received sound levels must far exceed the animal's hearing threshold for there to be any temporary threshold shift (TTS) in its hearing ability. For transient sounds, the sound level necessary to cause TTS is inversely related to the duration of the sound. Received sound levels must be even higher for there to be risk of permanent hearing impairment. In addition, intense acoustic (or explosive events) may cause trauma to tissues associated with organs vital for hearing, sound production, respiration and other functions. This trauma may include minor to severe hemorrhage.

There are three general categories of sounds recognized by NMFS: Continuous (such as shipping sounds), intermittent (such as vibratory pile driving sounds), and impulse. No impulse noise activities, such as blasting or standard pile driving, are associated with this project. The noise sources of potential concern are regasification/offloading (which is a continuous sound) and dynamic positioning of vessels using thrusters (an intermittent sound) from EBRVs during docking at the NEG port facility. Based on research by Malme *et al.* (1983; 1984), for both continuous and

intermittent sound sources, Level B harassment is presumed to begin at received levels of 120-dB. A detailed description of the noise that would result from the proposed LNG Port operations is provided in the **Federal Register** notice for the final IHA authorizing take incidental to the initial construction and operations of the NEG LNG Port facility and Pipeline Lateral in 2007 (72 FR 27077; May 14, 2007).

**NEG Port Activities**

Underwater noise generated at the NEG Port has the potential to result from two distinct actions, including closed-loop regasification of LNG and/or EBRV maneuvering during coupling and decoupling with STL buoys. To evaluate the potential for these activities to result in underwater noise that could harass marine mammals, Excelerate conducted field sound survey studies during periods of March 21 to 25, 2005 and August 6 to 9, 2006 while the EBRV *Excelsior* was both maneuvering and moored at the operational Gulf Gateway Port located 116 mi (187 km) offshore in the Gulf of Mexico (the Gulf) (*see* Appendices B and C of the NEG and Algonquin application). EBRV maneuvering conditions included the use of both stern and bow thrusters required for dynamic positioning during coupling. These data were used to model underwater sound propagation at the NEG Port. The pertinent results of the field survey are provided as underwater sound source pressure levels as follows:

- Sound levels during closed-loop regasification ranged from 104 to 110 decibel linear (dBL). Maximum levels during steady state operations were 108 dBL.
- Sound levels during coupling operations were dominated by the periodic use of the bow and stern thrusters and ranged from 160 to 170 dBL.

Figures 1–1 and 1–2 of the NEG and Algonquin's revised MMPA permit application present the net acoustic impact of one EBRV operating at the NEG Port. Thrusters are operated intermittently and only for relatively short durations of time. The resulting area within the 120 dB isopleth is less than 1 $km^2$ with the linear distance to the isopleths extending 430 m (1,411 ft). The area within the 180 dB isopleths safety zone is very localized and will not extend beyond the immediate area where EBRV coupling operations are occurring.

The potential impacts to marine mammals associated with sound propagation from vessel movements, anchors, chains and LNG regasification/offloading could be the temporary and short-term displacement of seals and whales from within the 120-dB zones ensonified by these noise sources. Animals would be expected to re-occupy the area once the noise ceases.

Although accidental oil spill/leaks from EBRVs or a ship strike could potentially occur as a result of the specified activity, NMFS considers these events unlikely. Regarding ship strikes, there are mitigation and monitoring measures (*see* Mitigation Measures section below) required by the IHA that should further reduce the already low probability of a ship strike. Regarding the likelihood of spills or leaks, the waterway within the Massachusetts Bay has few hazards for vessels transiting the area compared to less navigated waters; an accident that might result in a spill or leak is unlikely. Additionally, each vessel maintains an adequate supply of oil spill containment equipment for onboard oil spills. The vessel is contracted to and drills with a certified Oil Spill Response Organization by the International Maritime Organization to respond in the unlikely event of an oil spill that cannot be contained on board the vessel. At this time, there has never been a spill from an LNG port facility. NMFS does not think that take of marine mammals is likely to result from accidental oil spils, leaks or ship strikes as a result of this activity. Therefore, these potential impacts are not addressed further, and take from these impacts will not be authorized.

**Estimates of Take by Harassment**

Although Northeast Gateway stated that the ensonified area of 120-dB isopleths by EBRV's decoupling would be less than 1 $km^2$ as measured in the Gulf of Mexico in 2005, due to the lack of more recent sound source verification and the lack of source measurement in Massachusetts Bay, NMFS uses a more conservative spreading model to calculate the 120 dB isopleth received sound level. This model was also used to establish the 120-dB zone of influence (ZOI) for the previous IHAs issued to Northeast Gateway. In the vicinity of the LNG Port, where the water depth is about 80 m (262 ft), the 120-dB radius is estimated to be 2.56 km (1.6 mi) maximum from the sound source during dynamic positioning for the container ship, making a maximum ZOI of 21 $km^2$ (8.1 $mi^2$). For a shallow water depth (40 m or 131 ft) representative of the northern segment of the Algonquin Pipeline Lateral, the 120-dB radius is estimated to be 3.31 km (2.06 mi); the associated ZOI is 34 $km^2$ (13.1 $mi^2$).

The basis for Northeast Gateway and Algonquin's "take" estimate is the number of marine mammals that would be exposed to sound levels in excess of 120 dB. For the NEG port facility operations, the take estimates are determined by multiplying the area of the EBRV's ZOI (21 $km^2$) by local marine mammal density estimates, corrected to account for 50 percent more marine mammals that may be underwater, and then multiplying by the estimated LNG container ship visits per year. In the case of data gaps, a conservative approach was used to ensure the potential number of takes is not underestimated, as described next.

NMFS used data on cetacean distribution within Massachusetts Bay, such as those published by the National Centers for Coastal Ocean Science (NCCOS, 2006), to estimate potential takes of marine mammals species in the vicinity of project area. The NCCOS study used cetacean sightings from two sources: (1) The North Atlantic Right Whale Consortium (NARWC) sightings database held at the University of Rhode Island (Kenney, 2001); and (2) the Manomet Bird Observatory (MBO) database, held at NMFS Northeast Fisheries Science Center (NEFSC). The NARWC data contained survey efforts and sightings data from ship and aerial surveys and opportunistic sources between 1970 and 2005. The main data contributors included: Cetacean and Turtles Assessment Program (CETAP), Canadian Department of Fisheries and Oceans, Provincetown Center for Coastal Studies (PCCS), International Fund for Animal Welfare, NOAA's NEFSC, New England Aquarium, Woods Hole Oceanographic Institution, and the University of Rhode Island. A total of 653,725 km (406,293 mi) of survey track and 34,589 cetacean observations were provisionally selected for the NCCOS study in order to minimize bias from uneven allocation of survey effort in both time and space. The sightings-per-unit-effort (SPUE) was calculated for all cetacean species by month covering the southern Gulf of Maine study area, which also includes the project area (NCCOS, 2006).

The MBO's Cetacean and Seabird Assessment Program (CSAP) was contracted from 1980 to 1988 by NMFS NEFSC to provide an assessment of the relative abundance and distribution of cetaceans, seabirds, and marine turtles in the shelf waters of the northeastern United States (MBO, 1987). The CSAP program was designed to be completely compatible with NMFS NEFSC databases so that marine mammal data could be compared directly with fisheries data throughout the time series

during which both types of information were gathered. A total of 5,210 km (8,383 mi) of survey distance and 636 cetacean observations from the MBO data were included in the NCCOS analysis. Combined valid survey effort for the NCCOS studies included 567,955 km (913,840 mi) of survey track for small cetaceans (dolphins and porpoises) and 658,935 km (1,060,226 mi) for large cetaceans (whales) in the southern Gulf of Maine. The NCCOS study then combined these two data sets by extracting cetacean sighting records, updating database field names to match the NARWC database, creating geometry to represent survey tracklines and applying a set of data selection criteria designed to minimize uncertainty and bias in the data used.

Owing to the comprehensiveness and total coverage of the NCCOS cetacean distribution and abundance study, NMFS calculated the estimated take of marine mammals based on the most recent NCCOS report published in December 2006. For a detailed description and calculation of the cetacean abundance data and sighting per unit effort (SPUE), please refer to the NCCOS study (NCCOS, 2006). These data show that the relative abundance of North Atlantic right, fin, humpback, minke, and pilot whales, and Atlantic white-sided dolphins for all seasons, as calculated by SPUE in number of animals per square kilometer, is 0.0082, 0.0097, 0.0265, 0.0059, 0.0407, and 0.1314 n/km, respectively.

In calculating the area density of these species from these linear density data, NMFS used 0.4 km (0.25 mi), which is a quarter the distance of the radius for visual monitoring (see Monitoring and Mitigation section below), as a conservative hypothetical strip width (W). Thus the area density (D) of these species in the project area can be obtained by the following formula: $D = SPUE/2W$.

Based on this calculation method, the estimated take numbers per year for North Atlantic right, fin, humpback, minke, sei, and pilot whales, and Atlantic white-sided dolphins by the NEG Port facility operations, which is an average of 65 visits by LNG container ships to the project area per year (or approximately 1.25 visits per week), operating the vessels' thrusters for dynamic positioning before offloading natural gas, corrected for 50 percent underwater, are 21, 25, 68, 15, 11, 104, and 336, respectively. These numbers represent a maximum of 6.08, 1.09, 8.01, 0.46, 2.78, 0.39, and 0.53 percent of the populations for these species, respectively. Since it is very likely that individual animals could be "taken" by harassment multiple times, these percentages are the upper boundary of the animal population that could be affected. Therefore, the actual number of individual animals being exposed or taken would be far less. There is no danger of injury, death, or hearing impairment from exposure to these noise levels.

In addition, bottlenose dolphins, common dolphins, killer whales, harbor porpoises, harbor seals, and gray seals could also be taken by Level B harassment as a result of deepwater LNG port operations. The numbers of estimated take of these species are not available because they are rare in the project area. The population estimates of these marine mammal species and stock in the west North Atlantic basin are 81,588; 120,743; 89,054; 99,340; and 195,000 for bottlenose dolphins, common dolphins, harbor porpoises, and harbor seals, respectively (Waring *et al.,* 2010). No population estimate is available for the North Atlantic stock of killer whales and gray seals; however, their occurrence within the proposed project area is rare. Since the Massachusetts Bay represents only a small fraction of the west North Atlantic basin where these animals occur, and these animals do not congregate in the vicinity of the project area, NMFS believes that only relatively small numbers of these marine mammal species would be potentially affected by the Northeast Gateway LNG deepwater project.

**Potential Impact on Habitat**

Approximately 4.8 acres of seafloor has been converted from soft substrate to artificial hard substrate. The soft-bottom benthic community may be replaced with organisms associated with naturally occurring hard substrate, such as sponges, hydroids, bryozoans, and associated species. The benthic community in the up to 43 acres (worst case scenario based on severe 100-year storm with EBRVs occupying both STL buoys) of soft bottom that may be swept by the anchor chains while EBRVs are docked will have limited opportunity to recover, so this area will experience a long-term reduction in benthic productivity. In addition, disturbance from anchor chain movement would result in increased turbidity levels in the vicinity of the buoys that could affect prey species for marine mammals; however, as indicated in the Final Environmental Impact Statement/ Environmental Impact Report (EIS/EIR), these impacts are expected to be indirect and minor.

Daily removal of sea water from EBRV intakes will reduce the food resources available for planktivorous organisms. Water usage would be limited to the standard requirements of NEG's normal support vessel. As with all vessels operating in Massachusetts Bay, sea water uptake and discharge is required to support engine cooling, typically using a once-through system. The rate of seawater uptake varies with the ship's horsepower and activity and therefore will differ between vessels and activity type. For example, the Gateway Endeavor is a 90-foot vessel powered with a 1,200 horsepower diesel engine with a four-pump seawater cooling system. This system requires seawater intake of about 68 gallons per minute (gpm) while idling and up to about 150 gpm at full power. Use of full power is generally required for transit. A conservatively high estimate of vessel activity for the Gateway Endeavor would be operation at idle for 75% of the time and full power for 25% of the time. During routine activities this would equate to approximately 42,480 gallons of seawater per 8-hour work day. When compared to the engine cooling requirements of an EBRV over an 8-hour period (approximately 17.62 million gallons), the Gateway Endeavor uses about 0.2% of the EBRV requirement. To put this water use into context, the Project's final EIS/EIR concluded that the impacts to fish populations and to marine mammals that feed on fish or plankton resulting from water use by an EBRV during port operations (approximately 39,780,000 gallons over each 8-day regasification period) would be minor. Water use by support vessels during routine port activities would not materially add to the overall impacts evaluated in the final EIS/EIR. Additionally, discharges associated with the Gateway Endeavor and/or other support/maintenance vessels that are 79 feet or greater in length are now regulated under the Clean Water Act (CWA) and must receive and comply with the United States Environmental Protection Agency (EPA) Vessel General Permit (VGP). The permit incorporates the USCG mandatory ballast water management and exchange standards, and provides technology- and water quality-based effluent limits for other types of discharges, including deck runoff, bilge water, graywater, and other pollutants. It also establishes specific corrective actions, inspection and monitoring requirements, and recordkeeping and reporting requirements for each vessel. Massachusetts Bay circulation will not be altered, so plankton will be

continuously transported into the NEG Port area. The removal of these species is minor and unlikely to affect in a measurable way the food sources available to marine mammals.

**Monitoring and Mitigation Measures**

During the construction and operations of the NEG LNG Port facility in prior years, Northeast Gateway complied with IHA requirements and submitted reports on marine mammal sightings in the area. While it is difficult to draw biological conclusions from these reports, NMFS can make some general conclusions. Data gathered by MMOs is generally useful to indicate the presence or absence of marine mammals (often to a species level) within the safety zones (and sometimes without) and to document the implementation of mitigation measures. Though it is by no means conclusory, it is worth noting that no instances of obvious behavioral disturbance as a result of Northeast Gateway's activities were observed by the MMOs.

In addition, Northeast Gateway was required to maintain an array of Marine Autonomous Recording Units (MARUs) to monitor calling North Atlantic right whales (humpback, fin, and minke whale calls were also able to be detected). The Bioacoustics Research Program (BRP) of Cornell University analyzed the data and submitted a report covering the operations of the project between January and December 2008. During the operations period, right whales were acoustically detected on only 1,982 of the 136,776 total hours sampled (1.45% of recorded hours). Right whales were detected hourly throughout the year, but were more commonly detected in the late February through June period.

The Cornell's BRP performed acoustic analyses on background noise of all recordings from the MARUs. A comparison of the noise metrics derived from these analyses before, during, and after operations activities revealed increases in noise level during operations. A comparison of noise levels from areas including and near areas of known operations activities with levels from other areas showed increased noise levels for areas that included or were near the known operations activities. These increases in noise levels were evident for each of the three frequency bands utilized by fin, humpback, and right whales, with the greatest increase in the right whale band and the next highest increase in the humpback whale band. However, the BRP report did not provide an interpretation of this overall increase in noise conditions throughout the period when operations activities occurred. Nevertheless, NMFS does not consider that the sporadic exposure of marine mammals to continuous sound received levels above 120 dB by a single EBRV would have acute or chronic significant affects on these animals in the vicinity of the LNG port facility. These MARUs will remain deployed during the time frame of this IHA in order to obtain information during the operational phase of the Port facility (see below).

For the proposed NEG LNG port operations, NMFS proposes the following monitoring and mitigation measures.

*Marine Mammal Observers*

For activities related to the NEG LNG port operations, all individuals onboard the EBRVs responsible for the navigation and lookout duties on the vessel must receive training prior to assuming navigation and lookout duties, a component of which will be training on marine mammal sighting/reporting and vessel strike avoidance measures. Crew training of EBRV personnel will stress individual responsibility for marine mammal awareness and reporting.

If a marine mammal is sighted by a crew member, an immediate notification will be made to the Person-in-Charge on board the vessel and the Northeast Port Manager, who will ensure that the required vessel strike avoidance measures and reporting procedures are followed.

*Vessel Strike Avoidance*

(1) All EBRVs approaching or departing the port will comply with the Mandatory Ship Reporting (MSR) system to keep apprised of right whale sightings in the vicinity. Vessel operators will also receive active detections from an existing passive acoustic array prior to and during transit through the northern leg of the Boston Traffic Separation Scheme (TSS) where the buoys are installed.

(2) In response to active right whale sightings (detected acoustically or reported through other means such as the MSR or Sighting Advisory System (SAS)), and taking into account safety and weather conditions, EBRVs will take appropriate actions to minimize the risk of striking whales, including reducing speed to 10 knots or less and alerting personnel responsible for navigation and lookout duties to concentrate their efforts.

(3) EBRVs will maintain speeds of 12 knots or less while in the TSS until reaching the vicinity of the buoys (except during the seasons and areas defined below, when speed will be limited to 10 knots or less). At 1.86 mi (3 km) from the NEG port, speed will be reduced to 3 knots, and to less than 1 knot at 1,640 ft (500 m) from the buoy.

(4) EBRVs will reduce transit speed to 10 knots or less over ground from March 1–April 30 in all waters bounded by straight lines connecting the following points in the order stated below. This area is known as the Off Race Point Seasonal Management Area (SMA) and tracks NMFS regulations at 50 CFR 224.105:

42°30′00.0″ N—069°45′00.0″ W; thence to 42°30′00.0″ N—070°30′00.0″ W; thence to 42°12′00.0″ N—070°30′00.0″ W; thence to 42°12′00.0″ N—070°12′00.0″ W; thence to 42°04′56.5″ N—070°12′00.0″ W; thence along charted mean high water line and inshore limits of COLREGS limit to a latitude of 41°40′00.0″ N; thence due east to 41°41′00.0″ N—069°45′00.0″ W; thence back to starting point.

(5) EBRVs will reduce transit speed to 10 knots or less over ground from April 1–July 31 in all waters bounded by straight lines connecting the following points in the order stated below. This area is also known as the Great South Channel SMA and tracks NMFS regulations at 50 CFR 224.105:

42°30′00.0″ N—69°45′00.0″ W; 41°40′00.0″ N—69°45′00.0″ W; 41°00′00.0″ N—69°05′00.0″ W; 42°09′00.0″ N—67°08′24.0″ W; 42°30′00.0″ N—67°27′00.0″ W; and 42°30′00.0″ N—69°45′00.0″ W.

(6) LNG Regasification Vessels (LNGRVs) are not expected to transit Cape Cod Bay. However, in the event transit through Cape Cod Bay is required, LNGRVs will reduce transit speed to 10 knots or less over ground from January 1–May 15 in all waters in Cape Cod Bay, extending to all shorelines of Cape Cod Bay, with a northern boundary of 42°12′00.0″ N latitude.

(7) A vessel may operate at a speed necessary to maintain safe maneuvering speed instead of the required ten knots only if justified because the vessel is in an area where oceanographic, hydrographic and/or meteorological conditions severely restrict the maneuverability of the vessel and the need to operate at such speed is confirmed by the pilot on board or, when a vessel is not carrying a pilot, the master of the vessel. If a deviation from the ten-knot speed limit is necessary, the reasons for the deviation, the speed at which the vessel is operated, the latitude and longitude of the area, and the time and duration of such deviation shall be entered into the logbook of the vessel. The master of the vessel shall

attest to the accuracy of the logbook entry by signing and dating it.

*Research Passive Acoustic Monitoring (PAM) Program*

Northeast Gateway shall monitor the noise environment in Massachusetts Bay in the vicinity of the NEG Port using an array of 19 Marine Autonomous Recording Units (MARUs) that were deployed initially in April 2007 to collect data during the preconstruction and active construction phases of the NEG Port and Algonquin Pipeline Lateral. A description of the MARUs can be found in Appendix A of the NEG and Algonquin application. These 19 MARUs will remain in the same configuration during full operation of the NEG Port. The MARUs collect archival noise data and are not designed to provide real-time or near-real-time information about vocalizing whales. Rather, the acoustic data collected by the MARUs shall be analyzed to document the seasonal occurrences and overall distributions of whales (primarily fin, humpback, and right whales) within approximately 10 nautical miles of the NEG Port, and shall measure and document the noise "budget" of Massachusetts Bay so as to eventually assist in determining whether an overall increase in noise in the Bay associated with the NEG Port might be having a potentially negative impact on marine mammals. The overall intent of this system is to provide better information for both regulators and the general public regarding the acoustic footprint associated with long-term operation of the NEG Port in Massachusetts Bay, and the distribution of vocalizing marine mammals during NEG Port activities. In addition to the 19 MARUs, Northeast Gateway will deploy 10 Auto-Detection Buoys (Abs) within the TSS for the operational life of the NEG Port. A description of the ABs is provided in Appendix A of NEG and Algonquin's application. The purpose of the ABs shall be to detect a calling North Atlantic right whale an average of 5 nm (9.26 km) from each AB (detection ranges will vary based on ambient underwater conditions). The AB system shall be the primary detection mechanism that alerts the EBRV captains to the occurrence of right whales, heightens EBRV awareness, and triggers necessary mitigation actions as described in the Marine Mammal Detection, Monitoring, and Response Plan included as Appendix A of the NEG application.

Northeast Gateway has engaged representatives from Cornell University's Bioacoustics Research Program (BRP) and the Woods Hole Oceanographic Institution (WHOI) as the consultants for developing, implementing, collecting, and analyzing the acoustic data; reporting; and maintaining the acoustic monitoring system.

Further information detailing the deployment and operation of arrays of 19 passive seafloor acoustic recording units (MARUs) centered on the terminal site and the 10 ABs that are to be placed at approximately 5-m (8.0-km) intervals within the recently modified TSS can be found in the Marine Mammal Detection, Monitoring, and Response Plan included as Appendix A of the NEG and Algonquin application.

**Reporting**

The Project area is within the Mandatory Ship Reporting Area (MSRA), so all vessels entering and exiting the MSRA will report their activities to WHALESNORTH. During all phases of the Northeast Gateway LNG Port operations, sightings of any injured or dead marine mammals will be reported immediately to the USCG or NMFS, regardless of whether the injury or death is caused by project activities.

An annual report on marine mammal monitoring and mitigation will be submitted to NMFS Office of Protected Resources and NMFS Northeast Regional Office within 90 days after the expiration of an LOA. The annual report shall include data collected for each distinct marine mammal species observed in the project area in the Massachusetts Bay during the period of LNG facility operation. Description of marine mammal behavior, overall numbers of individuals observed, frequency of observation, and any behavioral changes and the context of the changes relative to operation activities shall also be included in the annual report.

**Negligible Impact and Small Numbers Analysis and Determination**

NMFS has defined "negligible impact" in 50 CFR 216.103 as "* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival." In making a negligible impact determination, NMFS considers a variety of factors, including but not limited to: (1) The number of anticipated mortalities; (2) the number and nature of anticipated injuries; (3) the number, nature, intensity, and duration of Level B harassment; and (4) the context in which the takes occur.

No injuries or mortalities are anticipated to occur as a result of Northeast Gateway's proposed port operation and maintenance activities, and none are authorized by NMFS. Additionally, animals in the area are not anticipated to incur any hearing impairment (*i.e.,* TTS or PTS), as the modeling of source levels indicates none of the source received levels exceeds 180 dB (rms).

While some of the species occur in the proposed project area year-round, some species only occur in the area during certain seasons. Sei whales are only anticipated in the area during the spring. Therefore, if shipments and/or maintenance activities occur in other seasons, the likelihood of sei whales being affected is quite low. Humpback and minke whales are not expected in the project area in the winter. During the winter, a large portion of the North Atlantic right whale population occurs in the southeastern U.S. calving grounds (*i.e.,* South Carolina, Georgia, and northern Florida). The fact that certain activities will occur during times when certain species are not commonly found in the area will help reduce the amount of Level B harassment for these species.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hr cycle). Behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.,* 2007). Operational activities are not anticipated to occur at the Port on consecutive days. In addition, Northeast Gateway EBRVs are expected to make 65 port calls throughout the year, with thruster use needed for only a few hours. Therefore, Northeast Gateway will not be creating increased sound levels in the marine environment for prolonged periods of time.

Of the 12 marine mammal species likely to occur in the area, four are listed as endangered under the ESA: North Atlantic right, humpback, fin, and sei whales. All of these species, as well as the northern coastal stock of bottlenose dolphin, are also considered depleted under the MMPA. There is currently no designated critical habitat or known reproductive areas for any of these species in or near the proposed project area. However, there are several well known North Atlantic right whale feeding grounds in the Cape Cod Bay

and Great South Channel. No mortality or injury is expected to occur and due to the nature, degree, and context of the Level B harassment anticipated, the activity is not expected to impact rates of recruitment or survival.

The population estimates for the species that may be taken by harassment from the most recent U.S. Atlantic Stock Assessment Reports were provided earlier in this document. From the most conservative estimates of both marine mammal densities in the project area and the size of the 120-dB ZOI, the maximum calculated number of individual marine mammals for each species that could potentially be harassed annually is small relative to the overall population sizes (8.01 percent for humpback whales and 6.08 percent for North Atlantic right whales and no more than 2.78 percent of any other species).

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS finds that operation, including repair and maintenance activities, of the Northeast Gateway LNG Port will result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from Northeast Gateway's proposed activities will have a negligible impact on the affected species or stocks.

**Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses**

There are no relevant subsistence uses of marine mammals implicated by this action.

**Endangered Species Act**

On February 5, 2007, NMFS concluded consultation with MARAD and the USCG, under section 7 of the Endangered Species Act (ESA), on the proposed construction and operation of the Northeast Gateway LNG facility and issued a biological opinion. The finding of that consultation was that the construction and operation of the Northeast Gateway LNG terminal may adversely affect, but is not likely to jeopardize, the continued existence of northern right, humpback, and fin whales, and is not likely to adversely affect sperm, sei, or blue whales and Kemp's ridley, loggerhead, green or leatherback sea turtles. An incidental take statement (ITS) was issued following NMFS' issuance of the IHA.

On November 15, 2007, Northeast Gateway and Algonquin submitted a letter to NMFS requesting an extension for the LNG Port construction into December 2007. Upon reviewing Northeast Gateway's weekly marine mammal monitoring reports submitted under the previous IHA, NMFS recognized that the potential take of some marine mammals resulting from the LNG Port and Pipeline Lateral by Level B behavioral harassment likely had exceeded the original take estimates. Therefore, NMFS Northeast Region (NER) reinitiated consultation with MARAD and USCG on the construction and operation of the Northeast Gateway LNG facility. On November 30, 2007, NMFS NER issued a revised biological opinion, reflecting the revised construction time period and including a revised ITS. This revised biological opinion concluded that the construction and operation of the Northeast Gateway LNG terminal may adversely affect, but is not likely to jeopardize, the continued existence of northern right, humpback, and fin whales, and is not likely to adversely affect sperm, sei, or blue whales.

**National Environmental Policy Act**

MARAD and the USCG released a Final EIS/EIR for the proposed Northeast Gateway Port and Pipeline Lateral. A notice of availability was published by MARAD on October 26, 2006 (71 FR 62657). The Final EIS/EIR provides detailed information on the proposed project facilities, construction methods and analysis of potential impacts on marine mammals.

NMFS was a cooperating agency (as defined by the Council on Environmental Quality (40 CFR 1501.6)) in the preparation of the Draft and Final EISs. NMFS has reviewed the Final EIS and has adopted it. Therefore, the preparation of another EIS or EA is not warranted.

**Determinations**

NMFS has determined that the operation and maintenance activities of the Northeast Gateway Port facility may result, at worst, in a temporary modification in behavior of small numbers of certain species of marine mammals that may be in close proximity to the Northeast Gateway LNG facility. These activities are expected to result in some local short-term displacement only of the affected species or stocks of marine mammals. Taking these two factors together, NMFS concludes that the activity will have no more than a negligible impact on the affected species or stocks, as there will be no expected effects on annual rates of survival and reproduction of these species or stocks. This determination is further supported by the required mitigation, monitoring, and reporting measures described in this document.

As a result of implementation of the described mitigation and monitoring measures, no take by injury or death would be requested, anticipated or authorized, and the potential for temporary or permanent hearing impairment is very unlikely due to the relatively low noise levels (and consequently small zone of impact relative to the size of Massachusetts Bay).

While the number of marine mammals that may be harassed will depend on the distribution and abundance of marine mammals in the vicinity of the LNG Port facility, the estimated numbers of marine mammals to be harassed are small relative to the affected species or stock sizes.

**Authorization**

NMFS has issued an IHA to Northeast Gateway for conducting LNG Port facility operations in Massachusetts Bay, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: August 27, 2010.

**James H. Lecky,**

*Director,Office of Protected Resources,National Marine Fisheries Service.*

[FR Doc. 2010–21822 Filed 8–31–10; 8:45 am]

**BILLING CODE 3510–22–P**

## CONSUMER PRODUCT SAFETY COMMISSION

### Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Safety Standard for Multi-Purpose Lighters

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Notice.

**SUMMARY:** The Consumer Product Safety Commission ("CPSC" or "Commission") is announcing that a proposed collection of information has been submitted to the Office of Management and Budget ("OMB") for review and clearance under the Paperwork Reduction Act of 1995 ("PRA").

**DATES:** Fax written comments on the collection of information by October 1, 2010.

**ADDRESSES:** To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, *Attn:* CPSC Desk Officer, *Fax:*

202–395–6974, or e-mailed to *oira_submission@omb.eop.gov.* Written comments should be captioned "Safety Standard for Multi-Purpose Lighters." All comments should be identified with the OMB Control Number 3041–0130. In addition, written comments should also be submitted by mail/hand delivery/courier (for paper, disk, or CD–ROM submissions), preferably in five copies, to: Office of the Secretary, Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7923.

**FOR FURTHER INFORMATION CONTACT:** Linda Glatz, Division of Policy and Planning, Office of Information Technology, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, 301–504–7671, *lglatz@cpsc.gov.*

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, the CPSC has submitted the following proposed collection of information to OMB for review and clearance.

Safety Standard for Multi-Purpose Lighters—(OMB Control Number 3041–0130–Extention). Section 14(a)(1) of the Consumer Product Safety Act ("CPSA") (15 U.S.C. 2063(a)) requires manufacturers, importers, and private labelers of a consumer product subject to a consumer product safety standard under the CPSA or similar rule, ban, standard, or regulation under any other act enforced by the Commission to issue a certificate stating that the product complies with all applicable rules, bans, standards or regulations.

Section 14(b) of the CPSA (15 U.S.C. 2063(b)) authorizes the Commission to issue regulations to prescribe a reasonable testing program to support certificates of compliance with a consumer product safety standard under the CPSA or similar rule, ban, standard, or regulation under any other act enforced by the Commission. Section 16(b) of the CPSA (15 U.S.C 2065(b)) authorizes the Commission to issue rules to require that firms establish and maintain records to permit the Commission to determine compliance with rules issued under the authority of the CPSA.

The Commission has issued regulations prescribing requirements for a reasonable testing program to support certificates of compliance with the standard for multi-purpose lighters. These regulations require manufacturers and importers to submit a description of each model of lighter, results of prototype qualification tests for compliance with the standard, and other information before the introduction of each model of lighter into commerce. These regulations also require manufacturers, importers, and private labelers of multi-purpose lighters to establish and maintain records to demonstrate successful completion of all required tests to support the certificates of compliance that they issue. 16 CFR part 1212, subpart B.

The Commission uses the information compiled and maintained by manufacturers, importers, and private labelers of multi-purpose lighters to protect consumers from risks of accidental deaths and burn injuries associated with those lighters. More specifically, the Commission uses this information to determine whether lighters comply with the standard by resisting operation by young children. The Commission also uses this information to obtain corrective actions if multi-purpose lighters fail to comply with the standard in a manner that creates a substantial risk of injury to the public.

In the **Federal Register** of May 18, 2010 (75 FR 27731), the CPSC published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

We estimate the burden of this collection of information as follows. The cost of the rule's testing, reporting, recordkeeping, and other certification-related provisions is comprised of time spent by testing organizations on behalf of manufacturers and importers, and time spent by firms to prepare, maintain, and submit records to CPSC. There are currently an estimated 59 firms that import, distribute and/or sell multi-purpose lighters in the United States, which is a subset of the approximately 145 firms total that may import, distribute and/or sell these lighters in the future. With a few exceptions, most manufacturers and importers have more than one model, currently ranging from 1 to 130 models for each firm. Based on past experience, an estimate of two models per firm is a reasonable number to use for calculating burden. Each manufacturer would spend approximately 50 hours per model. Therefore, the total annual amount of time that will be required for complying with the testing, recordkeeping, and reporting requirements of the rule is approximately 5,900 hours (59 firms $\times$ 2 models $\times$ 50 hours = 5,900 total hours requested). The annualized cost to respondents for the hour burden for collection of information is $335,887 based on a total of 5,900 hours at $56.93 per hour (based on total compensation of all management, professional, and related occupations in goods-producing industries in the United States, September 2009, Bureau of Labor Statistics).

The annual cost of the rule to the Federal Government is comprised chiefly of the Commission's resources for compliance and enforcement activities. An estimated 2 full-time-equivalent ("FTE") staff years of effort are required to administer the rule annually. The Commission's cost for these staff activities is approximately $170,000 per FTE. Thus, the annual cost of enforcing the rule to the Federal Government is estimated to be about $340,000. This cost estimate includes the agency's enforcement and field staff costs.

Dated: August 26, 2010.

**Alberta Mills,**

*Acting Secretary, Consumer Product Safety Commission.*

[FR Doc. 2010–21891 Filed 8–31–10; 8:45 am]

**BILLING CODE 6355–01–P**

## CONSUMER PRODUCT SAFETY COMMISSION

### Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Standard for the Flammability of Mattresses and Mattress Pads

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Notice.

**SUMMARY:** The Consumer Product Safety Commission ("CPSC" or "Commission") is announcing that a proposed collection of information has been submitted to the Office of Management and Budget ("OMB") for review and clearance under the Paperwork Reduction Act of 1995 ("PRA").

**DATES:** Fax written comments on the collection of information by October 1, 2010.

**ADDRESSES:** To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, *Attn:* CPSC Desk Officer, *fax:* 202–395–6974, or e-mailed to *oira_submission@omb.eop.gov.* Written comments should be captioned "Standard for the Flammability of Mattresses and Mattress Pads." All comments should be identified with the OMB Control Number 3041–0014. In addition, written comments should also be submitted by mail/hand delivery/courier (for paper, disk, or CD–ROM submissions), preferably in five copies, to: Office of the Secretary, Consumer

Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7923.

**FOR FURTHER INFORMATION CONTACT:** Linda Glatz, Division of Policy and Planning, Office of Information Technology, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, 301–504–7671, *lglatz@cpsc.gov.*

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, the CPSC has submitted the following proposed collection of information to OMB for review and clearance.

Standard for the Flammability of Mattresses and Mattress Pads—(OMB Control Number 3041–0014–Extention). The Standard for the Flammability of Mattresses and Mattress Pads was promulgated under section 4 of the Flammable Fabrics Act ("FFA"), 15 U.S.C. 1193, to reduce unreasonable risks of burn injuries and deaths from fires associated with mattresses and mattress pads. The standard prescribes a test to assure that a mattress or mattress pad will resist ignition from a smoldering cigarette. The standard requires manufacturers to perform prototype tests of each combination of materials and construction methods used to produce mattresses or mattress pads and to obtain acceptable results from such testing. Manufacturers and importers are required to maintain the records and test results specified under the standard.

In addition, the Standard for the Flammability (Open Flame) of Mattress Sets was promulgated under section 4 of the FFA, 16 CFR part 1633, to reduce deaths and injuries related to mattress fires, particularly those ignited by open flame sources such as lighters, candles and matches. The standard established new performance requirements for mattresses and mattress sets that will generate a smaller size fire from open flame source ignitions. Part 1633 also contains recordkeeping requirements to document compliance with the standard. The testing and recordkeeping requirements under 16 CFR part 1633 do not replace the testing and recordkeeping requirements under 16 CFR part 1632.

In May 2006, an Interim Enforcement Policy for Mattresses subject to 16 CFR parts 1632 and 1633, effective May 1, 2006, was issued that reduced prototype surface testing and recordkeeping requirements from six mattress surfaces to two mattress surfaces for each new prototype created after March 15, 2006. Manufacturers that avail themselves of the reduced testing program will have to maintain records on the cigarette test performed, but they will be testing only two surfaces rather than the required six surfaces. The policy is available at the CPSC's Web site at *www.cpsc.gov/BUSINFO/Interimmattress.pdf.* Mattress prototypes created before March 15, 2006, are subject to the full requirements of 16 CFR part 1632. In addition, mattress pads are not subject to this policy and must continue to adhere to all the requirements set forth in 16 CFR part 1632.

In the **Federal Register** of May 18, 2010 (75 FR 27733), the CPSC published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

We estimate the burden of this collection of information as follows. The CPSC staff estimates that there are 671 respondents (571 establishments producing conventional mattresses and 100 establishments producing non-conventional mattresses in the United States, a total of 671). It is estimated that each respondent will spend 26 hours for testing and recordkeeping annually for a total of 17,446 hours (671 firms × 26 hours = 17,446 total hours requested). The annualized cost to respondents would be approximately $993,201 based on 17,446 hours times $56.93 per hour (based on total compensation of all management, professional, and related occupations in goods-producing industries in the United States, September 2009, Bureau of Labor Statistics).

The estimated annual cost of the information collection requirements to the Federal government is approximately $142,000. This sum includes 10 staff months and travel costs expended for examination of the information in records required to be maintained by the standard and enforcement rule.

Dated: August 26, 2010.

**Alberta Mills,**

*Acting Secretary, Consumer Product Safety Commission.*

[FR Doc. 2010–21895 Filed 8–31–10; 8:45 am]

**BILLING CODE 6355–01–P**

## CONSUMER PRODUCT SAFETY COMMISSION

### Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Safety Standard for Bicycle Helmets

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Notice.

**SUMMARY:** The Consumer Product Safety Commission ("CPSC" or "Commission") is announcing that a proposed collection of information has been submitted to the Office of Management and Budget ("OMB") for review and clearance under the Paperwork Reduction Act of 1995 ("PRA").

**DATES:** Fax written comments on the collection of information by October 1, 2010.

**ADDRESSES:** To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: CPSC Desk Officer, *Fax:* 202–395–6974, or e-mailed to *oira_submission@omb.eop.gov.* Written comments should be captioned "Safety Standard for Bicycle Helmets." All comments should be identified with the OMB Control Number 3041–0127. In addition, written comments should also be submitted by mail/hand delivery/courier (for paper, disk, or CD–ROM submissions), preferably in five copies, to: Office of the Secretary, Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7923.

**FOR FURTHER INFORMATION CONTACT:** Linda Glatz, Division of Policy and Planning, Office of Information Technology, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, 301–504–7671, *lglatz@cpsc.gov.*

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, the CPSC has submitted the following proposed collection of information to OMB for review and clearance.

Safety Standard for Bicycle Helmets—(OMB Control Number 3041–0127–Extention). In 1994, Congress passed the "Child Safety Protection Act," which, among other things, included the "Children's Bicycle Helmet Safety Act of 1994" Public Law 103–267, 108 Stat. 726. This law directed the Commission to issue a final standard applicable to bicycle helmets that would replace several existing voluntary standards with a single uniform standard that would include provisions to protect against the risk of helmets coming off the heads of bicycle riders, address the risk of injury to children, and cover other issues as appropriate. The Commission issued the final bicycle helmet standard in 1998. It is codified at 16 CFR Part 1203. The standard requires all bicycle helmets manufactured after March 10, 1999, to meet impact-attenuation and other requirements. The standard also contains testing and recordkeeping

requirements to ensure that bicycle helmets meet the standard's requirements. Certification regulations implementing the standard require manufacturers, importers, and private labelers of bicycle helmets subject to the standard to: (1) Perform tests to demonstrate that those products meet the requirements of the standard; (2) maintain records of those tests; and (3) affix durable labels to the helmets stating that the helmet complies with the applicable standard. The certification regulations are codified at 16 CFR part 1203, subpart B. On September 2, 2009, the Commission issued a notice of requirements that provides the criteria and process for Commission acceptance of accreditation of third party conformity assessment bodies for testing bicycle helmets that are considered children's products under the Consumer Product Safety Act (74 FR 45428).

The Commission uses the information compiled and maintained by manufacturers, importers, and private labelers of bicycle helmets subject to the standard to help protect the public from risks of injury or death associated with head injury associated with bicycle riding. More specifically, this information helps the Commission determine whether bicycle helmets subject to the standard comply with all applicable requirements. The Commission also uses this information to obtain corrective actions if bicycle helmets fail to comply with the standard in a manner that creates a substantial risk of injury to the public.

In the **Federal Register** of May 18, 2010 (75 FR 27734), the CPSC published a 60-day notice requesting public comment on the proposed collection of information. One comment was received. The commenter did not address the collection of information burdens. Instead, the commenter states that the collection of information should not be approved because it would delay implementation of bicycle helmet safety.

The commenter has misunderstood the purpose of the collection of information. The standard has been in effect since 1999, and continues to be in effect. The collection of information addresses the testing, certification, and recordkeeping requirements that are required to ensure that the standard's requirements are met.

We estimate the burden of this collection of information as follows. Approximately 30 firms manufacture or import bicycle helmets subject to the standard. There are an estimated 200 different models of bicycle helmets currently marketed in the United States. The Commission staff estimates that the time required to comply with the collection of information requirements is approximately 100 to 150 hours per model per year. The total amount of time estimated for compliance with these requirements for testing, including third-party testing for children's bicycle helmets, certification, and recordkeeping will be 20,000 to 30,000 hours per year (200 models × 100 to 150 hours/model = 20,000 to 30,000 hours). The annualized cost to respondents for the hour burden for collection of information is $1,138,600 to $1,707,000 based on 20,000 to 30,000 hours times $56.93 per hour (based on total compensation of all civilian workers in managerial and professional positions in the United States, September 2009, Bureau of Labor Statistics).

The estimated expenditure to the Federal government is approximately $83,000 which includes 10 staff months and travel costs expended for examination of the information in records required to be maintained by the standard and implementing regulations.

Dated: August 26, 2010.

**Alberta Mills,**

*Acting Secretary, Consumer Product Safety Commission.*

[FR Doc. 2010–21892 Filed 8–31–10; 8:45 am]

**BILLING CODE 6355–01–P**

## DEPARTMENT OF EDUCATION

## Office of Elementary and Secondary Education Overview Information; Advanced Placement (AP) Test Fee Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2011

Catalog of Federal Domestic Assistance (CFDA) Number: 84.330B.

*Dates:*

*Applications Available:* September 1, 2010.

*Deadline for Transmittal of Applications:* November 17, 2010.

*Deadline for Intergovernmental Review:* January 18, 2011.

### Full Text of Announcement

### I. Funding Opportunity Description

*Purpose of Program:* The AP Test Fee program awards grants to eligible State educational agencies (SEAs) to enable them to pay all or a portion of advanced placement test fees on behalf of eligible low-income students who (1) are enrolled in an advanced placement course and (2) plan to take an advanced placement exam. The program is designed to increase the number of low-income students who take advanced placement tests and receive scores for which college academic credit is awarded.

*Program Authority:* 20 U.S.C. 6531–6537.

*Applicable Regulations:* The Education Department General Administration Regulations (EDGAR) in 34 CFR parts 75, 77, 79, 80, 81, 82, 84, 85, 97, 98, and 99.

### II. Award Information

*Type of Award:* Discretionary grants.

*Estimated Available Funds:* The Administration's budget request for FY 2011 does not include funds for this program but would, instead, provide support for advanced placement test fees through a proposed College Pathways and Accelerated Learning program. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

*Estimated Range of Awards:* $8,476–$4,377,999.

*Estimated Average Size of Awards:* $438,280.

*Estimated Number of Awards:* 42.

**Note:** The Department is not bound by any estimates in this notice.

*Project Period:* Up to 12 months.

### III. Eligibility Information

1. *Eligible Applicants:* SEAs in any State, including the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the freely associated states of the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau (subject to continued eligibility).

**Note:** For the purposes of this program, the Bureau of Indian Education in the U.S. Department of the Interior is treated as an SEA.

2. a. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

b. *Supplement-Not-Supplant:* This program involves supplement-not-supplant funding requirements. Section 1706 of the Elementary and Secondary Education Act of 1965, as amended (ESEA), requires that grant funds provided under the AP Test Fee program supplement, and not supplant, other non-Federal funds that are available to assist low-income individuals in paying for the cost of advanced placement test fees.

3. *Other:* Current grantees under this program that expect to have sufficient carryover funds to cover school year 2010–2011 advanced placement exam

fees for eligible low-income students should not apply for a new award under this program.

**IV. Application and Submission Information**

1. *Address to Request Application Package:* To obtain an application package via the Internet use the following address: *http://www.ed.gov/programs/apfee/applicant.html.*

To obtain an application package from the U.S. Department of Education use the following address: Francisco Ramirez, U.S. Department of Education, 400 Maryland Avenue, SW., Room 3E224, Washington, DC 20202–6200. Telephone: (202) 260–1541 or by e-mail: *francisco.ramirez@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the program person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

3. *Submission Dates and Times:*

*Applications Available:* September 1, 2010.

*Deadline for Transmittal of Applications:* November 17, 2010.

Applications for grants under this program must be submitted electronically using the Electronic Grant Application System (e-Application) accessible through the Department's e-Grants site. For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV.7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

*Deadline for Intergovernmental Review:* January 18, 2011.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, (1) you must have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN); (2) you must register both of those numbers with the Central Contractor Registry (CCR), the Government's primary registrant database; and (3) you must provide those same numbers on your application.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

7. *Other Submission Requirements:* Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the AP Test Fee Program, CFDA Number 84.330B, must be submitted electronically using e-Application, accessible through the Department's e-Grants Web site at: *http://e-grants.ed.gov.*

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

While completing your electronic application, you will be entering data online that will be saved into a database. You may not e-mail an electronic copy of a grant application to us.

*Please note the following:*

- You must complete the electronic submission of your grant application by 4:30:00 p.m., Washington, DC time, on the application deadline date. E-Application will not accept an application for this program after 4:30:00 p.m., Washington, DC time, on the application deadline date. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the application process.
- The hours of operation of the e-Grants Web site are 6:00 a.m. Monday until 7:00 p.m. Wednesday; and 6:00 a.m. Thursday until 8:00 p.m. Sunday, Washington, DC time. Please note that, because of maintenance, the system is unavailable between 8:00 p.m. on Sundays and 6:00 a.m. on Mondays, and between 7:00 p.m. on Wednesdays and 6:00 a.m. on Thursdays, Washington, DC time. Any modifications to these hours are posted on the e-Grants Web site.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: The Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. You must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three

file types specified in this paragraph or submit a password protected file, we will not review that material.

• Your electronic application must comply with any page limit requirements described in this notice.

• Prior to submitting your electronic application, you may wish to print a copy of it for your records.

• After you electronically submit your application, you will receive an automatic acknowledgment that will include a PR/Award number (an identifying number unique to your application).

• Within three working days after submitting your electronic application, fax a signed copy of the SF 424 to the Application Control Center after following these steps:

(1) Print SF 424 from e-Application.

(2) The applicant's Authorizing Representative must sign this form.

(3) Place the PR/Award number in the upper right hand corner of the hard-copy signature page of the SF 424.

(4) Fax the signed SF 424 to the Application Control Center at (202) 245–6272.

• We may request that you provide us original signatures on other forms at a later date.

*Application Deadline Date Extension in Case of e-Application Unavailability:* If you are prevented from electronically submitting your application on the application deadline date because e-Application is unavailable, we will grant you an extension of one business day to enable you to transmit your application electronically, by mail, or by hand delivery. We will grant this extension if—

(1) You are a registered user of e-Application and you have initiated an electronic application for this competition; and

(2)(a) E-Application is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Washington, DC time, on the application deadline date; or

(b) E-Application is unavailable for any period of time between 3:30 p.m. and 4:30:00 p.m., Washington, DC time, on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting you an extension. To request this extension or to confirm our acknowledgment of any system unavailability, you may contact either (1) the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** (*see* VII. Agency Contact) or (2) the e-Grants help desk at 1–888–336–8930. If e-Application is unavailable due to technical problems with the system and, therefore, the application deadline is extended, an e-mail will be sent to all registered users who have initiated an e-Application. Extensions referred to in this section apply only to the unavailability of e-Application.

*Exception to Electronic Submission Requirement:* You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through e-Application because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to e-Application; *and*

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application. If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Francisco Ramirez, U.S. Department of Education, 400 Maryland Avenue, SW., Room 3E224, Washington, DC 20202–6200. FAX: (202) 260–8969.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.330B), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

**Note:** The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application, by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.330B), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

*Note for Mail or Hand Delivery of Paper Applications:*

If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this grant notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

## V. Application Review Information

The Department intends to fund, at some level, all applications that meet the requirements for Approval of Application as described in the application package for this program and that demonstrate need for new or additional funds to pay advanced placement exam fees on behalf of low-

income students for school year 2010–2011.

Also, in determining whether to approve an application for a new award (including the amount of the award) from an applicant with a current grant under this program, the Department will consider the amount of any carryover funds under the existing grant.

**VI. Award Administration Information**

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* Under the Government Performance and Results Act of 1993 (GPRA), the Department has developed five performance measures to evaluate the overall effectiveness of the AP Test Fee and Advanced Placement Incentive (API) programs: (1) The number of advanced placement tests taken by low-income public school students nationally; (2) The number of advanced placement tests taken by minority (Hispanic, Black, Native American) public school students nationally; (3) The percentage of advanced placement tests passed (for AP exams, receiving scores of 3–5) by low-income public school students nationally; (4) The number of advanced placement tests passed (for AP exams, receiving scores of 3–5) by low-income public school students nationally; and (5) The cost per passage of an advanced placement test taken by a low-income public school student. The information provided by grantees in their final performance reports will be one of the sources of data for this measure. Other sources of data include the College Board and IB Americas.

**VII. Agency Contact**

**FOR FURTHER INFORMATION CONTACT:** Francisco Ramirez, U.S. Department of Education, 400 Maryland Avenue, SW., room 3E224, Washington, DC 20202–6200. Telephone: (202) 260–1541 or by e-mail: *francisco.ramirez@ed.gov.*

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

**VIII. Other Information**

*Accessible Format:* Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

*Electronic Access to This Document:* You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.* To use PDF you must have Adobe Acrobat Reader, which is available free at this site.

**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: August 27, 2010.

**Thelma Meléndez de Santa Ana,**

*Assistant Secretary for Elementary and Secondary Education.*

[FR Doc. 2010–21877 Filed 8–31–10; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF ENERGY

### Secretary of Energy Advisory Board

**AGENCY:** Department of Energy.

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces an open meeting of the Secretary of Energy Advisory Board (SEAB). SEAB was reestablished pursuant to the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) (the Act). This notice is provided in accordance with the Act.

**DATES:** Thursday, September 16, 2010. 8:30 a.m.–4 p.m.

**ADDRESSES:** Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585.

**Note:** See the Public Participation section for building entry requirements. Please arrive early.

**FOR FURTHER INFORMATION CONTACT:** Amy Bodette, Designated Federal Officer, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585; telephone (202) 586–0383 or facsimile (202) 586–1441; *SEAB@hq.doe.gov.*

**SUPPLEMENTARY INFORMATION:**

*Background:* The Board was reestablished to provide advice and recommendations to the Secretary on the Department's basic and applied research, economic and national security policy, educational issues, operational issues and other activities as directed by the Secretary.

*Purpose of the Meeting:* The meeting will serve as an introductory meeting and will provide an overview of Departmental programs and priorities to the Board.

*Tentative Agenda:* The meeting will start at 8:30 a.m. on September 16th and will serve as an introductory meeting for the Board. The tentative meeting agenda includes a welcome, opening remarks from the Secretary, overview presentations of Departmental programs and priorities, open discussion, and an opportunity for public comment. The meeting will conclude at 4 p.m.

*Public Participation:* The meeting is open to the public. Individuals who would like to attend must RSVP to Amy Bodette no later than 5 p.m. on Tuesday, September 14, 2010 at *SEAB@hq.doe.gov.* Please provide your name, organization, citizenship and contact information. Entry to the DOE Forrestal building will be restricted to those who have confirmed their attendance in advance. Anyone attending the meeting will be required to present a government photo identification, such as a passport, driver's license, or government identification. Individuals and representatives of organizations who would like to offer comments and suggestions may do so at the end of the meeting on Thursday, September 16, 2010. Approximately 30 minutes will be reserved for public comments. Time allotted per speaker will depend on the number who wish to speak but will not exceed 5 minutes. The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Those wishing to speak should register to do so beginning at 8 a.m. on September 16, 2010. Registration to speak will close at 1 p.m., September 16, 2010.

Those not able to attend the meeting or have insufficient time to address the committee are invited to send a written statement to Amy Bodette, U.S. Department of Energy 1000 Independence Avenue, SW., Washington, DC 20585, e-mail to *SEAB@hq.doe.gov.*

*Minutes:* The minutes of the meeting will be available by contacting Ms. Bodette. She may be reached at the postal address or e-mail address above.

Issued in Washington, DC, on August 27, 2010.

**Rachel Samuel,**

*Deputy Committee Management Officer.*

[FR Doc. 2010–21866 Filed 8–31–10; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Biological and Environmental Research Advisory Committee

**AGENCY:** Department of Energy, Office of Science.

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces a meeting of the Biological and Environmental Research Advisory Committee (BERAC). The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

**DATES:** Thursday, September 16, 2010, 9 a.m. to 5:30 p.m. and Friday, September 17, 2010, 8:30 a.m. to 12 p.m.

**ADDRESSES:** Hilton Hotel, 620 Perry Parkway, Gaithersburg, MD 20877.

**FOR FURTHER INFORMATION CONTACT:** Dr. David Thomassen, Designated Federal Officer, BERAC, U.S. Department of Energy, Office of Science, Office of Biological and Environmental Research, *SC–23/Germantown* Building, 1000 Independence Avenue, SW., Washington, DC 20585–1290. Phone 301–903–9817; fax (301) 903–5051 or e-mail: *david.thomassen@science.doe.gov.* The most current information concerning this meeting can be found on the Web site: *http://www.science.doe.gov loberlberaclannounce.html.*

**SUPPLEMENTARY INFORMATION:**

*Purpose of the Meeting:* To provide advice on a continuing basis to the Director, Office of Science of the Department of Energy, on the many complex scientific and technical issues that arise in the development and implementation of the Biological and Environmental Research Program.

*Tentative Agenda Topics:*

- Report from the Office of Science.
- Report from the Office of Biological and Environmental Research.
- News from the Biological Systems Science and Climate and Environmental Sciences Divisions.
- Discussions on the Climate Research Roadmap Workshop, BER Grand Challenge Workshop Report, and Systems Biology Knowledgebase Report.
- BER Communications Update.
- New Business.
- Public Comment.

*Public Participation:* The day and a half meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact David Thomassen at the address or telephone number listed above. You must make your request for an oral statement at least five business days before the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

*Minutes:* The minutes of this meeting will be available for public review and copying within 45 days at the BERAC Web site: *http://www.science.doe.gov/ober/beraciAfinutes.html.*

Issued in Washington, DC, on August 19, 2010.

**Rachel Samuel,**

*Deputy Committee Management Officer.*

[FR Doc. 2010–21673 Filed 8–31–10; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Blue Ribbon Commission on America's Nuclear Future

**AGENCY:** Office of Nuclear Energy, Department of Energy.

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces an open meeting of the Blue Ribbon Commission on America's Nuclear Future (the Commission). The Commission was organized pursuant to the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) (the Act). This notice is provided in accordance with the Act.

**DATES:** Tuesday, September 21, 2010. 8:30 a.m.–4:45 p.m. Wednesday, September 22, 2010. 8:30 a.m.–1 p.m.

**ADDRESSES:** Washington Marriott Hotel, 1221 22nd Street, NW., Washington, DC. *Phone:* 202–872–1500.

**FOR FURTHER INFORMATION CONTACT:** Timothy A. Frazier, Designated Federal Officer, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585; telephone (202) 586–4243 or facsimile (202) 586–0544; e-mail *CommissionDFO@nuclear.energy.gov.* Additional information will be available at *http://www.brc.gov.*

**SUPPLEMENTARY INFORMATION:**

*Background:* The President directed that the Commission be established to conduct a comprehensive review of policies for managing the back end of the nuclear fuel cycle. The Commission will provide advice and make recommendations on issues including alternatives for the storage, processing, and disposal of civilian and defense spent nuclear fuel and nuclear waste. The Commission is scheduled to submit a draft report to the Secretary of Energy in July 2011 and a final report in January 2012.

This is the fourth full Commission meeting. Previous meetings were held in March, May, and July 2010. Webcasts of the previous meetings along with meeting transcripts and presentations are available at *http://www.brc.gov.*

*Purpose of the Meeting:* The meeting will provide the Commission an opportunity to hear presentations and statements covering four broad areas: Nuclear waste program governance, international perspectives and implications of U.S. decisions regarding the back-end of the nuclear fuel cycle, the ethical foundations for nuclear waste management, and experiences and perspectives on public engagement in the facility siting process.

*Tentative Agenda:* The meeting is expected to start at 8:30 a.m. on Tuesday, September 21, 2010. The schedule for the 21st will include presentations and statements to the Commission. The meeting will resume at 8:30 a.m. on Wednesday, September 22, 2010, with presentations and statements to the Commission and Commission discussions lasting until about noon. The meeting will conclude with public statements and will end about 1 p.m.

*Public Participation:* Individuals and representatives of organizations who would like to offer comments and suggestions may do so at the end of the public session on Wednesday, September 22, 2010. Approximately 1 hour will be reserved for public comments from 12 p.m. to 1 p.m. Time allotted per speaker will depend on the number who wish to speak but will not exceed 5 minutes. The Designated Federal Officer is empowered to

conduct the meeting in a fashion that will facilitate the orderly conduct of business. Those wishing to speak should register to do so beginning at 7:30 a.m. on September 22, 2010, at the Washington Marriott. Registration to speak will close at 11 a.m., September 22, 2010.

Those not able to attend the meeting or have insufficient time to address the subcommittee are invited to send a written statement to Timothy A. Frazier, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, e-mail to *CommissionDFO@nuclear.energy.gov,* or post comments on the Commission Web site at *http://www.brc.gov.*

Additionally, the meeting will be available via live video webcast. The link will be available at *http://www.brc.gov.*

*Minutes:* The minutes of the meeting will be available at *http://www.brc.gov* or by contacting Mr. Frazier. He may be reached at the postal address or e-mail address above.

Issued in Washington, DC, on August 27, 2010.

**Rachel Samuel,**

*Deputy Committee Management Officer.*

[FR Doc. 2010–21868 Filed 8–31–10; :45 8 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Blue Ribbon Commission on America's Nuclear Future, Transportation and Storage Subcommittee

**AGENCY:** Department of Energy, Office of Nuclear Energy.

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces an open meeting of the Transportation and Storage (T&S) Subcommittee. The T&S Subcommittee is a subcommittee of the Blue Ribbon Commission on America's Nuclear Future (the Commission). The establishment of subcommittees is authorized in the Commission's charter. The Commission was organized pursuant to the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) (the Act). This notice is provided in accordance with the Act.

**DATES:** Thursday, September 23, 2010, 8:30 a.m.–3 p.m.

**ADDRESSES:** Washington Marriott Hotel, 1221 22nd Street, NW., Washington, DC, Phone: 202–872–1500.

**FOR FURTHER INFORMATION CONTACT:** Timothy A. Frazier, Designated Federal Officer, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585; telephone (202) 586–4243 or facsimile (202) 586–0544; e-mail *CommissionDFO@nuclear.energy.gov.* Additional information will be available at *http://www.brc.gov.*

**SUPPLEMENTARY INFORMATION:**

*Background:* The President directed that the Commission be established to conduct a comprehensive review of policies for managing the back end of the nuclear fuel cycle. The Commission will provide advice and make recommendations on issues including alternatives for the storage, processing, and disposal of civilian and defense spent nuclear fuel and nuclear waste.

The Co-chairs of the Commission requested the formation of the T&S Subcommittee to answer the question: "[s]hould the US change the way in which it is storing used nuclear fuel and high level waste while one or more final disposal locations are established?"

*Purpose of the Meeting:* The purpose of the meeting is to hear from Federal, State and local officials, industry representatives, and others having expertise in siting interim storage facilities for spent fuel, and for other similar facilities. The intent is to focus on what attributes and processes have, or have not, worked to support successful siting of potentially controversial facilities in a manner that is transparent, equitable, and that is viewed as credible to the public. The subcommittee will also explore transportation and logistics issues related to such siting efforts.

*Tentative Agenda:* The meeting is expected to begin at approximately 8:30 a.m. on Thursday, September 23, 2010, with speaker presentations beginning at 8:45 a.m. and ending at 2:15 p.m. A public comment period will be held from 2:15 p.m. to 3 p.m.

*Public Participation:* Subcommittee meetings are not required to be open to the public; however, the Commission has elected to open the presentation sessions of the meeting to the public. Individuals and representatives of organizations who would like to offer comments and suggestions may do so at the end of the public session on Thursday, September 23, 2010. Approximately 45 minutes will be reserved for public comments from 2:15 p.m. to 3 p.m. Time allotted per speaker will depend on the number who wish to speak but will not exceed 5 minutes. The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Those wishing to speak should register to do so beginning at 8 a.m. on September 23, 2010, at the Washington Marriott. Registration will close at noon on September 23, 2010.

Those not able to attend the meeting or have insufficient time to address the subcommittee are invited to send a written statement to Timothy A. Frazier, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, e-mail to *CommissionDFO@nuclear.energy.gov*, or post comments on the Commission Web site at *http://www.brc.gov*.

Additionally, the meeting will be available via live video webcast. The link will be available at *http://www.brc.gov*.

*Minutes:* The minutes of the meeting will be available at *http://www.brc.gov* or by contacting Mr. Frazier. He may be reached at the postal address or e-mail address above.

Issued in Washington, DC, on August 27, 2010.

**Rachel Samuel,**

*Deputy Committee Management Officer.*

[FR Doc. 2010–21867 Filed 8–31–10; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 2464–014]**

### Gresham Municipal Utilities; Notice of Intent To File License Application, Filing of Pre-Application Document, and Approving Use of the Traditional Licensing Process

August 25, 2010.

a. *Type of Filing:* Notice of Intent to File License Application and Request to Use the Traditional Licensing Process.

b. *Project No.:* P–2464–014.

c. *Dated Filed:* June 28, 2010.

d. *Submitted By:* Gresham Municipal Utilities.

e. *Name of Project:* Weed Dam Hydroelectric Project.

f. *Location:* On Red River in Shawano County, Wisconsin. No federal lands are occupied by the project works or located within the project boundary.

g. *Filed Pursuant to:* 18 CFR 5.3 of the Commission's regulations.

h. *Potential Applicant Contact:* Gresham Municipal Utilities, Village of Gresham, Wisconsin, Attn: Art Bahr, Village Administrator, 1126 Main Street, PO Box 50, Gresham, WI 54128.

i. *FERC Contact:* Janet Hutzel at (202) 502–8675; or e-mail at *janet.hutzel@ferc.gov.*

j. Gresham Municipal Utilities filed its request to use the Traditional Licensing Process on June 28, 2010.

Gresham Municipal Utilities provided public notice of its request on July 6, 2010. In a letter issued on August 23, 2010, Ms. Ann F. Miles, the Director of the Division of Hydropower Licensing, approved Gresham Municipal Utilities request to use the Traditional Licensing Process.

k. *With this notice, we are initiating informal consultation with:* (a) The U.S. Fish and Wildlife under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR, part 402; and (b) the Wisconsin State Historic Preservation Officer, as required by section 106, National Historical Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. Gresham Municipal Utilities filed a Pre-Application Document (PAD; including a proposed process plan and schedule) with the Commission, pursuant to 18 CFR 5.6 of the Commission's regulations.

m. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site (*http://www.ferc.gov*), using the "eLibrary" link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCONlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in paragraph h.

n. The licensee states its unequivocal intent to submit an application for a new license for Project No. 2464. Pursuant to 18 CFR 16.8, 16.9, and 16.10 each application for a new license and any competing license applications must be filed with the Commission at least 24 months prior to the expiration of the existing license. All applications for license for this project must be filed by June 30, 2013.

o. Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–21794 Filed 8–31–10; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EL10–82–000]**

### Southern Montana Electric Generation & Transmission Cooperative, Inc. v. NorthWestern Corporation; Notice of Complaint

August 25, 2010.

Take notice that on August 20, 2010, pursuant to section 206 of the Federal Power Act, 16 U.S.C. 824c, and Rule 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206, Southern Montana Electric Generation & Transmission Cooperative, Inc. (Complainant) filed a complaint against NorthWestern Corporation (Respondent), alleging that the Respondent violated Commission policies and its Open Access Transmission Tariff by (1) using an "umbrella" or "enabling" agreement as the contractual basis for a long-term point-to-point transmission service and (2) billing the Complainant with respect to a transmission service for which they had not contracted.

Complainant certifies that copies of the complaint were served on the contacts listed for Respondent as listed on the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

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 online 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 September 9, 2010.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–21790 Filed 8–31–10; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 2106–059]**

### Pacific Gas and Electric Company, California; Notice Correcting Times for Public Draft Environmental Impact Statement Meetings

August 25, 2010.

As stated in the July 30, 2010 Notice of Availability for the McCloud-Pit Hydroelectric Project draft Environmental Impact Statement (EIS), Commission staff will be conducting two public meetings to receive comments on the draft EIS. The July 30, 2010 notice, however, incorrectly listed the time for the morning meeting as 9 a.m.–11 p.m.. This notice corrects that error to indicate the meeting is from 9 a.m.–11 a.m.

The time and location of the meetings are as follows:

Morning Meeting:
*Date:* September 9, 2010.
*Time:* 9 a.m.–11 a.m.
*Place:* Holiday Inn Hotel,
*Address:* 1900 Hilltop Dr.,
Redding, CA.

Evening Meeting:
*Date:* September 9, 2010.
*Time:* 7 p.m.–9 p.m.
*Place:* Holiday Inn Hotel,
*Address:* 1900 Hilltop Dr.,
Redding, CA.

At these meetings, resource agency personnel and other interested persons will have the opportunity to provide oral and written comments and recommendations regarding the draft EIS. The meetings 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.

Whether or not you attend one of these meetings, you are invited to submit written comments on the draft EIS. Comments should be filed with Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. All comments must be filed by September 28, 2010, and should reference Project No. 2106–059. 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 "e-Library" link.

The Commission staff will consider comments made on the draft EIS in preparing a final EIS for the project. Before the Commission makes a licensing decision, it will take into account all concerns relevant to the public interest. The final EIS will be part of the record from which the Commission will make its decision.

For further information, please contact Emily Carter at (202) 502–6512.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–21792 Filed 8–31–10; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. ER10–2281–000]**

## Constellation Mystic Power, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

August 25, 2010.

This is a supplemental notice in the above-referenced proceeding of Constellation Mystic Power, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is September 14, 2010.

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 Street, NE., Washington, DC 20426.

The filings in the above-referenced proceeding 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.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–21791 Filed 8–31–10; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. RP10–829–000]**

## Southern LNG Company, L.L.C.; Notice of Technical Conference

August 25, 2010.

Take notice that Commission Staff will convene a technical conference in the above-referenced proceeding on Tuesday, September 14, 2010, at 9 a.m. (EST), in a room to be designated at the offices of the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

On June 7, 2010, Southern LNG Company, L.L.C. (Southern LNG) filed a tariff sheet to revise its tariff with respect to gas quality and interchangeability. On July 28, 2010, the Commission accepted and suspended Southern LNG's proposed tariff sheet, to become effective January 1, 2011, or an earlier date set by subsequent Commission order, subject to conditions and the outcome of a technical conference.[1] During the technical conference, Commission Staff and interested persons will have the opportunity to discuss all of the issues raised by Southern LNG's filing.

Southern LNG should be prepared to address all concerns raised by South Carolina Electric & Gas Company in its protest to the filing, and to provide additional technical, engineering, and operational support for its proposed gas quality and interchangeability standards. Consistent with the Commission's policy statement on gas quality issues, Southern LNG should also be prepared to explain how its proposal conforms with or differs from the Interim Guidelines and principles. *See Natural Gas Interchangeability, Policy Statement on Provisions Governing Natural Gas Quality and Interchangeability in Interstate Natural Gas Pipeline Company Tariffs,* 115 FERC ¶ 61,325 at P 34, 37 (2006).

FERC conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an e-mail to *accessibility@ferc.gov* or call toll free (866) 208–3372 (voice) or (202) 502–8659 (TTY), or send a fax to (202) 208–2106 with the required accommodations.

All interested persons are permitted to attend. For further information please contact Jennifer Kunz at (202) 502–6102 or e-mail *Jennifer.Kunz@ferc.gov.*

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–21793 Filed 8–31–10; 8:45 am]

**BILLING CODE 6717–01–P**

[1] 132 FERC ¶ 61,076 (2010).

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL09195–8]**

### Creation of the Fiscal Year (FY) 2011 "Environmental Workforce Development and Job Training Grants Program," Formerly Referred to as the "Brownfields Job Training Grants Program"

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** Section 104(k)(5)(A)(iii) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) requires EPA to publish guidance to assist applicants in preparing proposals/applications for grants to provide environmental training to facilitate the management, assessment, and cleanup of sites contaminated by solid and hazardous waste. EPA's Office of Solid Waste and Emergency Response (OSWER) provides funds to empower States, communities, Tribes and nonprofits to prevent, inventory, assess, clean up and reuse sites where real or perceived contamination exists and does so by working through OSWER's Office of Brownfields and Land Revitalization (OBLR); Office of Resource Conservation and Recovery; Office of Superfund Remediation and Technology Innovation; Office of Underground Storage Tanks; Federal Facilities Restoration and Reuse Office; Center for Program Analysis; the Innovations, Partnerships, and Communication Office; and Office of Emergency Management. In 2010, OBLR lead an effort to more closely collaborate on workforce development and job training with other programs within OSWER to develop a job training cooperative agreement opportunity that includes expanded training in other environmental media outside the traditional scope of just brownfields. As a result of this collaboration, the former "Brownfields Job Training Grants Program" was expanded and will now be referred to as the "Environmental Workforce Development and Job Training (EWDJT) Grants Program." With the creation of the "Environmental Workforce Development and Job Training Grants Program," EPA is soliciting comments on the new FY2011 Application Guidelines through this **Federal Register** notice, which includes the institutional framework of the prior Brownfields Job Training Grants Program.

**DATES:** Publication of this notice will start a ten working day comment period on revisions to the FY2011 Brownfields Grant Guidelines. Comments will be accepted through September 13, 2010. EPA expects to release a Request for Applications (RFA) based on these revised application guidelines in October 2010 with an anticipated deadline for submission of applications in January 2011.

**ADDRESSES:** The draft application guidelines/RFA can be downloaded at: *http://www.epa.gov/brownfields/*. If you do not have Internet access and require hard copies of the draft guidelines please contact Joseph Bruss at (202) 566–2772. Please send any comments to Joseph Bruss at *bruss.joseph@epa.gov* no later than September 13, 2010.

**FOR FURTHER INFORMATION CONTACT:** EPA's Office of Solid Waste and Emergency Response, Office of Brownfields and Land Revitalization, (202) 566–2777.

**SUPPLEMENTARY INFORMATION:** Please note that in accordance with 5 U.S.C. 553(a)(2), EPA is not undertaking notice and comment rulemaking and has not established a docket to receive public comments on the guidelines. Rather, the Agency as a matter of policy is soliciting the views of interested parties on proposed changes to the application guidelines in an effort to make the guidelines as responsive as possible to the needs of the public. Please note that these draft guidelines are subject to change. Please also note that for EWDJT grants, EPA must continue to impose the administrative cost prohibition as that requirement is statutory. Additionally, like the Brownfields Job Training Grants, the Agency will, as matter of policy, prohibit grantees from using funds to support life skills training. Rather, EPA encourages grantees to partner with local Workforce Investment Boards to deliver these critical services. Organizations interested in applying for funding must follow the instructions contained in the final application guidelines that EPA will publish on *http://www.grants.gov* in October 2010, rather than these draft guidelines.

The Catalogue of Federal Domestic Assistance entry for this competitive funding opportunity includes 66.815, 66.813, and 66.808.

Dated: August 26, 2010.

**David R. Lloyd,**

*Director, Office of Brownfields and Land Revitalization, Office of Solid Waste and Emergency Response.*

[FR Doc. 2010–21837 Filed 8–31–10; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2009–1016; FRL–8842–5]**

### Issuance of an Experimental Use Permit

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** EPA has granted an experimental use permit (EUP) to the following pesticide applicant. An EUP permits use of a pesticide for experimental or research purposes only in accordance with the limitations in the permit.

**FOR FURTHER INFORMATION CONTACT:** Gina Casciano, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 605–0513; e-mail address: *casciano.gina@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

#### I. General Information

*A. Does this Action Apply to Me?*

This action is directed to the public in general. Although this action may be of particular interest to those persons who conduct or sponsor research on pesticides, 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 information in this action, 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–2009–1016. 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. EUP

EPA has issued the following EUP:

*62097–EUP–1*. Issuance. Fine Agrochemicals, Ltd., c/o SciReg, Inc., 12733 Director's Loop, Woodbridge, VA

22192. This EUP allows the use of 531 pounds of the plant growth regulator Prohydrojasmon (PDJ), propyl-3-oxo-2-pentylcyclo-pentylacetate, on 780 acres of apples to evaluate plant growth/ripening. The program is authorized only in the States of California, Maryland, Michigan, New York, North Carolina, Oregon, Pennsylvania, Virginia, Washington, and West Virginia. The EUP is effective from August 6, 2010 to August 1, 2012.

**Authority:** 7 U.S.C. 136c.

**List of Subjects**

Environmental protection, Experimental use permits.

Dated: August 19, 2010.

**W. Michael McDavit,**

*Acting Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.*

[FR Doc. 2010–21716 Filed 8–31–10; 8:45 am]

**BILLING CODE 6560–50–S**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2009–0938; FRL–8842–2]**

## Notice of Receipt of Pesticide Petition Filed for Residues of Potassium Peroxymonosulfate in or on Various Commodities

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces the Agency's receipt of an initial filing of a pesticide petition proposing the establishment of regulations for residues of potassium peroxymonosulfate in or on various commodities.

**DATES:** Comments must be received on or before October 1, 2010.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2009–938 and the pesticide petition number (PP), by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

*Instructions*: Direct your comments to docket ID number EPA–HQ–OPP–2009–938 and the pesticide petition number (PP). EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket*: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** Jacqueline Campbell-McFarlane, Antimicrobials Division (7510P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–6416; e-mail address: *campbell-mcfarlane.jacqueline@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this Action Apply to Me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

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

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

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

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

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

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

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

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

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

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

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

## II. What Action is the Agency Taking?

EPA is announcing receipt of a pesticide petition filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, proposing the establishment of regulations in 40 CFR part 174 or part 180 for residues of pesticide chemicals in or on various food commodities. EPA has determined that the pesticide petition described in this notice contains data or information prescribed in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the pesticide petition. Additional data may be needed before EPA can make a final determination on this pesticide petition.

Pursuant to 40 CFR 180.7(f), a summary of the petition that is the subject of this notice, prepared by the petitioner, is included in a docket EPA has created for this rulemaking. The docket for this petition is available on-line at *http://www.regulations.gov*.

As specified in FFDCA section 408(d)(3), (21 U.S.C. 346a(d)(3)), EPA is publishing notice of the petition so that the public has an opportunity to comment on this request for the establishment or modification of regulations for residues of pesticides in or on food commodities. Further information on the petition may be obtained through the petition summary referenced in this unit.

*PP 8F7360.* E.I. du Pont de Nemours and Company, P.O. Box 80402, Wilmington, DE 19880–0402, proposes to establish an exemption from the requirement of a tolerance for residues of the antimicrobial, potassium peroxymonosulfate, in or on poultry; eggs, meat, fat and meat byproducts; swine; meat, fat, and meat byproducts. The petitioner believes no analytical method is needed because potassium peroxymonosulfate is a strong oxidizing agent that is short lived in, or, on treated surfaces and livestock which rapidly reduces to endogenous sulfate ions. Any residues of the sulfate ions that may result would not be distinguishable from background levels because they are ubiquitous inorganic ions common to all living systems.

### List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: August 20, 2010.

**Joan Harrigan-Farrelly,**

*Director, Antimicrobials Division, Office of Pesticide Programs.*

[FR Doc. 2010–21389 Filed 8–31–10; 8:45 am]

**BILLING CODE 6560–50–S**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2010–0615; FRL–8839–1]**

## Pesticide Products; Registration Applications for a New Active Ingredient Chemical Sedaxane

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** EPA has received applications to register pesticide products containing an active ingredient not included in any previously registered pesticide products. Pursuant to the provisions of section 3(c)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is hereby providing notice of receipt and opportunity to comment on this application.

**DATES:** Comments must be received on or before October 1, 2010.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2010–0615, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

*Instructions*: Direct your comments to docket ID number EPA–HQ–OPP–2010–0615. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your

comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket*: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** Heather Garvie, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–0034; e-mail address: *garvie.heather@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. General Information

*A. Does this Action Apply to Me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

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

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

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

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

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

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

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

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

## II. Registration Applications

EPA received applications to register pesticide products containing an active ingredient not included in any previously registered pesticide products. Pursuant to the provisions of section 3(c)(4) of FIFRA, EPA is hereby providing notice of receipt and opportunity to comment on this application. Notice of receipt of these applications does not imply a decision by the Agency on these applications.

1. *File symbol*: 100–RGIR. *Applicant*: Syngenta Crop Protection, Inc., P.O. Box 18300, Greensboro, NC 27419–8300. *Product name*: Sedaxane Technical. *Active ingredient*: Sedaxane at 98%. *Proposal classification/Use*: Fungicide for formulation into end use products.

2. *File symbol:* 100–RGIE. *Applicant*: Syngenta Crop Protection, Inc., P.O. Box 18300, Greensboro, NC 27419–8300. *Product name*: A16874F. *Active ingredients*: Sedaxane, difenoconazole, and mefenoxam at 1.22%, 5.86% and 1.46% respectively. *Proposal classification/Use*: Fungicide/seed treatment for protection against certain diseases of barley, oats, rye, triticale, and wheat.

3. *File symbol:* 100–RGIG. *Applicant*: Syngenta Crop Protection, Inc., P.O. Box 18300, Greensboro, NC 27419–8300. *Product name*: A17511B. *Active ingredients*: Sedaxane, difenoconazole, mefenoxam, and thiamethoxam at .72%, 3.34%, .86% and 2.78% respectively. *Proposal classification/Use*: Fungicide/seed treatment for protection against damage from certain insects and diseases of cereals.

4. *File symbol*: 100–RGTU. *Applicant*: Syngenta Crop Protection, Inc., P.O. Box 18300, Greensboro, NC 27419–8300. *Product name*: Sedaxane 500 FS. *Active ingredient*: Sedaxane at 45.45%. *Proposal classification/Use*: Fungicide/seed treatment for protection against certain diseases of barley, canola, oats, rye, soybean, triticale, and wheat.

### List of Subjects

Environmental protection, Pesticides and pest.

Dated: August 20, 2010.

**Lois Rossi,**

*Director, Registration Division, Office of Pesticide Programs.*

[FR Doc. 2010–21542 Filed 8–31–10; 8:45 am]

**BILLING CODE 6560–50–S**

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## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2010–0008; FRL–8832–7]**

## Pesticide Products; Registration Applications

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces receipt of applications to register new uses for pesticide products containing currently registered active ingredients, pursuant to the provisions of section 3(c) of the

Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended. EPA is publishing this notice of such applications, pursuant to section 3(c)(4) of FIFRA.

**DATES:** Comments must be received on or before October 1, 2010.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number specified within Unit II. of the **SUPPLEMENTARY INFORMATION**, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

*Instructions*: Direct your comments to the docket ID number specified for the pesticide of interest as shown in the registration application summaries. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket*: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** A contact person is listed at the end of each registration application summary and may be contacted by telephone or e-mail. The mailing address for each contact person listed is: Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

## I. General Information

### *A. Does this Action Apply to Me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

### *B. What Should I Consider as I Prepare My Comments for EPA?*

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments*. When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number). If you are commenting in a docket that addresses multiple products, please indicate to which registration number(s) your comment applies.

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

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

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

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

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

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

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

## II. Registration Applications

EPA received applications as follows to register pesticide products containing currently registered active ingredients pursuant to the provisions of section 3(c) of FIFRA, and is publishing this notice of such applications pursuant to section 3(c)(4) of FIFRA. Notice of

receipt of these applications does not imply a decision by the Agency on the applications.

1. *File symbol*: 239–ETNN. *Docket number*: EPA–HQ–OPP–2009–0276. *Company name and address*: The Scotts Company, D/B/A The Ortho Group, P.O. Box 190, Marysville, OH 43040. *Active ingredient*: Triticonazole. *Proposed uses*: Lawns, gardens (ornamentals, roses, trees, and scrubs), and houseplants. *Contact*: Tawanda Maignan, (703) 308–8050, *maignan.tawanda@epa.gov.*

2. *Registration numbers*: 279–3055, 279–3108, 279–3313. *Docket number*: EPA–HQ–OPP–2007–0099. *Company name and address*: FMC Corporation, 1735 Market Street, Philadelphia, PA 19103. *Active ingredient*: Bifenthrin. *Proposed uses*: Grass forage, fodder and hay group, grass grown for seed, pasture and rangeland, and tea. *Contact*: BeWanda Alexander, (703) 305–7460, *alexander.bewanda@epa.gov*.

3. *Registration numbers*: 279–3124, 279–3126. *Docket number*: EPA–HQ–OPP–2010–0472. *Company name and address*: FMC Corporation, 1735 Market Street, Philadelphia, PA 19103. *Active ingredient*: Zeta-Cypermethrin. *Proposed use*: Pistachio. *Contact*: Linda A. DeLuise, (703) 305–5428, *deluise.linda@epa.gov*.

4. *Registration number*: 279–3125. *Docket number*: EPA–HQ–OPP–2010–0472. *Company name and address*: FMC Corporation, 1735 Market Street, Philadelphia, PA 19103. *Active ingredient*: Zeta-Cypermethrin. *Proposed uses*: Artichoke, barley, buckwheat, oat, pistachio, and rye. *Contact*: Linda A. DeLuise, (703) 305–5428, *deluise.linda@epa.gov*.

**List of Subjects**

Environmental protection, Pesticides and pest.

Dated: August 20, 2010.

**Lois Rossi,**

*Director, Registration Division, Office of Pesticide Programs.*

[FR Doc. 2010–21827 Filed 8–31–10; 8:45 am]

**BILLING CODE 6560–50–S**

## ENVIRONMENTAL PROTECTION AGENCY

**[Docket # EPA–RO4–SFUND–2010–0729, FRL–9196–1]**

### Florida Petroleum Reprocessors Superfund Site; Davie, Broward County, FL; Notice of Settlement

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of settlement.

**SUMMARY:** Under Section 122(h)(1) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the United States Environmental Protection Agency has entered into a settlement for reimbursement of past response costs concerning the Florida Petroleum Reprocessors Superfund Site located in Davie, Broward County, Florida for publication.

**DATES:** The Agency will consider public comments on the settlement until October 1, 2010. The Agency will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate.

**ADDRESSES:** Copies of the settlement are available from Ms. Paula V. Painter. Submit your comments, identified by Docket ID No. EPA–RO4–SFUND–2010–0729 or Site name Florida Petroleum Reprocessors Superfund Site by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *http://www.epa.gov/region4/waste/sf/enforce.htm.*
- *Email: Painter.Paula@epa.gov.*

**FOR FURTHER INFORMATION CONTACT:** Paula V. Painter at (404) 562–8887.

Dated: August 18, 2010.

**Anita L. Davis,**

*Chief, Superfund Enforcement & Information Management Branch, Superfund Division.*

[FR Doc. 2010–21834 Filed 8–31–10; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

### Federal Advisory Committee Act; Advisory Committee on Diversity for Communications in the Digital Age

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice of public meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, this notice advises interested persons that the Federal Communications Commission's (FCC) Advisory Committee on Diversity for Communications in the Digital Age ("Diversity Committee") will hold a meeting on Tuesday, September 21, 2010 at 2 p.m. in the Commission Meeting Room of the Federal Communications Commission, Room TW–C305, 445 12th Street, SW., Washington, DC 20554.

**DATES:** September 21, 2010.

**ADDRESSES:** Federal Communications Commission, Room TW–C305 (Commission Meeting Room), 445 12th Street, SW., Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** Barbara Kreisman, 202–418–1605; *Barbara.Kreisman@FCC.gov.*

**SUPPLEMENTARY INFORMATION:** At this meeting the Constitutional, Broadband and Media Issues working groups will present best practices recommendations and review their work over the course of this Federal Advisory group charter.

Members of the general public may attend the meeting. The FCC will attempt to accommodate as many people as possible. However, admittance will be limited to seating availability. The public may submit written comments before the meeting to: Barbara Kreisman, the FCC's Designated Federal Officer for the Diversity Committee by e-mail: *Barbara.Kreisman@fcc.gov* or U.S. Postal Service Mail (Barbara Kreisman, Federal Communications Commission, Room 2–A665, 445 12th Street, SW., Washington, DC 20554).

Open captioning will be provided for this event. Other reasonable accommodations for people with disabilities are available upon request. Requests for such accommodations should be submitted via e-mail to *fcc504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (tty). Such requests should include a detailed description of the accommodation needed. In addition, please include a way we can contact you if we need more information. Please allow at least five days advance notice; last minute requests will be accepted, but may be impossible to fill.

Additional information regarding the Diversity Committee can be found at *http://www.fcc.gov/DiversityFAC.*

**Barbara A. Kreisman,**

*Chief, Video Division, Media Bureau, Federal Communications Commission.*

[FR Doc. 2010–21890 Filed 8–31–10; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL DEPOSIT INSURANCE CORPORATION

### Update to Notice of Financial Institutions for Which the Federal Deposit Insurance Corporation Has Been Appointed Either Receiver, Liquidator, or Manager

**AGENCY:** Federal Deposit Insurance Corporation.

**ACTION:** Update Listing of Financial Institutions in Liquidation.

**SUMMARY:** Notice is hereby given that the Federal Deposit Insurance Corporation (Corporation) has been appointed the sole receiver for the following financial institutions effective as of the Date Closed as indicated in the listing. This list (as updated from time to time in the **Federal Register**) may be relied upon as "of record" notice that the Corporation has been appointed receiver for purposes of the statement of policy published in the July 2, 1992 issue of the **Federal Register** (57 FR 29491). For further information concerning the identification of any institutions which have been placed in liquidation, please visit the Corporation Web site at *http://www.fdic.gov/bank/individual/failed/banklist.html* or contact the Manager of Receivership Oversight in the appropriate service center.

Dated: August 23, 2010.

Federal Deposit Insurance Corporation.

**Pamela Johnson,**

*Regulatory Editing Specialist.*

INSTITUTIONS IN LIQUIDATION

[In alphabetical order]

| FDIC Ref. No. | Bank name | City | State | Date closed |
|---|---|---|---|---|
| 10278 | Butte Community Bank | Chico | CA | 8/20/2010. |
| 10279 | Community National Bank at Bartow | Bartow | FL | 8/20/2010. |
| 10280 | Imperial Savings and Loan Association | Martinsville | VA | 8/20/2010. |
| 10281 | Independent National Bank | Ocala | FL | 8/20/2010. |
| 10282 | Los Padres Bank | Solvang | CA | 8/20/2010. |
| 10283 | Pacific State Bank | Stockton | CA | 8/20/2010. |
| 10284 | ShoreBank | Chicago | IL | 8/20/2010. |
| 10285 | Sonoma Valley Bank | Sonoma | CA | 8/20/2010. |

[FR Doc. 2010–21810 Filed 8–31–10; 8:45 am]

**BILLING CODE P**

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than September 27, 2010.

**A. Federal Reserve Bank of San Francisco** (Kenneth Binning, Vice President, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

*1. Wells Fargo & Company*, San Francisco, California; to acquire more than 5 percent of the voting shares of Western Liberty Bancorporation, New York, New York, and thereby indirectly acquire more than 5 percent of the voting shares of Service 1st Bank of Nevada, Las Vegas, Nevada.

Board of Governors of the Federal Reserve System, August 27, 2010.

**Jennifer J. Johnson,**

*Secretary of the Board.*

[FR Doc. 2010–21807 Filed 8–31–10; 8:45 am]

**BILLING CODE 6210–01–S**

## FEDERAL RESERVE SYSTEM

### Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than September 16, 2010.

**A. Federal Reserve Bank of Chicago** (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

*1. Marshall & Ilsley Corporation*, Milwaukee, Wisconsin; to retain an additional 4 percent, for a total equity of 84 percent, of Taplin Canida Habacht LLC, Miami, Florida, and thereby continue to engage in financial and investment advisory activities, and agency transactional services, pursuant to sections 225.28(b)(6)(i), 225.28(b)(6)(v), and 225.28(b)(7)(i) of Regulation Y.

Board of Governors of the Federal Reserve System, August 27, 2010.

**Jennifer J. Johnson,**

*Secretary of the Board.*

[FR Doc. 2010–21806 Filed 8–31–10; 8:45 am]

**BILLING CODE 6210–01–S**

## FEDERAL MARITIME COMMISSION

### Notice of Agreement Filed

The Commission hereby gives notice of the filing of the following agreement under the Shipping Act of 1984. Interested parties may submit comments on the agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. A copy of the agreement is available through the Commission's Web site (*http://www.fmc.gov*) or by contacting the Office of Agreements at (202)–523–5793 or *tradeanalysis@fmc.gov*.

*Agreement No.:* 011794–014.

*Title:* COSCON/KL/YMUK/Hanjin Worldwide Slot Allocation & Sailing Agreement.

*Parties:* COSCO Container Lines Company, Limited; Hanjin Shipping Co., Ltd.; Kawasaki Kisen Kaisha, Ltd.; and Yangming (UK) Ltd.

*Filing Party:* Robert B. Yoshitomi, Esq.; Nixon Peabody LLP; 555 West Fifth Street, 46th Floor; Los Angeles, CA 90013.

*Synopsis:* The amendment updates references to EU law and permits less than the full membership to discuss and agree on matters authorized by the Agreement.

By Order of the Federal Maritime Commission.

Dated: August 27, 2010.

**Rachel Dickon,**

*Assistant Secretary.*

[FR Doc. 2010–21883 Filed 8–31–10; 8:45 am]

**BILLING CODE 6730–01–P**

## FEDERAL MARITIME COMMISSION

### Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for a license as a Non-Vessel-Operating Common Carrier (NVO) and/or Ocean Freight Forwarder (OFF)—Ocean Transportation Intermediary (OTI) pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. chapter 409 and 46 CFR part 515). Notice is also hereby given of the filing of applications to amend an existing OTI license or the Qualifying Individual (QI) for a license.

Interested persons may contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

Advanced Shipping Corporation dba Star Cluster USA (NVO), 1908 E. Dominguez Street, Carson, CA 90810. *Officer:* Suwon Song, President (Qualifying Individual). *Application Type:* Trade Name Change.

American Cargoservice, Inc. (NVO & OFF), 7880 Convoy Court, San Diego, CA 92111. *Officers:* Terrence C. Simokat, President/CFO/Secretary (Qualifying Individual), Theodore Green, Stockholder. *Application Type:* New NVO & OFF License.

Aventura Logistics, Inc. (NVO & OFF), 18181 NE 31 Court, Suite 1203, Aventura, FL 33160. *Officer:* Iryna Klurman, President/Treasurer/Secretary/Director (Qualifying Individual), *Application Type:* New NVO & OFF License.

Cargo Express Logistics, LLC (NVO & OFF), 1170 Brighton Beach Avenue, Suite 3–C, Brooklyn, NY 11235. *Officer:* Julian A. Dozortcev, President (Qualifying Individual), *Application Type:* New NVO & OFF License.

Cedars Express International, Inc. (NVO & OFF), 960 E. Walnut Street, Carson, CA 90746. *Officers:* George Salloum, President/Secretary/Treasurer (Qualifying Individual), Carol Salloum, Vice President. *Application Type:* QI Change.

CN WorldWide Inc. (NVO), 935 de la Gauchetiere Street West, Montreal, Quebec H2B 2M9 Canada. *Officers:* Paul D. Tonsager, Vice President–North America (Qualifying Individual), Anita Ernesaks, President. *Application Type:* QI Change.

ECM Freight Solutions Corp (NVO), 9761 SW 12 Terrace, Miami, FL 33174. *Officers:* Christian A. Saravia, Vice President (Qualifying Individual), Eduardo N. Otero, President. *Application Type:* New NVO License.

Everplus Logistics Inc. (NVO & OFF), 3 University Plaza, Hackensack, NJ 07601. *Officers:* Danny Shin, Secretary/Treasurer (Qualifying Individual), Yun Kang, President. *Application Type:* New NVO & OFF License.

Globelink Logistics Inc. (NVO & OFF), 3 Whispering Pines Lane, Lakewood, NJ 08701. *Officer:* Mark Porges, President/Secretary/Treasurer (Qualifying Individual). *Application Type:* New NVO & OFF license.

"K" Line Logistics (U.S.A.) Inc. (NVO & OFF), 145 Hook Creek Blvd., C5B, Valley Stream, NY 11581. *Officers:* Antonio Rodriguez, Vice President (Qualifying Individual), Torri Hideyuki, President. *Application Type:* Add NVO Service.

Norma's Cargo Solutions, LLC (NVO & OFF), 5665 SW 8th Street, Miami, FL 33134. *Officer:* Norma A. Pineiro, Managing Member (Qualifying Individual). *Application Type:* Add NVO Service.

Pacific Glory USA, Inc (NVO & OFF), 5673 Old Dixie Highway, #102, Forest Park, GA 30297. *Officer:* Kil Ra, CEO (Qualifying Individual). *Application Type:* Add NVO Service.

Primex Cargo, Inc. (NVO), 9210 Bloomfield Avenue, Suite 103, Cypress, CA 90630. *Officer:* Chris H. Kang, President/Secretary/Treasurer (Qualifying Individual). *Application Type:* New NVO License.

Unico Logistics USA, Inc. (NVO), 10711 Walker Street, #B, Cypress, CA 90630. *Officers:* Hwa Y. Yoon, Secretary (Qualifyng Individual), Dookee Kim, CEO/CFO. *Application Type:* QI Change.

Unique Logistics International (LAX), Inc. (NVO), 16330 Marquardt Avenue, Cerritos, CA 90703. *Officers:* Sunandan Ray, CEO (Qualifying Individual), Richard Lee. *Application Type:* QI Change.

United Shipping Group Inc. (OFF), 1307 E. Colorado Street, Glendale, CA 91205. *Officer:* Mkrtich Tamrazyan, President (Qualifying Individual). *Application Type:* New OFF License.

Dated: August 26, 2010.

**Rachel E. Dickon,**

*Assistant Secretary.*

[FR Doc. 2010–21885 Filed 8–31–10; 8:45 am]

**BILLING CODE 6730–01–P**

## FEDERAL MARITIME COMMISSION

### Ocean Transportation Intermediary License Revocations

The Federal Maritime Commission hereby gives notice that the following Ocean Transportation Intermediary licenses have been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515, effective on the corresponding date shown below:

*License Number:* 2322F.

*Name:* DFW International Services, Inc.

*Address:* 3025 Roy Orr Blvd., Grand Prairie, TX 75050.

*Date Revoked:* August 12, 2010.

*Reason:* Failed to maintain a valid bond.

*License Number:* 3655F.
*Name:* Tranzip International Corp.
*Address:* 137 Tunicflower Lane, West Windsor, NJ 08550.
*Date Revoked:* August 15, 2010.
*Reason:* Failed to maintain a valid bond.

*License Number:* 003864F.
*Name:* Fredonia, Inc.
*Address:* 531 W. Roosevelt Road, Wheaton, IL 60187.
*Date Revoked:* August 12, 2010.
*Reason:* Failed to maintain a valid bond.

*License Number:* 4063F.
*Name:* VIP Transport, Inc.
*Address:* 2703 Wardlow Road, Corona, CA 91720.
*Date Revoked:* August 13, 2010.
*Reason:* Failed to maintain a valid bond.

*License Number:* 004553F.
*Name:* Marianas Steamship Agencies, Inc. dba MSA Logistics
*Address:* Commercial Port Annex, 2nd Floor, 1010 Cabras Highway, Piti, Guam 96915.
*Date Revoked:* August 15, 2010.
*Reason:* Failed to maintain a valid bond.

*License Number:* 012345N.
*Name:* Home Run Shipping International, Inc.
*Address:* 420 W. Merrick Road, Valley Stream, NY 11540–0459.
*Date Revoked:* August 9, 2010.
*Reason:* Failed to maintain a valid bond.

*License Number:* 015575F.
*Name:* Worldwide International, Inc.
*Address:* 5900 Roche Drive, Suite 315, Columbus, OH 43229.
*Date Revoked:* August 14, 2010.
*Reason:* Failed to maintain a valid bond.

*License Number:* 015708N.
*Name:* Blue Moon Express Limited.
*Address:* Room 1901, 19/F., CC Wu Bldg., 302–308 Hennessy Road, Wanchai, Hong Kong, Republic of China.
*Date Revoked:* August 7, 2010.
*Reason:* Failed to maintain a valid bond.

*License Number:* 016037N.
*Name:* J.C. Express of Miami, Corp.
*Address:* 8548 NW 72nd Street, Miami, FL 33166.
*Date Revoked:* August 6, 2010.
*Reason:* Failed to maintain a valid bond.

*License Number:* 016650F.
*Name:* McCollister's Transportation Systems, Inc.
*Address:* 1800 Route 130 North, Burlington, NJ 08016.
*Date Revoked:* August 16, 2010.
*Reason:* Failed to maintain a valid bond.

*License Number:* 017800NF.
*Name:* Nick's International Shipping Inc.
*Address:* 1841 Carter Avenue, Bronx, NY 10457.
*Dates Revoked:* August 8, 2010(N) and July 2, 2010 (OFF).
*Reason:* Failed to maintain a valid bond.

*License Number:* 018694N.
*Name:* Global Parcel System LLC.
*Address:* 8304 Northwest 30th Terrace, Miami, FL 33122.
*Date Revoked:* August 13, 2010.
*Reason:* Failed to maintain a valid bond.

*License Number:* 019006N.
*Name:* ATEC Systems, Ltd.
*Address:* 650 S. NorthLake Blvd., Suite 400, Altamonte Springs, FL 32701.
*Date Revoked:* August 8, 2010.
*Reason:* Failed to maintain a valid bond.

*License Number:* 019355F.
*Name:* Abad Air, Inc.
*Address:* 10411 NW 28th Street, Suite C102, Miami, FL 33172.
*Date Revoked:* August 6, 2010.
*Reason:* Failed to maintain a valid bond.

*License Number:* 019403NF.
*Name:* Vantage International Incorporated dba Trans Cargo Services dba Vantage International Inc.
*Address:* 2450 6th Avenue South, #208, Seattle, WA 98134.
*Date Revoked:* August 13, 2010.
*Reason:* Failed to maintain a valid bond.

*License Number:* 019584N.
*Name:* Dakota Export, LLC.
*Address:* 1413 7th Street, South Fargo, ND 58103.
*Date Revoked:* August 11, 2010.
*Reason:* Surrendered license voluntarily.

*License Number:* 020400NF.
*Name:* LIS Logistic-Global Inc.
*Address:* 1322 NW 78th Avenue, Miami, FL 33126.
*Date Revoked:* August 12, 2010.
*Reason:* Failed to maintain a valid bond.

*License Number:* 020815N.
*Name:* F.E.P.A. Enterprises, Inc. dba FEPA Logistics (USA).
*Address:* 1525 Lakeville Drive, Suite #215, Kingwood, TX 77339.
*Date Revoked:* August 7, 2010.
*Reason:* Failed to maintain a valid bond.

**Sandra L. Kusumoto,**

*Director, Bureau of Certification and Licensing.*

[FR Doc. 2010–21884 Filed 8–31–10; 8:45 am]

**BILLING CODE 6730–01–P**

## FEDERAL TRADE COMMISSION

### Agency Information Collection Activities; Proposed Collection; Comment Request

**AGENCY:** Federal Trade Commission ("Commission" or "FTC").

**ACTION:** Notice; request for public comment.

**SUMMARY:** The FTC intends to conduct a survey of consumers to advance its understanding of the prevalence of consumer fraud and to allow the FTC to better serve people who experience fraud. The survey is a follow-up to two previous surveys – the first was conducted in May and June of 2003 and the second in November and December of 2005. Before gathering this information, the FTC is seeking public comments on its proposed consumer research. Comments will be considered before the FTC submits a request for Office of Management and Budget ("OMB") review under the Paperwork Reduction Act.

**DATES:** Comments must be submitted on or before November 1, 2010.

**ADDRESSES:** Interested parties are invited to submit written comments electronically or in paper form by following the instructions in the Request for Comments part of the **SUPPLEMENTARY INFORMATION** section below. Comments in electronic form should be submitted by using the following weblink: (*https://ftcpublic.commentworks.com/ftc/fraudsurvey2010*) (and following the instructions on the web-based form). Comments filed in paper form should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex J), 600 Pennsylvania Avenue, N.W., Washington, DC 20580, in the manner detailed in the "Request for Public Comments" part of the **SUPPLEMENTARY INFORMATION** section below.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information should be addressed to Keith B. Anderson, Economist, Bureau of Economics, Federal Trade Commission, 600 Pennsylvania Avenue NW, Mail Stop NJ-4136, Washington, DC 20580. Telephone: (202) 326-3428.

**SUPPLEMENTARY INFORMATION:**

#### 1. Background

Under the Paperwork Reduction Act, 44 U.S.C. 3501-3521 ("PRA"), federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor. "Collection of

information" means agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. 44 U.S.C. 3502(3), 5 CFR 1320.3(c). As required by section 3506(c)(2)(A) of the PRA, the FTC is providing this opportunity for public comment before requesting that OMB grant clearance for the current proposed survey.

In 2003, OMB approved the FTC's request to conduct a survey on consumer fraud and assigned OMB Control Number 3084-0125. The FTC completed the consumer research in June 2003 and issued its report, "Consumer Fraud in the United States: An FTC Survey," in August 2004 (*http://www.ftc.gov/reports/consumerfraud/040805confraudrpt.pdf*).

In November 2005, OMB approved the Commission's request to reinstate this clearance. The second survey was conducted in November and December 2005. A report, "Consumer Fraud in the United States: The Second FTC Survey," detailing the results of the second survey, was issued in October 2007 (*http://www.ftc.gov/opa/2007/10/fraud.pdf*). The 2005 survey asked about consumers' experiences with 14 specific and two more general types of fraud during the previous year. Among frauds covered by the survey were whether the person had purchased a weight-loss product that did not work as promised, whether the person had fallen victim to an advance-fee loan scam, and whether the person had paid someone to remove derogatory information from his or her credit report. According to the survey results, 30.2 million adults in the United States – 13.5 percent of all adults in the country – had been a victim during the previous year of one or more of the frauds included in the survey.

Among the 14 specific frauds included in the survey, the most frequently reported was the purchase of a weight-loss product that the seller represented would allow the user to easily lose a substantial amount of weight or lose the weight without diet or exercise. However, in fact, consumers who tried the product found that they only lost a little of the weight they had expected to lose or failed to lose any weight at all. This was experienced by 4.8 million adults – 2.1 percent of the adult population.

**2. Description of the Collection of Information and Proposed Use**

The FTC proposes to conduct a telephone survey of up to 4,100 randomly-selected consumers nationwide age 18 and over – 100 in a pretest and 4,000 in the main survey – in order to gather specific information on the incidence of consumer fraud in the general population. In order to obtain a more reliable picture of the experience of demographic groups that the earlier surveys found to be at an elevated risk of becoming victims of consumer fraud – including Hispanics, African Americans, and Native Americans – the survey may oversample members of these groups. All information will be collected on a voluntary basis, and the identities of the consumers will remain confidential. Subject to OMB approval for the survey, the FTC will contract with a consumer research firm to identify consumers and conduct the survey. The results will assist the FTC in determining the incidence of consumer fraud in the general population and whether the type or frequency of consumer frauds is changing. This information will inform the FTC about how best to combat consumer fraud.

The FTC intends to use a sample size similar to that used in the 2005 survey. The questions will be very similar to the 2005 survey so that the results from the 2005 survey can be used as a baseline for a time-series analysis.[1] The FTC may choose to conduct another follow-up survey in approximately five years.

**3. Estimated Hours Burden**

The FTC will pretest the survey on approximately 100 respondents to ensure that all questions are easily understood. This pretest will take approximately 15 minutes per person and 25 hours as a whole (100 respondents x 15 minutes each). Answering the consumer survey will require approximately 15 minutes per respondent and 1,000 hours as a whole (4,000 respondents x 15 minutes each). Thus, cumulative total burden hours for the first year of the clearance will approximate 1,025 hours.

**4. Estimated Cost Burden**

The cost per respondent should be negligible. Participation is voluntary and will not require start-up, capital, or labor expenditures by respondents.

**5. Request for Public Comments**

The FTC invites comments on: (1) Whether the proposed collections of information are necessary for the proper performance of the functions of the FTC, including whether the information will have practical utility; (2) the accuracy of the FTC's estimate of the burden of the proposed collections of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of collecting information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to "Consumer Fraud Survey 2010, FTC File No. P105502" to facilitate the organization of comments. Please note that your comment – including your name and your state – will be placed on the public record of this proceeding, including on the publicly accessible FTC Website, at (*http://www.ftc.gov/os/publiccomments.shtm*).

Because comments will be made public, they should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential. . . .," as provided in Section 6(f) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).[2]

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: (*https://ftcpublic.commentworks.com/ftc/fraudsurvey2010*) (and following the instructions on the web-based form). To ensure that the Commission considers

[1] The survey instrument for the 2005 Consumer Fraud Survey is attached to the 2007 report as Appendix B.

[2] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

an electronic comment, you must file it on the web-based form at the weblink: (*https://ftcpublic.commentworks.com/ftc/fraudsurvey2010*). If this Notice appears at (*http://www.regulations.gov/search/index.jsp*), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC Website at (*http://www.ftc.gov*) to read the Notice and the news release describing it.

A comment filed in paper form should include the "Consumer Fraud Survey 2010, FTC File No. P105502" reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex J), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC Website, to the extent practicable, at (*http://www.ftc.gov/os/publiccomments.shtm*). As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (*http://www.ftc.gov/ftc/privacy.shtm*).

By direction of the Commission.

**Donald S. Clark,**

*Secretary.*

[FR Doc. 2010–21886 Filed 8–31–10; 8:45 am]

**BILLING CODE 6750–01–S**

## FEDERAL TRADE COMMISSION

### Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register**.

The following transactions were granted early termination of the waiting period provided by law and the premerger notification rules. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

TRANSACTION GRANTED EARLY TERMINATION

| ET date | Trans No. | ET REQ status | Party name |
|---|---|---|---|
| 26–JUL–10 | 20100914 | G | Natural Gas Partners VIII, LP. |
| | | G | The Goldman Sachs Group, Inc. |
| | | G | Cedar Bay Operating Services, LLC. |
| | | G | Gray Hawk Power Corporation. |
| | | G | Cedar Bay Management Services Company. |
| | | G | Cedar Power Corporation. |
| | | G | Cogentrix Operating Services Holdings LLC. |
| | | G | Raptor Holdings Company. |
| | | G | Cogentrix Eastern America LLC. |
| | | G | Cogentrix Energy LLC. |
| | 20100915 | G | Patterson-UTI Energy, Inc. |
| | | G | Key Energy Services, Inc. |
| | | G | Key Energy Pressure Pumping Services, LLC. |
| | | G | Key Electric Wireline Services, LLC. |
| | 20100924 | G | Thomas H. Lee Equity Fund VI, LP. |
| | | G | Parthenon Investors II, LP. |
| | | G | Intermedix Corporation. |
| 27–JUL–10 | 20100456 | G | Schlumberger N.V. (Schlumberger Limited). |
| | | G | Smith International, Inc. |
| | | G | Smith International, Inc. |
| | 20100910 | G | Galaxy PEF Holding LLC. |
| | | G | Otera US Holding Inc. |
| | | G | CW Financial Services LLC. |
| | 20100911 | G | Galaxy CF UST Investment Holdings LLC. |
| | | G | Otera US Holding Inc. |
| | | G | CW Financial Services LLC. |
| 30–JUL–10 | 20100884 | G | Cott Corporation. |
| | | G | Stanley A. Star. |
| | | G | Cliffstar Corporation. |
| | | G | Star World Trading Company. |
| | | G | Harvest Glassic LLC. |
| | | G | Star Realty Property. |
| | | G | ShanStar Biotech, Inc. |

TRANSACTION GRANTED EARLY TERMINATION—Continued

| ET date | Trans No. | ET REQ status | Party name |
|---|---|---|---|
| | 20100904 | G | PPL Corporation. |
| | | G | Ameren Corporation. |
| | | G | Electric Energy Inc. |
| 02–AUG–10 | 20100919 | G | Welsh, Carson, Anderson & Stowe XI, LP. |
| | | G | K2M, Inc. |
| | | G | K2M, Inc. |
| | 20100921 | G | Patrick L. Eudy. |
| | | G | Cameron Communications, LLC. |
| | | G | Cameron Communications, LLC. |
| | 20100922 | G | Wings Financial Credit Union. |
| | | G | City-County Federal Credit Union. |
| | | G | City-County Federal Credit Union. |
| | 20100927 | G | The Doctors Company. |
| | | G | American Physicians Capital, Inc. |
| | | G | American Physicians Capital, Inc. |
| | 20100929 | G | Quad-C Partners VII, LP. |
| | | G | Vestar Capital Partners IV, LP. |
| | | G | Joerns Healthcare LLC. |
| | 20100930 | G | BP p.l.c |
| | | G | Verenium Corporation. |
| | | G | Verenium Biofuels Corporation. |
| | 20100933 | G | SAIC, Inc. |
| | | G | Reveal Imaging Technologies, Inc. |
| | | G | Reveal Imaging Technologies, Inc. |
| | 20100940 | G | Wellspring Capital Partners IV, LP. |
| | | G | OMNI Energy Services Corp. |
| | | G | OMNI Energy Services Corp. |
| | 20100942 | G | Gores Capital Partners II, LP. |
| | | G | NEC Holdings Corp. |
| | | G | National Envelope Corporation. |
| 03–AUG–10 | 20100900 | G | Celgene Corporation. |
| | | G | Dr. Patrick Soon-Shiong, M.D. |
| | | G | Abraxis BioScience, Inc. |
| | 20100901 | G | Dr. Patrick Soon-Shiong, M.D. |
| | | G | Celgene Corporation. |
| | | G | Celgene Corporation. |
| | 20100931 | G | Apache Corporation. |
| | | G | BP p.l.c. |
| | | G | BP America Production Company. |
| 04–AUG–10 | 20100907 | G | Abrams Capital Partners II, LP. |
| | | G | Arbitron, Inc. |
| | | G | Arbitron, Inc. |
| | 20100776 | G | Viterra Inc. |
| | | G | 21C Holdings, LP. |
| | | G | 21C Holdings, LP. |
| | 20100939 | G | Magellan Midstream Partners, LP. |
| | | G | BP p.l.c. |
| | | G | BP Pipeplines. |
| | 20100952 | G | United Health Group Incorporated. |
| | | G | The Goldman Sachs Group, Inc. |
| | | G | Picis Solutions, Inc. |
| 06–AUG–10 | 20100632 | G | Oracle Corporation. |
| | | G | Phase Forward Incorporated. |
| | | G | Phase Forward Incorporated. |
| | 20100955 | G | NTELOS Holdings Corp. |
| | | G | One Communications Corp. |
| | | G | Mountaineer Telecommunications, LLC. |
| | 20100958 | G | Zep Inc. |
| | | G | Wind Point Partners V, LP. |
| | | G | Waterbury Companies, Inc. |
| | | G | Air Guard Control Corporation. |
| | 20100961 | G | Vestar Capital Partners V, LP. |
| | | G | Health Grades, Inc. |
| | | G | Health Grades, Inc. |
| | 20100965 | G | AT&T Inc. |
| | | G | Sprint Nextel Corporation. |
| | | G | WirelessCo, LP. |
| 10–AUG–10 | 20100917 | G | MPH Acquisition Corporation. |
| | | G | Carlyle Partners IV, LP. |
| | | G | MultiPlan Holdings, Inc. |

TRANSACTION GRANTED EARLY TERMINATION—Continued

| ET date | Trans No. | ET REQ status | Party name |
|---|---|---|---|
| | 20100960 | G | Nippon Telegraph and Telephone Corporation. |
| | | G | Dimension Data Holdings plc. |
| | | G | Dimension Data Holdings plc. |
| 11–AUG–10 | 20100897 | G | Nestle S.A. |
| | | G | LenSx Lasers, Inc. |
| | | G | LenSx Lasers, Inc. |
| 13–AUG–10 | 20100969 | G | KRG Capital Fund IV, LP. |
| | | G | Genstar Capital Partners IV, LP. |
| | | G | Fort Dearborn Holdings, LLC. |
| | 20100970 | G | Nippon Telegraph and Telephone Corporation. |
| | | G | NextWave Wireless Inc. |
| | | G | PacketVideo Corporation. |
| | 20100972 | G | Clayton, Dubilier & Rice Fund VIII, LP. |
| | | G | Harrington Group, Inc. |
| | | G | Harrington Group, Inc. |
| | 20100975 | G | First Reserve Fund XII, LP. |
| | | G | Quicksilver Resources Inc. |
| | | G | Quicksilver Gas Services Holdings LLC. |
| | 20100976 | G | Eaton Corporation. |
| | | G | Wright Line Purchaser LLC. |
| | | G | Wright Line Holding, Inc. |
| | 20100977 | G | AECOM Technology Corporation. |
| | | G | The Veritas Capital Fund II, LP. |
| | | G | MT Holding Corp. |
| | 20100985 | G | Green Equity Investors V, LP. |
| | | G | Ares Corporate Opportunities Fund II, LP. |
| | | G | AA Dental Management Holdings LLC. |
| | 20100987 | G | General Motors Company. |
| | | G | AmeriCredit Corp. |
| | | G | AmeriCredit Corp. |

**FOR FURTHER INFORMATION CONTACT:** Sandra M. Peay, Contact Representative or Renee Chapman, Contact Representative. Federal Trade Commission, Premerger Notification Office, Bureau of Competition, Room H–303, Washington, DC 20580. (202) 326–3100.

By direction of the Commission.

**Donald S. Clark,**

*Secretary.*

[FR Doc. 2010–21410 Filed 8–31–10; 8:45 am]

**BILLING CODE 6750–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2010–N–0394]**

### Clinical Studies of Safety and Effectiveness of Orphan Products Research Project Grant (R01); Correction

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice; correction.

**SUMMARY:** The Food and Drug Administration (FDA) is correcting a notice that appeared in the **Federal Register** of August 6, 2010 (75 FR 47602). The document announced the availability of grant funds for the support of FDA's Office of Orphan Products Development (OPD) grant program. The document was published with an error. This document corrects that error.

**FOR FURTHER INFORMATION CONTACT:** Vieda Hubbard, Acquisition Support and Grants, Food and Drug Administration, 5630 Fishers Lane, Rockville, MD 20857, 301–827–7177, email: *vieda.hubbard@fda.hhs.gov*.

**SUPPLEMENTARY INFORMATION:** In FR Doc. 2010–19354, appearing on page 47602 in the **Federal Register** of Friday, August 6, 2010, the following correction is made:

1. On page 47602, in the second column, in the "**DATES**" section, beginning in the sixth line, the sentence "2. The anticipated start dates are November 2010; November 2012." is corrected to read "2. The anticipated start dates are November 2011 and November 2012."

Dated: August 26, 2010.

**David Dorsey,**

*Acting Deputy Commissioner for Policy, Planning and Budget.*

[FR Doc. 2010–21795 Filed 8–31–10; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Health Center Program

**AGENCY:** Health Resources and Services Administration, HHS.

**ACTION:** Notice of Non-competitive Replacement Awards to Sunset Park Health Council, Inc.

**SUMMARY:** The Health Resources and Services Administration (HRSA) will transfer Health Center Program (Section 330(h) of the Public Health Service Act) funds originally awarded to Saint Vincent's Catholic Medical Centers of New York to Sunset Park Health Council, Inc., to ensure the continuity of services to low-income, underserved, homeless patients in New York City.

**SUPPLEMENTARY INFORMATION:**

*Former Grantee of Record:* Saint Vincent's Catholic Medical Centers of New York.

*Original Period of Grant Support:* November 1, 2007 to October 31, 2010.

*Replacement Awardee:* Sunset Park Health Council, Inc.

*Amount of Replacement Award:* $1,288,436.

*Period of Replacement Award:* The period of support for the replacement award is June 1, 2010 to October 31, 2010.

**Authority:** Section 330(h) of the Public Health Service Act, 42 U.S.C. 245b.

*CDFA Number:* 93.703.

*Justification for Exception to Competition:* The former grantee, Saint Vincent's Catholic Medical Centers of New York, has relinquished all grants. Saint Vincent's Catholic Medical Centers of New York's inpatient services has closed, and Saint Vincent's Catholic Medical Center of New York has filed for bankruptcy under Chapter 11. The former grantee has requested that HRSA transfer the Health Center Program Section 330(h) funds to SPHC in order to implement and carry out grant activities originally proposed under SVCMC funded Section 330(h) grant applications.

SPHC has been engaged in the delivery of primary health care services in the local area and is a current Section 330 grantee who indicated an ability to assume operations without a disruption of services.

The short-term transfer of the 330(h) funds will ensure that critical primary health care services continue and remain available to low-income, underserved, homeless patients with no interruption in services to the target population.

**FOR FURTHER INFORMATION CONTACT:** Marquita Cullom-Scott via e-mail at *MCullom-Scott@hrsa.gov* or 301–594–4300.

Dated: August 26, 2010.

**Mary K. Wakefield,**

*Administrator.*

[FR Doc. 2010–21836 Filed 8–31–10; 8:45 am]

**BILLING CODE 4165–15–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. 2010–N–0389]**

### Medical Device User Fee Act; Public Meeting; Request for Comments; Amendment of Notice

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing an amendment to the notice of a public meeting on the reauthorization of the medical device user fee program. This meeting was announced in the **Federal Register** of August 13, 2010 (75 FR 49502). The amendment is being made to include the exact meeting location, previously identified only as the Washington D.C. metropolitan area. There are no other changes.

**FOR FURTHER INFORMATION CONTACT:** James Swink, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1609, Silver Spring, MD 20993, 301–796–6313, FAX: 301–847–8121, email: *James.Swink@fda.hhs.gov*.

**SUPPLEMENTARY INFORMATION:** In the **Federal Register** of August 13, 2010 (75 FR 49502), FDA announced that a public meeting on the reauthorization of the medical device user fee program would be held on September 14, 2010. On page 49503, in the first column, the *Location* portion of the document is changed to read as follows:

*Location*: The meeting will be held at the Marriott Inn and Conference Center, University of Maryland University College (UMUC), 3501 University Blvd. East, Hyattsville, MD 20783, *www.marriott.com/wasum*.

Dated: August 27, 2010.

**David Dorsey,**

*Acting Deputy Commissioner for Policy, Planning and Budget.*

[FR Doc. 2010–21800 Filed 8–31–10; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Mental Health; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Services Subcommittee of the Interagency Autism Coordinating Committee (IACC), September 13, 2010, 1 p.m. to 4 p.m., National Institute of Mental Health, Neuroscience Center, 6001 Executive Boulevard, Conference Room A1/A2, Rockville, MD 20852, which was published in the **Federal Register** on August 19, 2010, 75 FR 51276.

The meeting will not be Webcast as originally advertised. The meeting is open to the public and will still be accessible through a conference call phone number. The meeting will be held in the same place and same time.

Dated: August 25, 2010.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–21817 Filed 8–31–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Clinical Neuroscience and Neurodegeneration Study Section, September 30, 2010, 8 a.m. to October 1, 2010, 5 p.m., Washington Plaza Hotel, 10 Thomas Circle, NW., Washington, DC, 20005 which was published in the **Federal Register** on August 4, 2010, 75 FR 46950–46951.

The meeting will be one day only September 30, 2010. The meeting time and location remain the same. The meeting is closed to the public.

Dated: August 26, 2010.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–21816 Filed 8–31–10; 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 Conflict: Developmental Biology.

*Date:* September 14–15, 2010.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Noni Byrnes, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5130, MSC 7840, Bethesda, MD 20892, (301) 435–1023, *byrnesn@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Cancer Immunotherapy.

*Date:* September 30, 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:* Syed M Quadri, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6210, MSC 7804, Bethesda, MD 20892, 301–435–1211, *quadris@csr.nih.gov.*

*Name of Committee:* Population Sciences and Epidemiology Integrated Review Group; Cardiovascular and Sleep Epidemiology Study Section.

*Date:* October 7–8, 2010.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

*Contact Person:* J. Scott Osborne, PhD, MPH, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4114, MSC 7816, Bethesda, MD 20892, (301) 435–1782, *osbornes@csr.nih.gov.*

*Name of Committee:* Genes, Genomes, and Genetics Integrated Review Group; Molecular Genetics A Study Section.

*Date:* October 7–8, 2010.

*Time:* 8:30 a.m. to 12 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Renaissance M Street Hotel, 1143 New Hampshire Avenue, NW., Washington, DC 20037.

*Contact Person:* Michael M Sveda, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1114, MSC 7890, Bethesda, MD 20892, 301–435–3565, *svedam@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Radiation Oncology.

*Date:* October 7, 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:* Syed M. Quadri, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6210, MSC 7804, Bethesda, MD 20892, 301–435–1211, *quadris@csr.nih.gov.*

*Name of Committee:* Digestive, Kidney and Urological Systems Integrated Review Group; Urologic and Kidney Development and Genitourinary Diseases Study Section.

*Date:* October 8, 2010.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Crowne Plaza Washington National Airport, 1489 Jefferson Davis Highway, Arlington, VA 22202.

*Contact Person:* Ryan G. Morris, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4205, MSC 7814, Bethesda, MD 20892, 301–435–1501, *morrisr@csr.nih.gov.*

*Name of Committee:* Musculoskeletal, Oral and Skin Sciences Integrated Review Group; Musculoskeletal Rehabilitation Sciences Study Section.

*Date:* October 8, 2010.

*Time:* 8 a.m. to 6 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hilton Alexandria Old Town, 1767 King Street, Alexandria, VA 22314.

*Contact Person:* Jo Pelham, BA, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4102, MSC 7814, Bethesda, MD 20892, (301) 435–1786, *pelhamj@csr.nih.gov.*

*Name of Committee:* Infectious Diseases and Microbiology Integrated Review Group; Host Interactions with Bacterial Pathogens Study Section.

*Date:* October 8, 2010.

*Time:* 8 a.m. to 6 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Pier 5 Hotel, 711 Eastern Avenue, Baltimore, MD 21202.

*Contact Person:* Fouad A El-Zaatari, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3186, MSC 7808, Bethesda, MD 20892, (301) 435–1149, *elzaataf@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: August 26, 2010.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–21815 Filed 8–31–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Advisory Committee to the Director (ACD), Centers for Disease Control and Prevention (CDC)—Health Disparities Subcommittee (HDS)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the CDC announces the following meeting of the aforementioned subcommittee:

*Time and Date:* 2 p.m.–3 p.m., September 23, 2010.

*Place:* The teleconference will originate at the CDC.

*Status:* Open to the public. Teleconference access limited only by the availability of telephone ports. The public is welcome to participate during the public comment period, which is tentatively scheduled from 2:45 p.m. to 2:50 p.m. To participate in the teleconference please dial (877) 394–7734 and enter conference code 9363147.

*Purpose:* The Subcommittee will provide recommendations for consideration to the Advisory Committee to the Director on strategic and other broad issues facing CDC.

*Matters to be Discussed:* Policy brief on health equity and social determinants of health; update on collaboration with the CDC Health Equity Workgroup; CDC Director's Annual Health Disparity Report; and briefing on the realignment of the CDC Office of Minority Health and Health Disparities.

Agenda items are subject to change as priorities dictate.

*Contact Person for More Information:* Walter W. Williams, M.D., M.P.H., Designated Federal Officer, Health Disparities Subcommittee, Advisory Committee to the Director, CDC, 1600 Clifton Road, NE., M/S E–67, Atlanta, Georgia 30333. Telephone (404) 498–2310, E-mail: *www1@cdc.gov.*

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 the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: August 24, 2010.

**Elaine L. Baker,**

*Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. 2010–21803 Filed 8–31–10; 8:45 am

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Human Genome Research Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. 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 Inherited Disease Research Access Committee.

*Date:* September 14, 2010.

*Time:* 11:30 a.m. to 12:30 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: August 26, 2010.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–21819 Filed 8–31–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Prospective Grant of Exclusive License: Use of Pentosan Polysulfate To Treat Certain Conditions of the Prostate

**AGENCY:** National Institutes of Health, Public Health Service, HHS.

**ACTION:** Notice.

**SUMMARY:** This is notice, in accordance with 35 U.S.C. 209(c)(1) and 37 CFR 404.7(a)(1)(i), that the National Institutes of Health (NIH), Department of Health and Human Services, is contemplating the grant of an exclusive patent license to practice the invention embodied in U.S. Patent Application No. 10/209,331, filed July 30, 2002, which was issued as U.S. Patent 6,828,309 on December 07, 2004, entitled, "USE OF PENTOSAN POLYSULFATE TO TREAT CERTAIN CONDITIONS OF THE PROSTATE," developed by Dr. Gary Striker (formerly of NIDDK) [HHS Ref. No. E–104–1997/0–US–03], to Swati Spentose Private Limited, having a place of business in Mumbai, India. The patent rights in this invention have been assigned to the United States of America.

The contemplated exclusive license territory may be worldwide, and the field of use may be limited to "the use of pentosan polysulfate for the treatment or prevention of benign prostatic hyperplasia."

**DATES:** Only written comments and/or application for a license which are received by the NIH Office of Technology Transfer on or before October 1, 2010 will be considered.

**ADDRESSES:** Requests for copies of the patents, inquiries, comments, and other materials relating to the contemplated license should be directed to: Suryanarayana Vepa, PhD, J.D., Licensing and Patenting Manager, Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, MD 20852–3804; Telephone: 301–435–5020; Facsimile: 301–402–0220; E-mail: *vepas@mail.nih.gov.*

**SUPPLEMENTARY INFORMATION:** This technology is a method for treating Benign Prostatic Hyperplasia (BHP) using the oral medication pentosan polysulfate (PPS). PPS is a well known, semi-synthetic polysaccharide extracted from beech wood cellulose that is FDA approved for the treatment of interstitial fibrosis. The current technology builds on the surprising discovery that PPS can cause regression of scarring and lesions in prostatic tissue. PPS reduces or eliminates both smooth muscle cell proliferation and extracellular matrix deposition, and so reduces the size of the prostate gland and decreases associated obstructive symptoms.

The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within 30 days from the date of this published Notice, the NIH receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Applications for a license in the prospective field of use filed in response to this notice will be treated as objections to the grant of the contemplated exclusive license. Comments and objections submitted in response to this notice will not be made available for public inspection, and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

Dated: August 25, 2010.

**Richard U. Rodriguez,**

*Director, Division of Technology Development & Transfer, Office of Technology Transfer, National Institutes of Health.*

[FR Doc. 2010–21818 Filed 8–31–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2010–N–0427]**

### Public Workshop on Medical Devices and Nanotechnology: Manufacturing, Characterization, and Biocompatibility Considerations; Correction

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice; correction.

**SUMMARY:** The Food and Drug Administration (FDA) is correcting a notice that appeared in the **Federal Register** of August 23, 2010 (75 FR 51829). The notice announced the public workshop entitled "Medical Devices & Nanotechnology: Manufacturing, Characterization, and Biocompatibility Considerations." The notice was published with an incorrect registration Web site. This document corrects that Web site.

**FOR FURTHER INFORMATION CONTACT:** Paul Gadiock, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 4432, Silver Spring, MD 20993–0002, 301–796–5736.

**SUPPLEMENTARY INFORMATION:** In FR Doc. 2010–20837, appearing on page 51829 in the **Federal Register** of Monday, August 23, 2010, the following correction is made:

1. On page 51829, in the second column, in the *Registration and Requests for Oral Presentations* section, in the first full paragraph, beginning in the third line, "*http://www.fda.gov/MedicalDevices/NewsEvents/WorskshopsConferences/default.htm*" is corrected to read "*http://www.fda.gov/MedicalDevices/NewsEvents/WorkshopsConferences/default.htm*".

Dated: August 27, 2010.

**David Dorsey,**

*Acting Deputy Commissioner for Policy, Planning and Budget.*

[FR Doc. 2010–21801 Filed 8–31–10; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention (CDC)

### Request for Nominations of Candidates To Serve on the Board of Scientific Counselors (BSC), National Center for Environmental Health/ Agency for Toxic Substances and Disease Registry (NCEH/ATSDR), Centers for Disease Control and Prevention, Department of Health and Human Services (HHS)

*Correction:* This notice was published in the **Federal Register** on July 8, 2010, Volume 75, Number 130, Page 39265–39266. The notice for the aforementioned meeting has been changed to the following:

The NCEH/ATSDR is soliciting nominations for consideration of membership on the BSC. The BSC, NCEH/ATSDR provides advice and guidance to the Secretary, HHS; the Director, CDC and the Director, NCEH/ATSDR, regarding program goals, objectives, strategies, and priorities in fulfillment of the agencies' mission to protect and promote people's health. The Board provides advice and guidance to help NCEH/ATSDR work more efficiently and effectively with its various constituents and to fulfill its mission in protecting America's health.

Nominations are being sought for individuals who have expertise and qualifications necessary to contribute to the accomplishments of the Board's objectives. Nominees will be selected from experts having experience in preventing human diseases and disabilities caused by environmental conditions. Experts in the disciplines of toxicology, epidemiology, environmental or occupational medicine, behavioral science, risk assessment, exposure assessment, and experts in public health and other related disciplines will be considered. Balanced membership will depend upon several factors, including: (1) The committee's mission; (2) the geographic, ethnic, social, economic, or scientific impact of the advisory committee's recommendations; (3) the types of specific perspectives required, for example, such as those of consumers, technical experts, the public at-large, academia, business, or other sectors; (4) the need to obtain divergent points of view on the issues before the advisory committee; and (5) the relevance of State, local, or tribal governments to the development of the advisory committee's recommendations. Members may be invited to serve up to four-year terms. Nominees must be U.S. citizens.

The following information must be submitted for each candidate: name, affiliation, address, telephone number, and current curriculum vitae. E-mail addresses are requested if available.

Nominations should be sent, in writing, and postmarked by November 30, 2010 to: Sandra Malcom, Committee Management Specialist, NCEH/ATSDR, CDC, 4770 Buford Highway (MS–F61), Chamblee, Georgia 30341. (E-mail address: *sym6@CDC.GOV*). Telephone and facsimile submissions cannot be accepted.

Candidates invited to serve will be asked to submit the "Confidential Financial Disclosure Form for Special Government Employees Serving on Federal Advisory Committees at the Centers for Disease Control and Prevention." This form allows CDC to determine whether there is a statutory conflict between that person's public responsibilities as a Special Government Employee and private interests and activities, or the appearance of a lack of impartiality, as defined by Federal regulation. The form may be viewed and downloaded at *http://www.usoge.gov/forms/oge450_pdf/oge450_accessible.pdf.* This form should not be submitted as part of a nomination.

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 National Center for Environmental Health/Agency for Toxic Substances and Disease Registry.

Dated: August 24, 2010.

**Elaine L. Baker,**

*Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. 2010–21802 Filed 8–31–10; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HOMELAND SECURITY

**[Docket No. DHS–2010–0073]**

### Science and Technology (S&T) Directorate; Agency Information Collection Activities: Submission for Review; Information Collection Request for the Department of Homeland Security (DHS) Science and Technology Protected Repository for the Defense of Infrastructure Against Cyber Threats (PREDICT) Program

**AGENCY:** Science and Technology Directorate, DHS.

**ACTION:** 30-day notice and request for comment.

**SUMMARY:** The Department of Homeland Security invites the general public to comment on data collection forms for the Protected Repository for the Defense of Infrastructure Against Cyber Threats (PREDICT) initiative. PREDICT is an initiative to facilitate the accessibility of computer and network operational data for use in cybersecurity defensive research and development. Specifically, PREDICT provides developers and evaluators with regularly updated network operations data sources relevant to cybersecurity defense technology development. The data sets are intended to provide developers with timely and detailed insight into cyberattack phenomena occurring across the Internet and in some cases will reveal the effects of these attacks on networks that are owned or managed by the data producers. A key motivation of PREDICT is to make these data sources more widely available to technology developers and evaluators, who today often determine the efficacy of their technical solutions on anecdotal evidence or small-scale test experiments, rather than on more comprehensive real-world data. The PREDICT Web site *http://www.predict.org/contains* an overview and general information as background, along with the data repository. As specified on the Web site, access to the PREDICT data repository is available to eligible research groups upon approval of their applications. In addition to helping to determine whether a group is eligible to access the repository, the forms will also manage the interactions between the PREDICT portal administrators and the research groups accessing the PREDICT portal. The Department is committed to improving its PREDICT initiative and invites interested persons to comment on the following forms and instructions (hereinafter "Forms Package") for the PREDICT initiative: (1) Account Request

Form (DHS Form 10029 (12/07)); (2) Request a Dataset Form (DHS Form 10032 (12/07)); (3) My Datasets Form (DHS Form 10033 (12/07)); (4) Memorandum of Agreement—PREDICT (PCC) Coordinating Center and Researcher/User (DHS Form 10035 (12/07)); (5) Memorandum of Agreement PREDICT Coordinating Center (PCC) and Data Provider (DP) (DHS Form 10036 (12/07)); (6) Memorandum of Agreement—PCC and Data Host (DH) (DHS Form 10037 (12/07)); (7) Authorization Letter for Data Host (DHS Form 10038 (12/07)); (8) Authorization Letter for Data Provider (DHS Form 10039 (12/07)); (9) Sponsorship Letter (DHS Form 10040 (12/07)); (10) Notice of Dataset Access/Application Expiration (DHS Form 10041 (12/07)); (11) Notice for Certificate of Data Destruction (DHS Form 10042 (12/07)). Two new forms are also included—(12) Amendment to Research/User Agreement (10060 (04/10)); (13) Notice of Data Access Expiration (10061 (04/10)).

This notice and request for comments is required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35).

**DATES:** Comments are encouraged and will be accepted until October 1, 2010.

*Comments:* Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to Desk Officer for the Department of Homeland Security, Science and Technology Directorate, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974. Please include docket number DHS–2010–0073 in the subject line of the message.

**FOR FURTHER INFORMATION CONTACT:** Jeffery Harris (202) 254–6015 (Not a toll free number).

**SUPPLEMENTARY INFORMATION:** Interested parties can obtain copies of the Forms Package by calling or writing the point of contact listed above. The content of PREDICT is proprietary datasets that will be used by the Research community in its efforts to build products and technologies that will better protect America's computing infrastructure. Using a secure Web portal, accessible through *https://www.predict.org/*, the PREDICT Coordinating Center manages a centralized repository that identifies the datasets and their sources and location, and acts as gatekeeper for access and release of the data. All data input to the system is either keyed in by users (Data Providers) or migrated (via upload of XML files).

DHS is particularly interested in comments that:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Suggest ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Suggest ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

The user will complete a portion of the forms online and submit them through the Web site, while some forms will be printed from the Web site and faxed to a PREDICT portal administrator. The entire Forms Package will be available on the PREDICT Web site found at *https://www.predict.org.*

*Overview of this Information Collection:*

(1) *Type of Information Collection:* Information Collection Revision.

(2) *Title of the Form/Collection:* DHS S&T PREDICT Initiative.

*Agency Form Number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* DHS Science and Technology Directorate, (1) Account Request Form (DHS Form 10029 (12/07)); (2) Request a Dataset Form (DHS Form 10032 (12/07)); (3) My Datasets Form (DHS Form 10033 (12/07)); (4) Memorandum of Agreement—PREDICT (PCC) Coordinating Center and Researcher/User (DHS Form 10035 (12/07)); (5) Memorandum of Agreement PREDICT Coordinating Center (PCC) and Data Provider (DP) (DHS Form 10036 (12/07)); (6) Memorandum of Agreement—PCC and Data Host (DH) (DHS Form 10037 (12/07)); (7) Authorization Letter for Data Host (DHS Form 10038 (12/07)); (8) Authorization Letter for Data Provider (DHS Form 10039 (12/07)); (9) Sponsorship Letter (DHS Form 10040 (12/07)); (10) Notice of Dataset Access/Application Expiration (DHS Form 10041 (12/07)); (11) Notice for Certificate of Data Destruction (DHS Form 10042 (12/07)). Two new forms are also included—(12) Amendment to Research/User Agreement (10060 (04/10)); (13) Notice of Data Access Expiration (10061 (04/10)).

(3) *Affected public who will be asked or required to respond, as well as a brief abstract:* Individuals or households, Business or other for-profit, Not-for-profit institutions, Federal government, and State, local, or tribal government; the data gathered will allow the PREDICT initiative to provide a central repository, accessible through a Web-based portal (*https://www.predict.org/*) that catalogs current computer network operational data, provide secure access to multiple sources of data collected as a result of use and traffic on the Internet, and facilitate data flow among PREDICT participants for the purpose of developing new models, technologies and products that support effective threat assessment and increase cyber security capabilities.

(4) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

a. *Estimate of the total number of respondents:* 206.

b. *An estimate of the time for an average respondent to respond:* 8 burden hours.

c. *An estimate of the total public burden (in hours) associated with the collection:* 118 burden hours.

Dated: August 24, 2010.

**Tara O'Toole,**

*Under Secretary for Science and Technology.*

[FR Doc. 2010–21783 Filed 8–31–10; 8:45 am]

**BILLING CODE 9110–9F–P**

## DEPARTMENT OF HOMELAND SECURITY

**[Docket No. DHS–2010–0072]**

## Science and Technology (S&T) Directorate: Agency Information Collection Activities: Submission for Review; Information Collection Request for the Department of Homeland Security (DHS) Science and Technology TechSolutions Program

**AGENCY:** Science and Technology Directorate, DHS.

**ACTION:** 30-day notice and request for comment.

**SUMMARY:** The TechSolutions Program was established by the Department of Homeland Security's (DHS) Science and Technology (S&T) Directorate to provide information, resources and technology solutions that address mission capability gaps identified by the emergency response community. The

goal of TechSolutions is to field technologies that meet 80% of the operational requirement, in a 12 to 15 month time frame, at a cost commensurate with the proposal. Goals will be accomplished through rapid prototyping or the identification of existing technologies that satisfy identified requirements. Through the use of data collection forms, TechSolutions will collect submitter and capability gap information from first responders (Federal, State, local, and tribal police, firefighters, and emergency medical service) through the TechSolutions Web site. The information will be used to address reported capability gaps, leading to improved safety and productivity. The DHS invites interested persons to comment on the following forms and instructions (hereinafter "Forms Package") for the TechSolutions program: (1) Submit a Capability Gap (DHS Form 10011 (04/07)), (2) Information Request (DHS Form 10012 (04/07)), and (3) User Registration (DHS Form 10015 (04/07)). Section 313 of the Homeland Security Act of 2002 (Pub. L. 107–296) established this requirement. This notice and request for comments is required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35).

**DATES:** Comments are encouraged and will be accepted until October 1, 2010.

*Comments:* Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to Desk Officer for the Department of Homeland Security, Science and Technology Directorate, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974. Please include docket number DHS–2010–0072 in the subject line of the message.

**FOR FURTHER INFORMATION CONTACT:** Jeffery Harris (202) 254–6015 (Not a toll free number).

**SUPPLEMENTARY INFORMATION:** Please note that the Forms Package includes three forms for collecting submitter and capability gap information from first responders (Federal, State, local, and tribal police, firefighters, and emergency medical service). As explained herein, these separate forms are intended to be flexible and permit DHS S&T to address reported capability gaps, leading to improved safety and productivity without undue bureaucratic burden. The Department is committed to improving its TechSolutions processes and urges all interested parties to suggest how these materials can further reduce burden while seeking necessary information under the Act. DHS is particularly interested in comments that:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Suggest ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Suggest ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

The Forms Package will be available on the Tech Solutions Web site found at (*https://www.techsolutions.dhs.gov*). The user will complete the forms online and submit them through the Web site.

**Overview of This Information Collection**

(1) *Type of Information Collection:* Information Collection Revision.

(2) *Title of the Form/Collection:* TechSolutions Submit a Capability Gap, Information Request, and User Registration.

*Agency Form Number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* DHS Science and Technology Directorate, Submit a Capability Gap (DHS Form 10011 (04/07), Information Request (DHS Form 10012 (04/07), and User Registration (DHS Form 10015 (04/07).

(3) *Affected public who will be asked or required to respond, as well as a brief abstract:* Business or other for-profit, not-for-profit institutions, and state, local or tribal government; the data collected through the TechSolutions Forms Package will be used to address reported capability gaps, leading to improved safety and productivity for first responders.

(4) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

a. *Estimate of the total number of respondents:* 391.

b. *An estimate of the time for an average respondent to respond:* .42 burden hours.

c. *An estimate of the total public burden (in hours) associated with the collection:* 39 burden hours.

Dated: August 24, 2010.

**Tara O'Toole,**

*Under Secretary for Science and Technology.*

[FR Doc. 2010–21786 Filed 8–31–10; 8:45 am]

**BILLING CODE 9110–9F–P**

## DEPARTMENT OF HOMELAND SECURITY

**[Docket No. DHS–2010–0074]**

### Homeland Security Advisory Council

**AGENCY:** The Office of Policy, DHS.

**ACTION:** Notice of Open Teleconference Federal Advisory Committee Meeting.

**SUMMARY:** The Homeland Security Advisory Council (HSAC) will meet via teleconference for the purpose of reviewing the report of the HSAC's Southwest Border Task Force (SWBTF).

**DATES:** The HSAC conference call will take place from 4:30 p.m. to 5:30 p.m. EDT on Thursday, September 16, 2010. Please be advised that the meeting is scheduled for one hour and all participating members of the public should promptly call-in at the beginning of the teleconference.

**ADDRESSES:** The HSAC meeting will be held via teleconference. Members of the public interested in participating in this teleconference meeting may do so by following the process outlined below (see "Public Participation").

Written comments must be submitted and received by September 9, 2010.

Comments must be identified by Docket No. DHS–2010–0074 and may be submitted by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: HSAC@dhs.gov.* Include docket number in the subject line of the message.
- *Fax:* (202) 282–9207.
- *Mail:* Homeland Security Advisory Council, Department of Homeland Security, Mailstop 0850, 245 Murray Lane, SW., Washington, DC 20528.

*Instructions:* All submissions received must include the words "Department of Homeland Security" and DHS–2010–0074, the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided.

*Docket:* For access to the docket to read background documents or

comments received by the DHS Homeland Security Advisory Council, go to *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** HSAC Staff at *hsac@dhs.gov* or 202–447–3135.

**SUPPLEMENTARY INFORMATION:** Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. 2. The HSAC provides independent advice to the Secretary of the Department of Homeland Security to aid in the creation and implementation of critical and actionable policies and capabilities across the spectrum of homeland security operations. The HSAC periodically reports, as requested, to the Secretary, on such matters. The Federal Advisory Committee Act requires **Federal Register** publication 15 days prior to a meeting. The HSAC will meet to review the SWBTF report with findings and recommendations.

*Public Participation:* Members of the public may register to participate in this HSAC teleconference via aforementioned procedures. Each individual must provide his or her full legal name, e-mail address and phone number no later than 5 p.m. EDT on September 14, 2010, to a staff member of the HSAC via e-mail at *HSAC@dhs.gov* or via phone at (202) 447–3135. HSAC conference call details will be provided to interested members of the public at this time.

*Information on Services for Individuals with Disabilities:* For information on facilities or services for individuals with disabilities, or to request special assistance at the meeting, contact the HSAC as soon as possible.

Dated: August 25, 2010.

**Becca Sharp,**

*Executive Director, Homeland Security Advisory Council, DHS.*

[FR Doc. 2010–21787 Filed 8–31–10; 8:45 am]

**BILLING CODE 9110–9M–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R8–ES–2010–N190; 80221–1113–0000–F5]**

### Endangered Species Recovery Permit Applications

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of receipt of permit applications; request for comment.

**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 also requires that we invite public comment before issuing these permits.

**DATES:** Comments on these permit applications must be received on or before October 1, 2010.

**ADDRESSES:** Written data or comments should be submitted to the U.S. Fish and Wildlife Service, Endangered Species Program Manager, Region 8, 2800 Cottage Way, Room W–2606, Sacramento, CA 95825 (telephone: 916–414–6464; fax: 916–414–6486). Please refer to the respective permit number for each application when submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Daniel Marquez, Fish and Wildlife Biologist; see **ADDRESSES** (telephone: 760–431–9440; fax: 760–431–9624).

**SUPPLEMENTARY INFORMATION:** The following applicants have applied for scientific research permits to conduct certain activities with endangered species under section 10(a)(1)(A) of the Act (16 U.S.C. 1531 *et seq.*). We seek review and comment from local, State, and Federal agencies and the public on the following permit requests. 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 No. TE–15544A**

*Applicant:* Christine L. Beck, San Diego, California.

The applicant requests a permit to take (harass by survey, nest monitor and band) the California least tern (*Sterna antillarum browni*) and least Bell's vireo (*Vireo belliipusillus*) in conjunction with surveys and population monitoring throughout the range of the species in San Diego and Orange Counties, California, for the purpose of enhancing their survival.

**Permit No. TE–797267**

*Applicant:* H.T. Harvey and Associates, Los Gatos, California.

The applicant requests an amendment to an existing permit (December 16, 2009, 74 FR 66668) to take (survey, capture, handle and release) the tidewater goby (*Eucyclogobius newberryi*) in conjunction with surveys and population monitoring throughout the range of the species in Humboldt County, California, for the purpose of enhancing its survival.

**Permit No. TE–15548A**

*Applicant:* Karen T. Mabb, Camp Pendleton, California.

The applicant requests a permit to take (capture, collect, and kill) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the Riverside fairy shrimp (*Streptocephalus wootoni*), the San Diego fairy shrimp (*Branchinecta sandiegonensis*), and the vernal pool tadpole shrimp (*Lepidurus packardi*) in conjunction with surveys and habitat enhancement activities throughout the range of each species in California, and to remove/reduce to possession *Erynigium aristulatum var. parishii* (San Diego Button-celery) from Federal lands in conjunction with surveys and habitat enhancement activities on Camp Pendleton Marine Corps Base, California, for the purpose of enhancing their survival.

**Permit No. TE–210235**

*Applicant:* Matthew W. McDonald, Idyllwild, California.

The applicant requests an amendment to an existing permit (May 1, 2009, 74 FR 20337) to take (survey by pursuit) the Quino checkerspot butterfly (*Euphydryas editha quino*) in conjunction with surveys throughout the range of the species in California for the purpose of enhancing its survival.

**Permit No. TE–17841A**

*Applicant:* Tetra Tech Incorporated, Santa Barbara, California.

The applicant requests a permit to take (capture, collect, and kill) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the Riverside fairy shrimp (*Streptocephalus wootoni*), the San Diego fairy shrimp (*Branchinecta sandiegonensis*), and the vernal pool tadpole shrimp (*Lepidurus packardi*) in conjunction with survey activities throughout the range of each species in California for the purpose of enhancing their survival.

**Permit No. TE–003269**

*Applicant:* Robert A. James, San Diego, California.

The applicant requests an amendment to an existing permit (December 16, 1999, 64 FR 70274) to take (capture,

collect, and kill) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the Riverside fairy shrimp (*Streptocephalus wootoni*), the San Diego fairy shrimp (*Branchinecta sandiegonensis*), and the vernal pool tadpole shrimp (*Lepidurus packardi*) in conjunction with survey activities throughout the range of each species in California for the purpose of enhancing their survival.

**Permit No. TE–19226A**

*Applicant:* Jillian S. Bates, Oceanside, California.

The applicant requests a permit to take (capture, collect, and kill) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the Riverside fairy shrimp (*Streptocephalus wootoni*), the San Diego fairy shrimp (*Branchinecta sandiegonensis*), and the vernal pool tadpole shrimp (*Lepidurus packardi*) in conjunction with survey activities throughout the range of each species in California for the purpose of enhancing their survival.

**Permit No. TE–142435**

*Applicant:* Debra M. Shier, Topanga, California.

The applicant requests an amendment to an existing permit (December 14, 2007, 72 FR 71145) to take (inject hormones, collect ectoparasites, transport, and hold in captivity) the Stephen's kangaroo rat (*Dipodomys stephensi*) in conjunction with scientific research throughout the range of the species in California for the purpose of enhancing its survival.

**Permit No. TE–172629**

*Applicant:* Kristen L. Sellheim, Davis, California.

The applicant requests an amendment to an existing permit (January 31, 2008, 73 FR 5868) to take (capture, collect, and kill) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the Riverside fairy shrimp (*Streptocephalus wootoni*), the San Diego fairy shrimp (*Branchinecta sandiegonensis*), and the vernal pool tadpole shrimp (*Lepidurus packardi*) in conjunction with survey activities throughout the range of each species in California for the purpose of enhancing their survival.

We invite public review and comment on each of these recovery permit applications. Comments and materials we receive will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

**Michael Long,**

*Acting Regional Director, Region 8, Sacramento, California.*

[FR Doc. 2010–21879 Filed 8–31–10; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

### National Register of Historic Places; Notification of Pending Removal of Listed Property

Pursuant to § 60.15 of 36 CFR part 60, comments are being accepted on the following properties being considered for removal from the National Register of Historic Places. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St., NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by September 16, 2010.

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.

**J. Paul Loether,**

*Chief, National Register of Historic Places/ National Historic Landmarks Program.*

Request for REMOVAL has been made for the following resources:

**ARKANSAS**

**Howard County**

First Christian Church, N. Main St., Nashville, 82000831

**Montgomery County**

Lee Hall Depot, 114 US 270, Mount Ida, 01001231

[FR Doc. 2010–21770 Filed 8–31–10; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

### National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before August 7, 2010. Pursuant to § 60.13 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service,1201 Eye St., NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by September 16, 2010.

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.

**Alexandra Lord,**

*Acting Chief, National Register of Historic Places/National Historic Landmarks Program.*

**CALIFORNIA**

**Alameda County**

Iceland, 2727 Milvia St, Berkley, 10000769

**Los Angeles County**

Bungalow Court at 1516 N. Serrano Ave, 1516–1528½ N. Serrano Ave, Los Angeles, 10000761

Bungalow Court at 1544 N. Serrano Avenue, 1544–1552 N. Serrano Ave, Los Angeles, 10000764

Bungalow Court at 1554 N. Serrano Avenue, 1554–1576 N. Serrano Ave, Los Angeles, 10000762

Bungalow Court at 1721 N. Kinglsey Drive, 1721–1729½ N. Kinglsey Dr, Los Angeles, 10000763

**DISTRICT OF COLUMBIA**

**District of Columbia**

Morris Residence, 4001 Linnean Ave, Washington, 10000750

**FLORIDA**

**St. Johns County**

Fullerwood Park Residential Historic District, Roughly bounded by San Marcos, Macaris, Hildreth & Hospital Creek, Saint Augustine, 10000767

**Volusia County**

Three Chimneys Archaeological Site, 715 W. Granada Blvd, Ormond Beach, 10000757

**ILLINOIS**

**McDonough County**

Lamoine Hotel, 201 N. Randolph St, Macomb, 10000760

**MASSACHUSETTS**

**Barnstable County**

Town Hall Square Historic District Boundary Increase, roughly bounded by MA Rte 6A, Morse Rd, Water St, Shawme Lake, Grove St, Main St, and Tupper Rd., Sandwich, 10000752

**Worcester County**

Stevens Linen Works Historic District, 8–10 Mill St, 2 W. Main St, 2 Curfew Ln, Ardlock Pl, Dudley, 10000751

**MISSOURI**

**St. Louis Independent City**

St. Louis News Company, 1008–1010 Locust St, St. Louis, 10000755

**MONTANA**

**Missoula County**

Missoula County Fairgrounds Historic District, 1101 S. Ave W, Missoula, 10000765

**MONTANA**

**Yellowstone County**

Billings Old Town Historic District, Generally bounded by Montana Ave on the N; S 26th on the E; 1st Ave S on the S; and S. 30th St on the W, Billings, 10000753

Laurel Downtown Historic District, Roughly bounded by the Burlington Northern Santa Fe Railway Company tracks to the S, Third S. to the N, Wyoming Ave, Laurel, 10000768

**NEBRASKA**

**Douglas County**

Neef, Henry B., House, 2884 Iowa St, Omaha, 10000758

Wohlner's Neighborhood Grocery, 5203 Leavenworth St, Omaha, 10000759

**NORTH CAROLINA**

**Henderson County**

Singletary—Reese—Robinson House, 211 Robinson Ln, Laurel Park, 10000754

**OHIO**

**Hamilton County**

Fairview Public School Annex, 255 Warner St and 2232 Stratford Ave, Cincinnati, 10000756

**RHODE ISLAND**

**Kent County**

Anthony Village Historic District, Washington St between Battey St and Hazard St and various properties on 12 adjacent Sts and the Pawtuxet River, Coventry, 10000770

**VERMONT**

**Windham County**

Mechanicsville Historic District, Rte 121 E, Grafton, 10000766

[FR Doc. 2010–21771 Filed 8–31–10; 8:45 am]

**BILLING CODE P**

## INTERNATIONAL TRADE COMMISSION

### Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *In Re Certain Components for Installation of Marine Autopilots with GPS or IMU,* DN 2752; the Commission is soliciting comments on any public interest issues raised by the complaint.

**FOR FURTHER INFORMATION CONTACT:** Marilyn R. Abbott, Secretary to the Commission, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission has received a complaint filed on behalf of American GNC on August 26, 2010. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain Marine Autopilots. The complaint names as respondents Furuno Electronics Co., Ltd. of Hyogo, Japan; Furuno U.S.A. Inc. of Camas, WA; Navico Holdings AS of Lysaker, Norway; Navico UK, Ltd. of Romsey Hampshire, United Kingdom; Navico, Inc. of Nashua, NH; Flir Systems, Inc. of Wilsonville, OR; Raymarine UK Ltd., of Portsmouth Hampshire, United Kingdom; and Raymarine Inc. of Merrimack, NH.

The complainant, proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five pages in length, on any public interest issues raised by the complaint. Comments should address whether issuance of an exclusion order and/or a cease and desist order in this investigation would negatively affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the orders are used in the United States;

(ii) Identify any public health, safety, or welfare concerns in the United States relating to the potential orders;

(iii) Indicate the extent to which like or directly competitive articles are produced in the United States or are otherwise available in the United States, with respect to the articles potentially subject to the orders; and

(iv) Indicate whether Complainant, Complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to an exclusion order and a cease and desist order within a commercially reasonable time.

Written submissions must be filed no later than by close of business, five business days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Submissions should refer to the docket number ("Docket No. 2752") in a prominent place on the cover page and/or the first page. The

Commission's rules authorize filing submissions with the Secretary by facsimile or electronic means only to the extent permitted by section 201.8 of the rules (*see* Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/documents/handbook_on_electronic_filing.pdf*). Persons with questions regarding electronic filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10 and 210.50(a)(4) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.50(a)(4)).

By order of the Commission.

Issued: August 26, 2010.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. 2010–21789 Filed 8–31–10; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation Nos. 701–TA–467 and 731–TA–1164–1165 (Final)]**

### Narrow Woven Ribbons With Woven Selvedge From China and Taiwan

**Determinations**

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (Commission) determines,[2] pursuant to sections 705(b) and 735(B) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)) and (19 U.S.C. 1673d(b)) (the Act), that an industry in the United States is threatened with material injury by reason of imports of narrow woven ribbons with woven selvedge from China, primarily provided for in subheading 5806.32 of the Harmonized Tariff Schedule of the United States, that the U.S. Department of Commerce ("Commerce") has determined are subsidized and sold in the United States at less than fair value ("LTFV"). The Commission further determines,[2] pursuant to section 735(B) of the Act (19 U.S.C. 1673d(b)), that an industry in the United States is threatened with material injury by reason of imports of narrow woven ribbons with woven selvedge from Taiwan, primarily provided for in subheading 5806.32 of the Harmonized Tariff Schedule of the United States, that Commerce has determined are sold in the United States at LTFV. In addition, the Commission determines that it would not have found material injury but for the suspension of liquidation.

**Background**

The Commission instituted these investigations effective July 9, 2009, following receipt of a petition filed with the Commission and Commerce by Berwick Offray LLC and its wholly-owned subsidiary Lion Ribbon Company, Inc., Berwick, PA. The final phase of the investigations was scheduled by the Commission following notification of preliminary determinations by Commerce that imports of narrow woven ribbons with woven selvedge from China were subsidized within the meaning of section 703(b) of the Act (19 U.S.C. 1671b(b)) and that imports of narrow woven ribbons with woven selvedge from China and Taiwan were dumped within the meaning of 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on March 12, 2010 (75 FR 11908). The hearing was held in Washington, DC, on July 15, 2010, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on August 25, 2010. The views of the Commission are contained in USITC Publication 4180 (September 2010), entitled *Narrow Woven Ribbons With Woven Selvedge From China and Taiwan: Investigation Nos. 701–TA–467 and 731–TA–1164–1165 (Final).*

By order of the Commission.

Issued: August 26, 2010.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. 2010–21760 Filed 8–31–10; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 731–TA–459 (Third Review)]**

### Polyethylene Terephthalate (PET) Film From Korea

**AGENCY:** United States International Trade Commission.

**ACTION:** Institution of a five-year review concerning the antidumping duty order on PET film from Korea.

**SUMMARY:** The Commission hereby gives notice that it has instituted a review pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)) (the Act) to determine whether revocation of the antidumping duty order on PET film from Korea would be likely to lead to continuation or recurrence of material injury. Pursuant to section 751(c)(2) of the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission; [1] to be assured of consideration, the deadline for responses is October 1, 2010. Comments on the adequacy of responses may be filed with the Commission by November 15, 2010. For further information concerning the conduct of this review and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207), as most recently amended at 74 FR 2847 (January 16, 2009).

**DATES:** *Effective Date:* September 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] Commissioners Charlotte R. Lane, Shara L. Aranoff, and Irving A. Williamson made affirmative determinations. Chairman Deanna Tanner Okun and Commissioner Daniel R. Pearson made negative determinations. Commissioner Dean A. Pinkert made an affirmative determination with respect to China and a negative determination with respect to Taiwan.

[1] No response to this request for information is required if a currently valid Office of Management and Budget (OMB) number is not displayed; the OMB number is 3117–0016/USITC No. 11–5–222, expiration date June 30, 2011. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436.

impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this review may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

**SUPPLEMENTARY INFORMATION:**

*Background.*—On June 5, 1991, the Department of Commerce (Commerce) issued an antidumping duty order on imports of PET film from Korea (56 FR 25669). The original order was amended pursuant to final court decision on September 26, 1997 (62 FR 50557). Following first five-year reviews by Commerce and the Commission, effective March 7, 2000, Commerce issued a continuation of the antidumping duty order on imports of PET film from Korea (65 FR 11984). Following second five-year reviews by Commerce and the Commission, effective October 20, 2005, Commerce issued a continuation of the antidumping duty order on imports of PET film from Korea (70 FR 61118). The Commission is now conducting a third review to determine whether revocation of the order would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. It will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct a full review or an expedited review. The Commission's determination in any expedited review will be based on the facts available, which may include information provided in response to this notice.

*Definitions.*—The following definitions apply to this review:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year review, as defined by the Department of Commerce.

(2) The *Subject Country* in this review is Korea.

(3) The *Domestic-Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its original determination and its first and second expedited five-year review determinations, the Commission defined the *Domestic-Like Product* as all PET film, including equivalent PET film. One Commissioner defined the *Domestic Like Product* differently in the original investigation.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic-Like Product,* or those producers whose collective output of the *Domestic-Like Product* constitutes a major proportion of the total domestic production of the product. In its original determination and its first and second expedited five-year review determinations, the Commission defined the *Domestic Industry* as all domestic producers of PET film, including equivalent PET film. One Commissioner defined the *Domestic Industry* differently.

(5) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

*Participation in the review and public service list.*—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the review as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register.** The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the review.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation. The Commission's designated agency ethics official has advised that a five-year review is not considered the "same particular matter" as the corresponding underlying original investigation for purposes of 18 U.S.C. 207, the post employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 73 FR 24609 (May 5, 2008). This advice was developed in consultation with the Office of Government Ethics. Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Carol McCue Verratti, Deputy Agency Ethics Official, at 202–205–3088.

*Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.*—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in this review available to authorized applicants under the APO issued in the review, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the review. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

*Certification.*—Pursuant to section 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this review must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will be deemed to consent, unless otherwise specified, for the Commission, its employees, and contract personnel to use the information provided in any other reviews or investigations of the same or comparable products which the Commission conducts under Title VII of the Act, or in internal audits and investigations relating to the programs and operations of the Commission pursuant to 5 U.S.C. Appendix 3.

*Written submissions.*—Pursuant to section 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is October 1, 2010. Pursuant to section 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct an expedited or full review. The deadline for filing such comments is November 15, 2010. All written submissions must conform with the provisions of sections 201.8 and 207.3 of the Commission's rules and any submissions that contain BPI must also conform with the requirements of sections 201.6 and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002). Also,

in accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the review must be served on all other parties to the review (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the review you do not need to serve your response).

*Inability to provide requested information.*—Pursuant to section 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to section 776(b) of the Act in making its determination in the review.

*Information to be Provided in Response to this Notice of Institution:* As used below, the term "firm" includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and E-mail address of the certifying official.

(2) A statement indicating whether your firm/entity is a U.S. producer of the *Domestic Like Product,* a U.S. union or worker group, a U.S. importer of the *Subject Merchandise,* a foreign producer or exporter of the *Subject Merchandise,* a U.S. or foreign trade or business association, or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in this review by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping duty order on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry.*

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in section 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in the *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries after 2004.

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and e-mail address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product during calendar year 2009, except as noted (report quantity data in pounds and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (*i.e.,* the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) The quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s); and

(d) The quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s).

(e) The value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from the *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2009 (report quantity data in pounds and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') imports;

(b) The quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. commercial shipments of *Subject Merchandise* imported from the *Subject Country;* and

(c) The quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from the *Subject Country.*

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in the *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2009 (report quantity data in pounds and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in the *Subject Country* accounted for by your firm's(s') production; and

(b) Capacity (quantity) of your firm to produce the *Subject Merchandise* in the *Subject Country* (*i.e.,* the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and

cleanup, and a typical or representative product mix); and

(c) The quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in the *Subject Country* after 2004, and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in the *Subject Country,* and such merchandise from other countries.

(13) (OPTIONAL) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

**Authority:** This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.61 of the Commission's rules.

By order of the Commission.

Issued: August 24, 2010.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. 2010–21366 Filed 8–31–10; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation Nos. 731–TA–376, 563, and 564 (Third Review)]**

## Stainless Steel Butt-Weld Pipe Fittings From Japan, Korea, and Taiwan

**AGENCY:** United States International Trade Commission.

**ACTION:** Institution of five-year reviews concerning the antidumping duty orders on stainless steel butt-weld pipe fittings from Japan, Korea, and Taiwan.

**SUMMARY:** The Commission hereby gives notice that it has instituted reviews pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)) (the Act) to determine whether revocation of the antidumping duty orders on stainless steel butt-weld pipe fittings from Japan, Korea, and Taiwan would be likely to lead to continuation or recurrence of material injury. Pursuant to section 751(c)(2) of the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission; [1] to be assured of consideration, the deadline for responses is October 1, 2010. Comments on the adequacy of responses may be filed with the Commission by November 15, 2010. For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207), as most recently amended at 74 FR 2847 (January 16, 2009).

**DATES:** *Effective Date:* September 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

**SUPPLEMENTARY INFORMATION:**

*Background.*—On March 25, 1988, the Department of Commerce (Commerce) issued an antidumping duty order on imports of stainless steel butt-weld pipe fittings from Japan (53 FR 9787). On February 23, 1993, Commerce issued an antidumping duty order on imports of stainless steel butt-weld pipe fittings from Korea (58 FR 11029). On June 16, 1993, Commerce issued an antidumping duty order on imports of stainless steel butt-weld pipe fittings from Taiwan, as amended (58 FR 33250). Following five-year reviews by Commerce and the Commission, effective March 6, 2000, Commerce issued a continuation of the antidumping duty orders on imports of stainless steel butt-weld pipe fittings from Japan, Korea, and Taiwan (65 FR 11766). Following second five-year reviews by Commerce and the Commission, effective October 20, 2005, Commerce issued a continuation of the antidumping duty orders on stainless steel butt-weld pipe fittings from Japan, Korea, and Taiwan (70 FR 61119). The Commission is now conducting third reviews to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. It will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full reviews or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

*Definitions.*—The following definitions apply to these reviews:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by Commerce.

(2) The *Subject Countries* in these reviews are Japan, Korea, and Taiwan.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its original determinations and its first and second expedited five-year review determinations, the Commission defined the *Domestic Like Product* as stainless steel butt-weld pipe fittings, co-extensive with Commerce's scope of the subject merchandise.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product,* or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determinations and its first and second expedited five-

[1] No response to this request for information is required if a currently valid Office of Management and Budget (OMB) number is not displayed; the OMB number is 3117–0016/USITC No. 11–5–223, expiration date June 30, 2011. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436.

year review determinations, the Commission defined the *Domestic Industry* as all domestic producers of stainless steel butt-weld pipe fittings.

(5) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

*Participation in the reviews and public service list.*—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the reviews as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register.** The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the reviews.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation. The Commission's designated agency ethics official has advised that a five-year review is not considered the "same particular matter" as the corresponding underlying original investigation for purposes of 18 U.S.C. 207, the post employment statute for Federal employees, and Commission rule 201.15(b)(19 CFR 201.15(b)), 73 FR 24609 (May 5, 2008). This advice was developed in consultation with the Office of Government Ethics. Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Carol McCue Verratti, Deputy Agency Ethics Official, at 202–205–3088.

*Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.*—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in these reviews available to authorized applicants under the APO issued in the reviews, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the reviews. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

*Certification.*—Pursuant to section 207.3 of the Commission's rules, any person submitting information to the Commission in connection with these reviews must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will be deemed to consent, unless otherwise specified, for the Commission, its employees, and contract personnel to use the information provided in any other reviews or investigations of the same or comparable products which the Commission conducts under Title VII of the Act, or in internal audits and investigations relating to the programs and operations of the Commission pursuant to 5 U.S.C. appendix 3.

*Written submissions.*—Pursuant to section 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is October 1, 2010. Pursuant to section 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews. The deadline for filing such comments is November 15, 2010. All written submissions must conform with the provisions of sections 201.8 and 207.3 of the Commission's rules and any submissions that contain BPI must also conform with the requirements of sections 201.6 and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002). Also, in accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the reviews you do not need to serve your response).

*Inability to provide requested information.*—Pursuant to section 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to section 776(b) of the Act in making its determinations in the reviews.

*Information to be Provided in Response to this Notice of Institution:* If you are a domestic producer, union/worker group, or trade/business association; import/export *Subject Merchandise* from more than one *Subject Country;* or produce *Subject Merchandise* in more than one *Subject Country,* you may file a single response. If you do so, please ensure that your response to each question includes the information requested for each pertinent *Subject Country.* As used below, the term "firm" includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address if available) and name, telephone number, fax number, and E-mail address of the certifying official.

(2) A statement indicating whether your firm/entity is a U.S. producer of the *Domestic Like Product,* a U.S. union or worker group, a U.S. importer of the *Subject Merchandise,* a foreign producer or exporter of the *Subject Merchandise,* a U.S. or foreign trade or business association, or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in these reviews by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping duty orders on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry.*

(5) A list of all known and currently operating U.S. producers of the

*Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in section 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in each *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries after 2004.

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and E-mail address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product during calendar year 2009 (report quantity data in pounds and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (*i.e.,* the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) The quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s); and

(d) The quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s).

(e) The value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from the *Subject Country(ies),* provide the following information on your firm's(s') operations on that product during calendar year 2009 (report quantity data in pounds and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') imports;

(b) The quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. commercial shipments of *Subject Merchandise* imported from each *Subject Country;* and

(c) The quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from each *Subject Country.*

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in the *Subject Country(ies),* provide the following information on your firm's(s') operations on that product during calendar year 2009 (report quantity data in pounds and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in each *Subject Country* accounted for by your firm's(s') production; and

(b) Capacity (quantity) of your firm to produce the *Subject Merchandise* in each *Subject Country* (*i.e.,* the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) The quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in the *Subject Countries* after 2004, and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in each *Subject Country,* and such merchandise from other countries.

(13) (OPTIONAL) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

**Authority:** These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.61 of the Commission's rules.

By order of the Commission.

Issued: August 24, 2010.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. 2010–21367 Filed 8–31–10; 8:45 am]

**BILLING CODE 7020–02–P**

## JOINT BOARD FOR THE ENROLLMENT OF ACTUARIES

### Invitation for Membership on Advisory Committee

**AGENCY:** Joint Board for the Enrollment of Actuaries.

**ACTION:** Notice.

**SUMMARY:** The Joint Board for the Enrollment of Actuaries (Joint Board),

established under the Employee Retirement Income Security Act of 1974 (ERISA), is responsible for the enrollment of individuals who wish to perform actuarial services under ERISA. The Joint Board has established an Advisory Committee on Actuarial Examinations (Advisory Committee) to assist in its examination duties mandated by ERISA. The current Advisory Committee members' terms expire on February 28, 2011. This notice describes the Advisory Committee and invites applications from those interested in serving on it.

**1. General**

To qualify for enrollment to perform actuarial services under ERISA, an applicant must have requisite pension actuarial experience and satisfy knowledge requirements as provided in the Joint Board's regulations. The knowledge requirements may be satisfied by successful completion of Joint Board examinations in basic actuarial mathematics and methodology and in actuarial mathematics and methodology relating to pension plans qualifying under ERISA.

The Joint Board, the Society of Actuaries, and the American Society of Pension Professionals & Actuaries jointly offer examinations acceptable to the Joint Board for enrollment purposes and acceptable to those actuarial organizations as part of their respective examination programs.

**2. Programs**

The Advisory Committee plays an integral role in the examination program by assisting the Joint Board in offering examinations that will enable examination candidates to demonstrate the knowledge necessary to qualify for enrollment. The Advisory Committee will discuss the philosophy of such examinations, will review topics appropriately covered in them, and will make recommendations relative thereto. It also will recommend to the Joint Board proposed examination questions. The Joint Board will maintain liaison with the Advisory Committee in this process to ensure that its views on examination content are understood.

**3. Function**

The manner in which the Advisory Committee functions in preparing examination questions is intertwined with the jointly administered examination program. Under that program, the participating actuarial organizations draft questions and submit them to the Advisory Committee for its consideration. After review of the draft questions, the Advisory Committee selects appropriate questions, modifies them as it deems desirable, and then prepares one or more drafts of actuarial examinations to be recommended to the Joint Board. (In addition to revisions of the draft questions, it may be necessary for the Advisory Committee to originate questions and include them in what is recommended.)

**4. Membership**

The Joint Board will take steps to ensure maximum practicable representation on the Advisory Committee of points of view regarding the Joint Board's actuarial examination extant in the community at large and from nominees provided by the actuarial organizations. Since the members of the actuarial organizations comprise a large segment of the actuarial profession, this appointive process ensures expression of a broad spectrum of viewpoints. All members of the Advisory Committee will be expected to act in the public interest, that is, to produce examinations that will help ensure a level of competence among those who will be accorded enrollment to perform actuarial services under ERISA.

Membership normally will be limited to actuaries previously enrolled by the Joint Board. However, individuals having academic or other special qualifications of particular value for the Advisory Committee's work also will be considered for membership. Federally-registered lobbyists may not be members of the Advisory Committee.

The Advisory Committee will meet about four times a year. Advisory Committee members should be prepared to devote from 125 to 175 hours, including meeting time, to the work of the Advisory Committee over the course of a year. Members will be reimbursed for travel expenses incurred, in accordance with applicable government regulations.

Actuaries interested in serving on the Advisory Committee should express their interest and fully state their qualifications in a letter addressed to: Joint Board for the Enrollment of Actuaries, c/o Office of Professional Responsibility SE:OPR, Internal Revenue Service, Attn: Executive Director IR–7238, 1111 Constitution Avenue, NW., Washington, DC 20224.

Any questions may be directed to the Joint Board's Executive Director at 202–622–8225.

The deadline for accepting applications is November 30, 2010.

Dated: August 24, 2010.

**Patrick W. McDonough,**

*Executive Director, Joint Board for the Enrollment of Actuaries.*

[FR Doc. 2010–21609 Filed 8–31–10; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Consent Decree Under the Resource Conservation and Recovery Act

Notice is hereby given that on August 25, 2010, a proposed Consent Decree in *United States of America and State of Texas* v.

*Air Products LLC,* Civil No. 4:10-cv-03074 (S.D. Tex.), was lodged with the United States District Court for the Southern District of Texas.

In the Complaint filed in this action, the United States and the State of Texas sought injunctive relief and civil penalties against Air Products LLC ("Air Products") for violations of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6901–6992k, at Air Products' chemical manufacturing facility in Pasadena, Texas. The Complaint alleged that Air Products' past practice of sending spent sulfuric acid hazardous waste to the neighboring Agrifos Fertilizer, Inc. ("Agrifos") facility for disposal violated several provisions of RCRA. The Complaint also alleged one violation of RCRA's hazardous waste labeling requirements. The State of Texas has joined as a co-plaintiff and brings its own claims under State law. In the proposed Consent Decree, Air Products agrees to manage the spent sulfuric acid on-site, and not to ship it to Agrifos or to any other facility not authorized to accept it; and to certify its compliance with labeling and other requirements applicable to hazardous waste storage tanks on site. Finally, the Consent Decree requires Air Products to pay a $1.485 million civil penalty.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, with a copy to Deborah A. Gitin, U.S. Department of Justice, 301 Howard Street, Suite 1050, San Francisco, CA 94105, and should refer to *United States of America and State*

*of Texas* v. *Air Products LLC,* D.J. Ref. 90–7–1–09206.

The Consent Decree may be examined at the Office of the United States Attorney, 919 Milam St., Houston, Texas 77208, and at U.S. EPA Region 6, Office of Regional Counsel, 1445 Ross Ave., Dallas, Texas 75202. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $9.50 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address. In requesting a copy exclusive of appendices, please enclose a check in the amount of $8.00 (25 cents per page reproduction cost) payable to the U.S. Treasury.

**Maureen Katz,**

*Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 2010–21742 Filed 8–31–10; 8:45 am]

**BILLING CODE 4410–15–P**

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation and Liability Act

Notice is hereby given that on August 26, 2010, two proposed Consent Decrees were lodged with the United States District Court for the District of Minnesota in *United States* v. *International Paper Company, et al.*, Civil Action No. 10–cv–03749–ADM–XXX.

In this action, the United States asserted claims against three parties for recovery of response costs incurred by the United States in connection with the St. Regis Paper Company Superfund Site (the "Site") in Cass Lake, Minnesota, pursuant to Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9607.

The proposed Consent Decrees would resolve claims that the United States has asserted against all three parties. Under the first proposed Consent Decree ("the International Paper-BNSF Railway Consent Decree"), International Paper Company and BNSF Railway Company will reimburse $3,662,475.00 of the costs incurred by the United States in connection with the Site through December 31, 2008. Under the second proposed Consent Decree ("the Cass Forest Products Consent Decree"), Cass Forest Products, Inc. will pay an additional $500 to resolve its liability for response costs incurred, or to be incurred by the United States in connection with the Site. This settlement is based on Cass Forest Products, Inc.'s ability to pay.

The Department of Justice will receive comments relating to these Consent Decrees for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *International Paper Company, et al.*, Civil Action No.10–cv–03749–ADM–XXX, DJ # 90–11–3–06790/2.

The Consent Decrees may be examined at the Office of the United States Attorney, District of Minnesota, 600 United States Courthouse, 300 South Fourth Street, Minneapolis, MN, 55414 and at U.S. EPA Region 5, 77 W. Jackson Blvd., Chicago, IL 60604. During the public comment period, the Consent Decrees may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_ Decrees.html.* A copy of the Consent Decrees may also be obtained by mail from the Consent Decree Library, U.S. Department of Justice, P.O. Box 7611, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax number (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy of the International Paper-BNSF Railway Consent Decree from the Consent Decree Library, please enclose a check in the amount of $6.25 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address. In requesting a copy of the Cass Forest Products Consent Decree from the Consent Decree Library, please enclose a check in the amount of $16.25 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

**Maureen Katz,**

*Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division, United States Department of Justice.*

[FR Doc. 2010–21808 Filed 8–31–10; 8:45 am]

**BILLING CODE 4410–15–P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Importer of Controlled Substances; Notice of Application

This is notice that on May 4, 2010, Cambrex Charles City, Inc., 1205 11th Street, Charles City, Iowa 50616–3466, made application by renewal to the Drug Enforcement Administration (DEA) for registration as an importer of the basic classes of controlled substances listed in schedule II:

| Drug | Schedule |
|---|---|
| Opium, raw (9600) | II |
| Poppy Straw Concentrate (9670) | II |

The company plans to import the basic classes of controlled substances to manufacture a bulk intermediate which will be distributed in bulk to the company's customers.

As explained in the Correction to Notice of Application pertaining to Rhodes Technologies, 72 FR 3417 (2007), comments and requests for hearings on applications to import narcotic raw material are not appropriate.

As noted in a previous notice published in the **Federal Register** on September 23, 1975, (40 FR 43745), all applicants for registration to import a basic class of any controlled substances 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: August 2, 2010.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. 2010–21749 Filed 8–31–10; 8:45 am]

**BILLING CODE 4410–09–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 of the Code of Federal Regulations § 1301.34(a), this is notice that on May 5, 2010, AllTech Associates Inc., 2051 Waukegan Road, Deerfield, Illinois 60015, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the basic classes of controlled substances listed in schedule I and II:

| Drug | Schedule |
|---|---|
| Gamma Hydroxybutyric Acid (2010). | I |
| Heroin (9200) | I |
| Cocaine (9041) | II |
| Codeine (9050) | II |
| Hydrocodone (9193) | II |
| Meperidine (9230) | II |
| Methadone (9250) | II |
| Morphine (9300) | II |

The company plans to import these controlled substances for the manufacture of reference standards.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic class of controlled substance 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 October 1, 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: August 3, 2010.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. 2010–21747 Filed 8–31–10; 8:45 am]

**BILLING CODE 4410–09–P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Importer of Controlled Substances; Notice of Application

This is notice that on May 25, 2010, Noramco, Inc., 1440 Olympic Drive, Athens, Georgia 30601, made application by letter to the Drug Enforcement Administration (DEA) for registration as an importer of Poppy Straw Concentrate (9670), a basic class of controlled substance listed in schedule II.

The company plans to import the listed controlled substance in bulk to manufacture other controlled substances solely in bulk for distribution to the company's customers.

As explained in the Correction to Notice of Application pertaining to Rhodes Technologies, 72 FR 3417 (2007), comments and requests for hearings on applications to import narcotic raw material are not appropriate.

As noted in a previous notice published in the **Federal Register** on September 23, 1975, (40 FR 43745), all applicants for registration to import a basic class of any controlled substances 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: August 13, 2010.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. 2010–21750 Filed 8–31–10; 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 May 17, 2010, Cambridge Isotope Lab, 50 Frontage Road, Andover, Massachusetts 01810, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of Morphine (9300), a basic class of controlled substance listed in schedule II.

The company plans to utilize small quantities of the listed controlled substance in the preparation of analytical standards.

Any other such applicant, and any person who is presently registered with DEA to manufacture such a substance, 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 November 1, 2010.

Dated: August 3, 2010.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. 2010–21739 Filed 8–31–10; 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 April 29, 2010, Cambrex Charles City, Inc., 1205 11th Street, Charles City, Iowa 50616, made application by letter to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of Gamma Hydroxybutyric Acid (GHB) (2010), a basic class of controlled substance listed in schedule I.

The company plans to manufacture Gamma Hydroxybutyric Acid (GHB) (2010) in bulk active pharmaceutical ingredient (API) form for distribution to the company's customers.

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 November 1, 2010.

Dated: August 13, 2010.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. 2010–21745 Filed 8–31–10; 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 May 5, 2010, Austin Pharma LLC., 811 Paloma Drive, Suite C, Round Rock, Texas 78665–2402, 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 |
|---|---|
| Marihuana (7360) | I |
| Tetrahydrocannabinols (7370) | I |
| Alphamethadol (9605) | I |
| Nabilone (7379) | II |
| Methadone (9250) | II |
| Methadone Intermediate (9254) | II |
| Levo-alphacetylmethadol (9648) | II |
| Alfentanil (9737) | II |
| Remifentanil (9739) | II |
| Sufentanil (9740) | II |
| Fentanyl (9801) | II |

The company plans to manufacture the listed controlled substances in bulk for distribution to its customers.

In reference to drug code 7360 (Marihuana), the company plans to bulk manufacture cannabidiol as a synthetic intermediate. This controlled substance will be further synthesized to bulk manufacture a synthetic THC (7370). No other activity for this drug code is authorized for this registration.

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 November 1, 2010.

Dated: August 2, 2010.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator/Deputy Chief of Operation, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. 2010–21785 Filed 8–31–10; 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 April 15, 2010, American Radiolabeled Chemicals, Inc., 101 Arc Drive, St. Louis, Missouri 63146, made application by renewal to the Drug Enforcement Administration (DEA) as a bulk manufacturer of the basic classes of controlled substances listed in schedules I and II:

| Drug | Schedule |
|---|---|
| Gamma Hydroxybutyric Acid (2010) | I |
| Ibogaine (7260) | I |
| Lysergic acid diethylamide (7315) | I |
| Tetrahydrocannabinols (7370) | I |
| Dimethyltryptamine (7435) | I |
| 1-[1-(2–Thienyl)cyclohexyl]piperidine (7470) | I |
| Dihydromorphine (9145) | I |
| Normorphine (9313) | I |
| Amphetamine (1100) | II |
| Methamphetamine (1105) | II |
| Amobarbital (2125) | II |
| Phencyclidine (7471) | II |
| Phenylacetone (8501) | II |
| Cocaine (9041) | II |
| Codeine (9050) | II |
| Dihydrocodeine (9120) | II |
| Oxycodone (9143) | II |
| Hydromorphone (9150) | II |
| Ecgonine (9180) | II |
| Hydrocodone (9193) | II |
| Meperidine (9230) | II |
| Metazocine (9240) | II |
| Dextropropoxyphene, bulk (non-dosage forms) (9273) | II |
| Morphine (9300) | II |
| Oripavine (9330) | II |
| Thebaine (9333) | II |
| Oxymorphone (9652) | II |
| Phenazocine (9715) | II |
| Fentanyl (9801) | II |

The company plans to manufacture small quantities of the listed controlled substances as radiolabeled compounds for biochemical research.

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 November 1, 2010.

Dated: August 3, 2010.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. 2010–21784 Filed 8–31–10; 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 May 11, 2010, Cody Laboratories, 601 Yellowstone Avenue, Cody, Wyoming 82414, 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 |
|---|---|
| Dihydromorphine (9145) | I |
| Amphetamine (1100) | II |
| Methamphetamine (1105) | II |
| Amobarbital (2125) | II |
| Pentobarbital (2270) | II |
| Secobarbital (2315) | II |
| Phenylacetone (8501) | II |
| Cocaine (9041) | II |
| Codeine (9050) | II |
| Dihydrocodeine (9120) | II |
| Oxycodone (9143) | II |
| Hydromorphone (9150) | II |
| Diphenoxylate (9170) | II |
| Ecgonine (9180) | II |
| Hydrocodone (9193) | II |
| Meperidine (9230) | II |
| Methadone (9250) | II |
| Morphine (9300) | II |
| Oxymorphone (9652) | II |
| Alfentanil (9737) | II |
| Remifentanil (9739) | II |
| Sufentanil (9740) | II |
| Fentanyl (9801) | II |

The company plans on manufacturing the listed controlled substances in bulk for sale to its customers.

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 November 1, 2010.

Dated: August 2, 2010.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. 2010–21776 Filed 8–31–10; 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), Title 21 of the Code of Federal Regulations (CFR), this is notice that on May 27, 2010, Archimica, Inc., 2460 W. Bennett Street, Springfield, Missouri 65807–1229, 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 |
|---|---|
| Lisdexamfetamine (1205) | II |
| Methylphenidate (1724) | II |
| Phenylacetone (8501) | II |
| Methadone Intermediate (9254) | II |

The company plans to manufacture the listed controlled substances in bulk for distribution to its customers.

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 November 1, 2010.

Dated: August 2, 2010.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. 2010–21775 Filed 8–31–10; 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 May 14, 2010, Chattem Chemicals Inc., 3801 St. Elmo Avenue, Building 18, Chattanooga, Tennessee 37409, made application by renewal to the Drug Enforcement Administration (DEA) as a bulk manufacturer of the basic classes of controlled substances listed in schedules I and II:

| Drug | Schedule |
|---|---|
| 4–Methoxyamphetamine (7411) | I |
| Dihydromorphine (9145) | I |
| Amphetamine (1100) | II |
| Methamphetamine (1105) | II |
| Lisdexamfetamine (1205) | II |
| Methylphenidate (1724) | II |
| Pentobarbital (2270) | II |
| Codeine (9050) | II |
| Dihydrocodeine (9120) | II |
| Oxycodone (9143) | II |
| Hydromorphone (9150) | II |
| Hydrocodone (9193) | II |
| Meperidine (9230) | II |
| Methadone (9250) | II |
| Methadone intermediate (9254) | II |
| Morphine (9300) | II |
| Oripavine (9330) | II |
| Thebaine (9333) | II |
| Oxymorphone (9652) | II |
| Noroxymorphone (9668) | II |
| Alfentanil (9737) | II |
| Remifentanil (9739) | II |
| Sufentanil (9740) | II |
| Fentanyl (9801) | II |

The company plans to manufacture the listed controlled substances in bulk for distribution to its customers.

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 November 1, 2010.

Dated: August 2, 2010.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. 2010–21773 Filed 8–31–10; 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 May 4, 2010, Cambrex Charles City, Inc., 1205 11th Street, Charles City, Iowa 50616, 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 |
|---|---|
| Amphetamine (1100) | II |
| Methamphetamine (1105) | II |
| Lisdexamfetamine (1205) | II |
| Methylphenidate (1724) | II |
| Phenylacetone (8501) | II |
| Codeine (9050) | II |
| Oxycodone (9143) | II |
| Hydromorphone (9150) | II |
| Dextropropoxyphene, bulk (non-dosage forms) (9273). | II |
| Morphine (9300) | II |
| Thebaine (9333) | II |
| Raw Opium (9600) | II |
| Opium extracts (9610) | II |
| Opium, powdered (9639) | II |
| Opium, granulated (9640) | II |
| Poppy Straw (9650) | II |
| Oxymorphone (9652) | II |
| Concentrate of Poppy Straw (9670). | II |
| Sufentanil (9740) | II |
| Fentanyl (9801) | II |

The company plans to manufacture the listed controlled substances in bulk for sale to its customers.

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 November 1, 2010.

Dated: August 2, 2010.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. 2010–21772 Filed 8–31–10; 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 May 14, 2010, Chattem Chemicals Inc., 3801 St. Elmo Avenue, Building 18, Chattanooga, Tennessee 37409, made application to the Drug Enforcement Administration (DEA) as a bulk manufacturer of the basic classes of controlled substances listed in schedule II:

| Drug | Schedule |
|---|---|
| Phenylacetone (8501) | II |
| Raw Opium (9600) | II |
| Concentrate of Poppy Straw (9670). | II |

The company plans to manufacture the listed controlled substances in bulk for distribution to its customers.

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 November 1, 2010.

Dated: August 13, 2010.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. 2010–21744 Filed 8–31–10; 8:45 am]

**BILLING CODE 4410–09–P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Manufacturer of Controlled Substances; Notice of Registration

By Notice dated March 16, 2010, and published in the **Federal Register** on March 24, 2010, (75 FR 14189), Rhodes Technologies, 498 Washington Street, Coventry, Rhode Island 02816, 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 |
| Methylphenidate (1724) | II |
| Codeine (9050) | II |
| Dihydrocodeine (9120) | II |
| Oxycodone (9143) | II |
| Hydromorphone (9150) | II |
| Hydrocodone (9193) | II |
| Oripavine (9330) | II |
| Thebaine (9333) | II |
| Oxymorphone (9652) | II |
| Noroxymorphone (9668) | II |
| Fentanyl (9801) | II |

The company plans to manufacture the listed controlled substances in bulk for conversion and sale to dosage form manufacturers.

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 Rhodes Technologies to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Rhodes Technologies 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(a), 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: August 2, 2010.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. 2010–21782 Filed 8–31–10; 8:45 am]

**BILLING CODE 4410–09–P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Manufacturer of Controlled Substances; Notice of Registration

By Notice dated March 16, 2010, and published in the **Federal Register** on March 24, 2010, (75 FR 14189), Archimica, Inc., 2460 W. Bennett Street, Springfield, Missouri 65807–1229, made application by letter to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of Amphetamine (1100), a basic class of controlled substance listed in schedule II.

The company plans to acquire the listed controlled substance in bulk from a domestic source in order to manufacture other controlled substances in bulk for distribution to its customers.

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 Archimica, Inc., to manufacture the listed basic class of controlled substance is consistent with the public interest at this time. DEA has investigated Archimica, 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(a), and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic class of controlled substance listed.

Dated: August 13, 2010.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. 2010–21780 Filed 8–31–10; 8:45 am]

**BILLING CODE 4410–09–P**

## NATIONAL SCIENCE FOUNDATION

### Proposal Review; Notice of Meetings

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces its intent to hold proposal review meetings throughout the year. The purpose of these meetings is to provide advice and recommendations concerning proposals submitted to the NSF for financial support. The agenda for each of these meetings is to review and evaluate proposals as part of the selection process for awards. The review and evaluation may also include assessment of the progress of awarded proposals. The majority of these meetings will take place at NSF, 4201 Wilson Blvd., Arlington, Virginia 22230.

These meetings will be closed to the public. The proposals being reviewed 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. 552b(c), (4) and (6) of the Government in the Sunshine Act. NSF will continue to review the agenda and merits of each meeting for overall compliance of the Federal Advisory Committee Act.

These closed proposal review meetings will not be announced on an individual basis in the **Federal Register**. NSF intends to publish a notice similar to this on a quarterly basis. For an advance listing of the closed proposal review meetings that include the names of the proposal review panel and the time, date, place, and any information on changes, corrections, or cancellations, please visit the NSF Web site: *http://www.nsf.gov.* This information may also be requested by telephoning, 703/292–8182.

Dated: August 27, 2010.

**Susanne Bolton,**

*Committee Management Officer.*

[FR Doc. 2010–21813 Filed 8–31–10; 8:45 am]

**BILLING CODE 7555–01–P**

## NATIONAL SCIENCE FOUNDATION

### Notice of Permit Applications Received Under the Antarctic Conservation Act of 1978 (Pub. L. 95–541)

**AGENCY:** National Science Foundation.

**ACTION:** Notice of Permit Applications Received under the Antarctic Conservation Act of 1978, Public Law 95–541.

**SUMMARY:** The National Science Foundation (NSF) is required to publish notice of permit applications received to conduct activities regulated under the Antarctic Conservation Act of 1978. NSF has published regulations under the Antarctic Conservation Act at Title 45 Part 670 of the Code of Federal Regulations. This is the required notice of permit applications received.

**DATES:** Interested parties are invited to submit written data, comments, or views with respect to this permit application by October 1, 2010. This application may be inspected by interested parties at the Permit Office, address below.

**ADDRESSES:** Comments should be addressed to Permit Office, Room 755, Office of Polar Programs, National Science Foundation, 4201 Wilson Boulevard, Arlington, Virginia 22230.

**FOR FURTHER INFORMATION CONTACT:** Nadene G. Kennedy at the above address or (703) 292–7405.

**SUPPLEMENTARY INFORMATION:** The National Science Foundation, as directed by the Antarctic Conservation Act of 1978 (Pub. L. 95–541), as amended by the Antarctic Science, Tourism and Conservation Act of 1996, has developed regulations for the establishment of a permit system for various activities in Antarctica and designation of certain animals and certain geographic areas a requiring special protection. The regulations establish such a permit system to designate Antarctic Specially Protected Areas.

The applications received are as follows:

**1. Applicant**

Permit Application No. 2011–005.

George Waters, Director, U.S. AMLR Program, Southwest Fisheries Science Center, National Marine Fisheries Service, 8604 La Jolla Shores Drive, La Jolla, CA 92038.

**Activity for Which Permit is Requested**

Take, Enter Antarctic Specially Protected Areas, and Import into the USA. This notice amends the notice published in the **Federal Register** on July 21, 2010 for George Waters to include the installation of four snow-measurement gauges at Cape Shirreff (ASPA #149) and four at Copacabana, Admiralty Bay (ASPA #128). Each gauge will be constructed with a single metal rod, 1.5 to 2.5m in length, and >2.5cm in diameter, that will be driven into the ground to a depth of circa 0.5m. The gauges would be installed at four locations at each site, in the vicinity of seabird colonies or seal rookeries. The applicant recognizes that ultrasonic snow-depth sensing equipment is available, however positioning such devices near seabird and pinniped colonies would require additional towers/power supplies that are currently unavailable at these field sites. To take this step would be more intrusive to the sites, as it would require not only more gear, but more setup and installation effort (aka disturbance) near the animals. The low-tech solution is preferable, and more reliable over time.

**Location**

Cape Shirreff, Livingston Island (ASPA #149) and Copacabana field camp at Admiralty Bay, King George Island (ASPA # 128).

**Dates**

October 1, 2010 to July 31, 2011.

**Nadene G. Kennedy,**

*Permit Officer, Office of Polar Programs.*

[FR Doc. 2010–21788 Filed 8–26–10; 8:45 am]

**BILLING CODE P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 72–10 (50–282/306)]**

### Northern States Power Company, a Minnesota Corporation; Notice of Issuance of Materials License Amendment to SNM–2506 Prairie Island Independent Spent Fuel Storage Installation at the Prairie Island Nuclear Generating Plant Site

The U.S. Nuclear Regulatory Commission (NRC or the Commission) has issued Amendment 7 to Materials License SNM–2506 held by the Northern States Power Company, a Minnesota Corporation (NSPM [1] or the licensee), authorizing receipt, possession, transfer, and storage of spent fuel at the Prairie Island Independent Spent Fuel Storage Installation (ISFSI) located onsite at its Prairie Island Nuclear Generating Plant site in Goodhue County, Minnesota. This license amendment is effective as of the date of its issuance and shall be implemented within ninety (90) days of the date of issuance.

By application dated March 28, 2008, as supplemented June 26 and August 29, 2008, June 26 and September 28, 2009, January 18, May 4, and July 27, 2010, NSPM requested to amend its ISFSI license and to reformat the license Technical Specifications (TS) for the Prairie Island ISFSI in accordance with 10 CFR part 72. The licensee proposed in the license amendment request (LAR) to modify the TN–40 cask for storage of higher initially enriched and higher burnup fuel. The modified cask is designated the TN–40HT storage cask. This amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR chapter I,

[1] On September 22, 2008, Nuclear Management Company, LLC (NMC) transferred its operating authority to Northern States Power Company, a Minnesota corporation (NSPM), doing business as Xcel Energy. By letter dated September 3, 2008 (package, ML082240762), NSPM assumed responsibility for actions and commitments previously submitted by NMC.

which are set forth in the license amendment.

In accordance with 10 CFR 72.46(b)(2), a determination has been made that the amendment does not present a genuine issue as to whether public health and safety will be significantly affected. Therefore, immediate action on the license amendment may be taken and a notice of the action taken will be promptly published in the **Federal Register**. This **Federal Register** notice also informs interested persons of the right to request a hearing on whether the action should be rescinded or modified.

Also in connection with this action, the Commission prepared an Environmental Assessment (EA) and a Finding of No Significant Impact (FONSI). The Notice of Availability of the EA and FONSI for Prairie Island ISFSI was published in the **Federal Register** on December 4, 2009 (74 FR 63798).

In accordance with 10 CFR 2.390 of the NRC's "Rules of Practice," a copy of the EA and FONSI are available electronically for public inspection in the NRC Public Document Room or from the Publicly Available Records (PARS) component of NRC's document system (ADAMS). ADAMS is accessible from the NRC Web site at *http://www.nrc.gov/NRC/ADAMS/index.html* (the Public Electronic Reading Room).

Dated at Rockville, Maryland, this 20th day of August 2010.

For the Nuclear Regulatory Commission.

**Eric Benner,**

*Branch Chief, Division of Spent Fuel Storage and Transportation, Office of Nuclear Material Safety and Safeguards.*

[FR Doc. 2010–21826 Filed 8–31–10; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2010–0289]**

### Notice of Availability and Opportunity for Comment on Draft Division of Safety Systems Interim Staff Guidance DSS–ISG–2010–01: Staff Guidance Regarding the Nuclear Criticality Safety Analysis for Spent Fuel Pools

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Solicitation of public comment.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) requests public comment on a draft Division of Safety Systems Interim Staff Guidance, (DSS–ISG) DSS–ISG–2010–01, "Staff Guidance Regarding the Nuclear Criticality Safety Analysis for Spent Fuel Pools." This draft DSS–ISG provides updated guidance to the NRC staff reviewer to address the increased complexity of recent spent fuel pool (SFP) license application analyses and operations. The guidance is intended to reiterate existing guidance, clarify ambiguity in existing guidance, and identify lessons learned based on recent submittals.

**DATES:** Comments may be submitted by October 1, 2010. Comments received after this date will be considered, if it is practical to do so, but only comments received on or before this date can be assured consideration.

**ADDRESSES:** You may submit comments by any one of the following methods. Please include Docket ID NRC–2010–0289 in the subject line of your comments. Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site *http://www.regulations.gov.* Your comments will not be edited to remove any identifying or contact information, therefore, you should not include any information in your comments that you do not want publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

*Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2010–0289. Address questions about NRC dockets to Carol Gallagher 301–492–3668; e-mail *Carol.Gallagher@nrc.gov.*

*Mail comments to:* Cindy K. Bladey, Chief, Rules, Announcements and Directives Branch, Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, or by fax to RADB at (301) 492–3667.

You can access publicly available documents related to this notice using the following methods:

*NRC's Public Document Room (PDR):* The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Room O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

*NRC's Agencywide Documents Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this page, 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 there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.* The Staff Guidance Regarding the Nuclear Criticality Safety Analysis Accompanying Spent Fuel Pool License Amendment Requests, DSS–ISG–2010–01, is available electronically under ADAMS Accession Number ML102220567.

*Federal Rulemaking Web site:* Public comments and supporting materials related to this notice can be found at *http://www.regulations.gov* by searching on Docket ID: NRC–2010–0289.

**FOR FURTHER INFORMATION CONTACT:** Kent A. L. Wood, Reactor Systems Engineer, Reactor Systems Branch, Division of Safety Systems, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Rockville, Maryland 20852. Telephone: (301) 415–4120; fax number: (301) 415–3577; e-mail: *Kent.Wood@nrc.gov.*

**SUPPLEMENTARY INFORMATION:** The NRC is issuing this notice to solicit public comments on the draft DSS–ISG–2010–01, "Staff Guidance Regarding the Nuclear Criticality Safety Analysis Accompanying Spent Fuel Pool License Amendment Requests." After the NRC staff considers any public comments received, it will make a determination regarding issuance of the proposed DSS–ISG.

Dated at Rockville, Maryland, this 25th day of August 2010.

For the Nuclear Regulatory Commission.

**William H. Ruland,**

*Director, Division of Safety Systems, Office of Nuclear Reactor Regulation.*

[FR Doc. 2010–21825 Filed 8–31–10; 8:45 am]

**BILLING CODE 7590–01–P**

## PERSONNEL MANAGEMENT OFFICE

### Proposed Collection; Equal Employment Opportunity Commission (EEOC) Form, Demographic Information on Applicants, OMB 3046–0046; Correction

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Notice; correction.

**SUMMARY:** The published document in the Federal Register of August 2, 2010,

concerning Proposed collection. The document contained incorrect dates.

**DATES:** Effective on September 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** U.S. Office of Personnel Management, Employment Services, USAJOBS, 1900 E Street, NW., Washington, DC 20415, Attention: Patricia Stevens or send electronic mail to *patricia.stevens@opm.gov.*

**Correction**

In the **Federal Register** of Monday, August 2, 2010, at 75 FR 45173, in the third column, correct the **DATES** section to read:

**DATES:** Effective on December 12, 2010.

U.S. Office of Personnel Management.

**Angela Bailey,**

*Deputy Associate Director for Recruitment and Diversity.*

[FR Doc. 2010–21799 Filed 8–31–10; 8:45 am]

**BILLING CODE 6325–39–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–62775; File No. SR–PHLX–2010–115]**

## Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Amendment to Rule 862 Relating to, Among Other Things, Eliminate Broker Discretionary Voting for All Elections of Directors, Except for Companies Registered Under the Investment Company Act of 1940

August 26, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on August 18, 2010, NASDAQ OMX PHLX, Inc. ("PHLX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. 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.

[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, pursuant to Section 19(b)(1) of the Act [5] and Rule 19b–4 thereunder,[6] proposes to amend PHLX Rule 862 (Proxies at Direction of Owner) to comport with the Chicago Board Options Exchange ("CBOE") Rule 31.85(b) and the New York Stock Exchange ("NYSE") Rule 452 to eliminate broker discretionary voting for all elections of directors at shareholder meetings, whether contested or not, except for companies registered under the Investment Company Act of 1940 (the "1940 Act"),[7] to amend PHLX Rule 862 to preclude broker discretionary voting on a matter that materially amends an investment advisory contract with an investment company, and to define that a material amendment to an investment advisory contract would include any proposal to obtain shareholder approval of an investment company's investment advisory contract with a new investment advisor. In addition, including the changes noted above, this proposal reorganizes the broker voting rules to specifically include 20 instances where member organizations may not vote without customer instructions, while retaining the prohibition that the member organization may not vote without instructions from the customer on matters that may substantially affect the rights and privileges of the stockholders. This proposal also clarifies proxy procedures and proxy record retention.

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

PHLX Rule 862 provides instructions on how the proxies are voted. The purpose of the proposed rule change is to amend PHLX Rule 862(2) to comport with CBOE Rule 31.85(b) and NYSE Rule 452 to eliminate broker discretionary voting for all elections of directors at shareholder meetings, whether contested or not, except for companies registered under the Investment Company Act of 1940 (the "1940 Act"), to amend PHLX Rule 862 to preclude broker discretionary voting on a matter that materially amends an investment advisory contract with an investment company, and to define that a material amendment to an investment advisory contract would include any proposal to obtain shareholder approval of an investment company's investment advisory contract with a new investment advisor. In addition, including the changes noted above, this proposal reorganizes the broker voting rules to specifically include 20 instances where member organizations may not vote without customer instructions, while retaining the prohibition that the member organization may not vote without instructions from the customer on matters that may substantially affect the rights and privileges of the stockholders. This proposal also clarifies proxy procedures and proxy record retention.

The proposed amendment does not materially change the proxy rules with the exception of the changes made in this filing. Amending PHLX Rule 862 to comport with CBOE Rule 31.85 (b) and NYSE Rule 452 provides consistency among the exchanges to eliminate disparities regarding proxy voting. The Exchange proposes this amendment in response to a request by the Securities and Exchange Commission (the "Commission") that self-regulatory organizations have uniform proxy rules regarding broker discretionary voting.[8] As a result, PHLX believes the broker discretionary voting amendments will have little impact on the market participants since the changes are in line with the rules of the other self-regulatory organizations as defined within the meaning of Section 3(a)(26)

[5] 15 U.S.C. 78s(b)(1).

[6] 17 CFR 240.19b–4.

[7] The Commission notes that the exception for companies registered under the 1940 Act only apply to uncontested director elections, *i.e.,* when there is no counter solicitation. *See* proposed Phlx Rule 862(b)(2).

[8] *See* NYSE Approval Order, 74 FR at 33298, Commission Release No. 34–60215 (July 1, 2009), note 69.

of the Act [9] (otherwise known as "SROs"). PHLX members with customers are also members of one of the other SROs.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [10] in general, and furthers the objectives of Section 6(b)(5) of the Act [11] in particular, in that it is designed to 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. Specifically, the Exchange believes that the proposed rule change will protect investors and the public interest by ensuring better corporate governance and transparency of the election process for directors and by promoting greater uniformity with the proxy rules of other SROs. In particular, for Exchange member organizations that are also member firms of other SROs, confusion might arise as to which SROs' proxy voting rules are applicable to a company listed on the Exchange if there are disparities between the rules of the Exchange and the other SROs.

The proposal should further the protection of investors and the public interest by assuring that voting on matters as critical as the election of directors can no longer be determined by member organizations without specific instructions from the beneficial owner, and thus should enhance corporate governance and accountability to shareholders. Additionally, other changes enhance the proxy rules by providing clarity to proxy handling and record retention matters which also improves the protection to the investors.

*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.

[9] 15 U.S.C. 78c(a)(26).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [12] and Rule 19b–4(f)(6) [13] thereunder because the proposal does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) by its terms, 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, provided that the Exchange has given the Commission 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.[14]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii) [15] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay period. In making this request, the Exchange noted that waiver of the 30-day operative delay will conform to the Commission's desire to eliminate any disparities with proxy voting.

The Commission believes that the waiver of the 30-day operative delay period is consistent with the protection of investors and the public interest.[16] The proposal would permit the Exchange to comply with the Commission's stated goal that self-regulatory organizations who currently allow members to use discretionary voting for director elections conform their rules to the NYSE's rules to eliminate any voting disparities depending on where the shares are held.[17] In this regard, Phlx's proposed changes to Rule 862 are substantively similar to NYSE Rule 452 and CBOE Rule 31.85. Further, the proposal would conform the Exchange's rule to the NYSE's rule with respect to voting on investment advisory contracts. Moreover, the Commission notes that the NYSE's adopted rule changes were subject to full notice and comment, and considered and approved by the Commission.[18] Finally, the Commission notes that the clarification of proxy procedures, record retention, and other changes to Phlx Rule 862 are based substantially on CBOE's rules. Based on the above, the Commission finds that waiving the 30-day operative delay period is consistent with the protection of investors and the public interest, and the proposal is therefore deemed operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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.[19]

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6).

[14] The Exchange has satisfied the five business day pre-filing requirement.

[15] 17 CFR 240.19b–4(f)(6)(iii).

[16] 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).

[17] *See supra* note 8.

[18] *See id.*

[19] 15 U.S.C. 78s(b)(3)(C).

**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–2010–115 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–2010–115. 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–PHLX–2010–115 and should be submitted on or before September 22, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–21849 Filed 8–31–10; 8:45 am]

**BILLING CODE 8010–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–62776; File No. SR–Phlx–2010–91]**

## Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Order Approving Proposed Rule Change, as Modified by Amendment No. 1 Thereto, To Amend Phlx Rule 604 Relating to Registration and Qualification Requirements for PSX

August 26, 2010.

### I. Introduction

On June 29, 2010, NASDAQ OMX PHLX, Inc. ("Phlx" or "Exchange") 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 adopt provisions relating to the registration and qualification of members and persons associated with member organizations. On July 13, 2010, the Exchange submitted Amendment No. 1 to the proposed rule change. The proposed rule change was published for comment in the **Federal Register** on July 22, 2010.[3] The Commission received no comment letters on the proposal. This order approves the proposed rule change, as modified by Amendment No. 1.

### II. Description of the Proposal

Phlx proposes to amend Rule 604, "Registration and Termination of Registered Persons," to adopt new and modify existing provisions governing general and limited categories of principals and representatives. The proposal is meant to capture all persons associated with member organizations who trade on the Exchange's new equity platform, NASDAQ OMX PSX ("PSX"). Specifically, the Exchange proposes to adopt Rule 604(g), "Principal Registration," and Supplementary Material .01–.03 to set forth the categories of principal registration. The rule would require, among other things, that all associated persons who perform certain functions pass an appropriate examination and register as principals; every member organization to have at least two registered principals (unless an exception applies); and each member organization to have a Limited Principal—Financial/Operations. In addition, Phlx Rule 604(h) and Supplementary Material .04 would require that each representative be registered and pass the General Securities Representative Examination ("Series 7").

Phlx also proposes to adopt Phlx Rule 604(i)(1) to delineate categories of persons that are exempt from registration, Rule 604(i)(2) to allow member organizations and persons associated with member organizations to pay to non-registered foreign persons transaction-related compensation based upon business of customers they direct to member organizations if certain conditions are met, and Phlx Rule 604(j) to allow for waiver of qualification examination requirements in exceptional circumstances. In connection with the above amendments, Phlx proposes to add several related terms to Rule 1, "Definitions." Finally, Phlx proposes to amend Rule 640, "Continuing Education for Registered Persons," to delete an outdated reference.

*Applicability—Rule 604(f)*

Proposed Phlx Rule 604(f) would state that sub-paragraphs (g) and (h), discussed in greater detail below, apply to member organizations, and associated persons of member organizations, that are registered with the Exchange for the purpose of trading NMS stocks.[4]

*Principal Registration—Rule 604(g)*

Proposed Phlx Rule 604(g) would provide that persons associated with a member organization who are actively engaged in the management of the member organization's investment banking or securities business, including supervision, solicitation, conduct of business or training of persons associated with a member organization for any of these functions, shall be registered as principals. Such persons would include sole proprietors, officers, partners, managers of offices of supervisory jurisdiction, and directors of corporations.

Every member organization, except a sole proprietorship, would be required to have at least two officers or partners who are registered as principals with respect to each aspect of the member organization's investment banking and securities business;[5] provided, however, that a proprietary trading firm with 25 or fewer registered representatives would only be required to have one officer or partner registered as a principal. The proposed rule would allow Phlx to waive the two-principal requirement in situations that indicate conclusively that only one person should be required to register as a principal.[6]

All persons who are to function as principals[7] would be required to pass the General Securities Principal Qualification Examination ("Series 24") and submit a Form U4 through WebCRD reflecting registration as such, unless a different category of principal registration applies. Each person seeking to register and qualify as a General Securities Principal would be required to, before or concurrent with

[20] 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. 62509 (July 15, 2010), 75 FR 42804.

[4] PSX will not be used for trading any securities other than NMS stocks. Existing rules would continue to govern registration of associated persons of member organizations that trade options, but not cash equities, through Phlx. The Commission understands that Phlx intends to amend its registration rules for its options members shortly.

[5] *See* proposed Rule 604(g)(5)(A).

[6] *See* proposed Rule 604(g)(5)(B).

[7] Any person associated with a member organization as a registered representative whose duties are changed to require registration in any principal classification would be allowed a period of 90 calendar days following the change in his duties to pass the appropriate principal qualification examination. Upon elevation, the member organization shall submit to the Exchange through FINRA's Central Registration Depository ("Web CRD") an amended "Uniform Application for Securities Industry Registration or Transfer" ("Form U4") and any applicable fees. No one may function as a principal beyond the initial 90 calendar day period following the change in his duties without having passed the appropriate qualification examination. *See* proposed Rule 604(g)(4).

such registration, become registered either as a General Securities Representative or as a Limited Representative—Corporate Securities.[8]

The Exchange proposes to adopt a "Limited Principal—General Securities Sales Supervisor" category for persons whose supervisory responsibilities are limited.[9] A person registered in this category solely on the basis of having passed the General Securities Sales Supervisor Qualification Examination ("Series 9/10") would not be qualified to function in a principal capacity with responsibility over any area of business activity other than securities sales activity, nor be counted for purposes of fulfilling the requirement that member organizations have at least two principals.[10]

The Exchange also proposes to adopt a requirement that member organizations [11] register as a Limited Principal—Financial and Operations ("FINOP"), any associated person who performs enumerated financial and operational management duties (one of whom must be the Chief Financial Officer).[12] Each would be required to pass the Financial and Operations Principal Qualification Examination ("Series 27").

Furthermore, in general, a person designated as a Chief Compliance Officer on Schedule A of Form BD of a member organization would be required to register with the Exchange as a General Securities Principal and pass the Series 24 examination ("Series 24") before his registration could become effective, unless the person's activities are so limited to qualify him for one or more of the limited categories of principal registration.[13]

Phlx proposes to add that any person whose registration has been revoked by the Exchange as a disciplinary sanction, or whose most recent registration as Principal has been terminated for a period of two or more years immediately preceding the date of receipt by the Exchange of a new application, must pass a qualification examination for principals appropriate to the person's category of registration.

*Representative Registration—Rule 604(h) and Supplementary Material .04*

Proposed Phlx Rule 604(h) and Supplementary Material .04 would govern the registration of representatives [14] with the Exchange. All persons engaged or to be engaged in the investment banking or securities business of a member organization who are to function as representatives would be required to pass the Series 7, register as a General Securities Representative, and submit a Form U4 through WebCRD reflecting their registration status. Any person whose registration has been revoked by the Exchange as a disciplinary sanction or whose most recent registration as a representative or principal has been terminated for a period of two or more years immediately preceding the date of receipt by the Exchange of a new application would be required to pass the Series 7 examination. No member organization would be able to permit any member or person associated with it [15] to engage in the investment banking or securities business [16] unless the member organization determines that the person satisfies the qualification requirements and is not subject to statutory disqualification.[17]

*Phlx Rule 604(i)(1)*

The Exchange also proposes to adopt Phlx Rule 604(i)(1) exempting the following persons associated with a member organization from registration with the Exchange: (1) Persons whose functions are solely and exclusively clerical or ministerial; (2) persons who are not actively engaged in the investment banking or securities business; (3) persons whose functions are related solely and exclusively to the member organization's need for nominal corporate officers or for capital participation; and (4) persons whose functions are related solely and exclusively to: (A) effecting transactions on the floor of another national securities exchange and who are registered as floor members with such exchange; (B) transactions in municipal securities; (C) transactions in commodities; (D) transactions in security futures, provided that any such person is registered with FINRA or a registered futures association; (E) transactions in variable contracts and insurance premium funding programs and other contracts issued by an insurance company; (F) transactions in direct participation programs; (G) transactions in government securities; or (H) effecting sales as part of a primary offering of securities not involving a public offering pursuant to Section 3(b), 4(2), or 4(6) of the Securities Act of 1933 and the rules and regulations thereunder.

[8] The Limited Representative—Corporate Securities is a FINRA category of registration and requires passing the Series 62 examination. *See* FINRA Rule 1032(e).

[9] Each person associated with a member organization who is included in the definition of principal in Phlx Rule 604(g) may register as a Limited Principal—General Securities Sales Supervisor if: (i) His supervisory responsibilities are limited to the securities sales activities of a member organization; (ii) he is registered pursuant to Exchange Rules as a General Securities Representative; and (iii) he is qualified to be so registered by passing an appropriate examination, which is the Series 9/10.

[10] A Limited Principal—General Securities Sales Supervisor will not be qualified to perform for a member organization any of the following activities: (i) Supervision of the origination and structuring of underwritings; (ii) supervision of market making commitments; (iii) final approval of advertisements as these are defined in Phlx Rule 605; (iv) supervision of the custody of firm or customer funds and/or securities for purposes of Rule 15c3–3 under the Act; or (v) supervision of overall compliance with financial responsibility rules for broker/dealers promulgated pursuant to the provisions of the Act.

[11] This applies to member organizations operating pursuant to Rule 15c3–1(a)(1)(ii), (a)(2)(i), or (a)(8) under the Act.

[12] These duties are: Final approval and responsibility for the accuracy of financial reports submitted to any duly established securities industry regulatory body; final preparation of such reports; supervision of individuals who assist in the preparation of such reports; supervision of and responsibility for individuals who are involved in the actual maintenance of the member organization's books and records from which such reports are derived; supervision and/or performance of the member organization's responsibilities under all financial responsibility rules promulgated pursuant to the provisions of the Act; overall supervision of and responsibility for the individuals who are involved in the administration and maintenance of the member organization's back office operations; or any other matter involving the financial and operational management of the member organization.

[13] Pursuant to proposed Phlx Rule 604.01(c), a person registered solely as a General Securities Principal is not qualified to function as a FINOP or a Limited Principal—General Securities Sales Supervisor.

[14] Phlx proposes to define "representative" as a member or an associated person of a registered broker or dealer, including assistant officers other than principals, who is engaged in the investment banking or securities business for the member organization including the functions of supervision, solicitation or conduct of business in securities or who is engaged in training of persons associated with a broker or dealer for any of these functions. To the extent provided in Phlx Rule 604, all representatives are required to be registered with the Exchange and are referred to in Phlx's rulebook as "Registered Representatives." *See* proposed Phlx Rule 1(uu).

[15] The term "associated person" or "person associated with" a member organization means any partner, officer, director, or branch manager of an Exchange member organization or applicant (or person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such member organization or applicant, or any employee of such member or applicant, except that any person associated with a member organization or applicant whose functions are solely clerical or ministerial shall not be included in the meaning of such term for purposes of the Exchange rules. *See* proposed Phlx Rule 1(vv). *See also* 15 U.S.C. 78*c*(a)(18).

[16] The term "investment banking or securities business" means the business, carried on by a broker or dealer, of underwriting or distributing issues of securities, or of purchasing securities and offering the same for sale as a dealer, or of purchasing and selling securities upon the order and for the account of others. *See* proposed Phlx Rule 1(ww).

[17] *See* Section 3(a)(39) of the Act; 15 U.S.C. 78c(a)(39).

*Phlx Rule 604(j)*

Proposed Phlx Rule 604(j) provides that the Exchange may, in exceptional cases and where good cause is shown, waive an applicable qualification examination and accept other standards as evidence of an applicant's qualifications for registration.[18]

*Other Changes*

Pursuant to proposed Rule 604(i)(2), the Exchange proposes to allow a member organization, and persons associated with a member organization, to pay to non-registered foreign persons transaction-related compensation based upon the business of customers directed to member organizations under certain enumerated conditions.[19]

## III. Discussion and Commission Findings

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[20] Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[21] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest. The Commission believes that the proposed rule change is also consistent with Section 6(c)(3)(B) of the Act,[22] which authorizes exchanges to prescribe standards of training, experience and competence for persons associated with exchange members, and gives exchanges the authority to bar a natural person from becoming a member or a person associated with a member, if the person does not meet the standards of training, experience and competence prescribed in the rules of the exchange. The Commission believes that the changes proposed by Phlx to its rules will strengthen the regulatory structure of the Exchange and should enhance the ability of member firms to comply with the Exchange's rules as well as with the Federal securities laws.

Additionally, the Commission believes that the proposed rule change is consistent with the principles of Section 11A(a)(1)[23] of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Commission believes that the proposed rule will promote uniformity of regulation across markets, thus reducing opportunities for regulatory arbitrage. The proposed rule helps ensure that all persons conducting a securities business through Phlx are subject to registration, qualification and continuing education requirements, and are appropriately supervised, as the Commission expects of all self-regulatory organizations ("SROs").

In order to meet its obligations under Section 6 of the Act[24] to enforce compliance by member firms[25] and their associated persons with the Act, the rules thereunder, and the exchange's own rules, an exchange must have baseline registration and examination or qualification requirements for all persons conducting business on an exchange, as well as for those supervising such activity. In addition, SROs should have continuing education requirements for registered persons which help ensure that members and persons associated with their members are up to date on amendments to SRO rules and securities laws, rules, and regulations that govern their activities. Furthermore, an exchange must know if an associated person of a member firm is subject to a statutory disqualification.[26] This information is elicited by the Form U4, which is used by most exchanges and FINRA to register associated persons.

The Commission believes that Phlx's proposed rule change will help ensure that all associated persons of member organizations transacting business on PSX, as well as those who supervise, train or otherwise oversee those who do, will be registered with, and qualified by, the Exchange and will be subject to continuing education requirements. In addition, the proposal should strengthen the Exchange's ability to ensure an effective supervisory structure for those conducting business on PSX.[27] The requirements apply broadly and are intended to help close a regulatory gap which has resulted in varying registration, qualification, and supervision requirements across markets. Phlx will not allow any member organization to permit any person associated with it to engage in the investment banking or securities business through its facilities unless the member organization determines that such person satisfies the registration and qualification requirements and is not subject to statutory disqualification.

The Commission believes that Phlx's requirement that each person associated with a member organization who performs the functions of a representative, register with Phlx as a General Securities Representative and pass the Series 7 examination before registration may become effective, helps ensure that all associated persons who transact business on PSX, including those engaged in proprietary trading, are subject to appropriate registration, qualification, and continuing education requirements and is consistent with the Act. These requirements bolster the integrity of the Exchange by helping to ensure that all associated persons engaged in a securities business are, and will continue to be, properly trained and qualified to perform their functions and will be supervised and can be identified by regulators and the general public.

Similarly, the Commission believes that the requirement that all persons functioning in certain capacities be registered through WebCRD as principals and be subject to higher qualification standards appropriately identifies those persons with heightened accountability and reflects the enhanced responsibility of the principal role and is consistent with the Act. The general requirement that firms have a minimum of two principals responsible for oversight of member organization activity on Phlx—who must be registered as such and pass the Series 24 exam—should help Phlx strengthen the regulation of its member firms, and

[18] Advanced age or physical infirmity will not alone constitute sufficient grounds to waive a qualification examination. Experience in fields ancillary to the investment banking or securities business may constitute sufficient grounds to waive a qualification examination.

[19] Phlx also proposes to amend Rule 640, Commentary .01 to delete an outdated reference to "XLE," the Exchange's former trading system for NMS stocks, since XLE ceased operations in 2008.

[20] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[21] 15 U.S.C. 78f(b)(5).

[22] 15 U.S.C. 78f(c)(3)(B).

[23] 15 U.S.C. 78k–1(a)(1).

[24] Section 6 requires exchanges to have the ability to enforce compliance by their members and associated persons with the Federal securities laws and with their own rules. 15 U.S.C. 78f.

[25] Broker and dealers are required to supervise the activities of their associated persons. *See* Section 15(b)(4)(E) of the Act.

[26] *See* Section 6(c)(2) of the Act and Rule 19h–1 under the Act. The Commission believes that it is important that certain registration information, such as whether an associated person is subject to a statutory disqualification, is available to exchanges and other regulators, including the Commission and the State securities regulators, through WebCRD as well as members of the public through BrokerCheck, which derives information from WebCRD.

[27] Exchange Rule 748, Supervision, requires that all locations and activities of a member organization be supervised by a qualified supervisor. The principal registration requirement in proposed Rule 604(g) supplements Rule 748.

prepare those individuals for their responsibilities.

In addition, the Commission believes that requiring Chief Compliance Officers and any employee operating in the capacity of a FINOP to register with the Exchange as principals and take either the Series 24 or Series 27, respectively, is appropriate based on the heightened level of accountability inherent in the duty of overseeing compliance by an Exchange member, and in the oversight and preparation of financial reports and the oversight of those employed in the financial and operational capacities at each firm.

The Commission believes Phlx's proposed Limited Principal—General Securities Sales Supervisor category is appropriate as the qualification standards required reflect the narrower responsibility of persons in this category of registration.[28] Overall, the proposed new principal registration and qualification requirements should expand and strengthen the framework of supervisory rules that apply to Exchange member organizations and their associated persons doing business on PSX.

The Commission believes Phlx's proposed provision requiring any person whose registration has been revoked by the Exchange as a disciplinary sanction or whose most recent registration as a principal or representative has been terminated for a period of two or more years immediately preceding the date of receipt by the Exchange of a new application, to pass the qualification examination appropriate to such person's category of registration is appropriate. This rule helps to ensure that persons' qualifications are current.

The Commission also believes Phlx's proposed exceptions from the above-discussed general requirements are appropriate. Any member seeking an exception from Phlx's mandate that each firm have two principals must provide evidence that conclusively indicates to the Exchange that only one principal is necessary. The Commission expects this authority to be used sparingly, since principals oversee the operations of member firms and provide the first line of defense in ensuring that member firms are complying with the rules of an exchange as well as the Federal securities laws. In addition, the qualification examination waiver applies only in exceptional cases and requires the Exchange to have good cause;[29] the Commission believes this authority also should be used sparingly. The Commission expects the Exchange to maintain records and to utilize careful judgment in providing waivers. Finally, the Commission notes that these exceptions are substantively the same as exceptions provided to similar rules at other SROs.[30]

The Commission believes that proposed Rule 604(i)(2), which allows payment to finders when certain conditions are satisfied, is reasonable as it is consistent with the compensation arrangements allowed on other exchanges for foreign finders who direct business to member organizations.[31]

Finally, the Commission believes that adding paragraph (f) to Rule 604, specifying the applicability of paragraphs (g) and (h), and adding terms used in the proposed rules to its Definitions section will provide clarity to Phlx's rules, enabling regulators, members, and the general public to better understand the rules.

## VI. Conclusion

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[32] that the proposed rule change (SR–Phlx–2010–91), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[33]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–21850 Filed 8–31–10; 8:45 am]

**BILLING CODE 8010–01–P**

[28] A Limited Principal—General Securities Sales Supervisor may only supervise sales activities. Persons qualified only as Limited Principals—General Securities Sales Supervisors do not count toward the two-principal requirement of Rule 604(g)(5).

[29] *See* proposed Rule 604(j).

[30] *See, e.g.,* FINRA Rule 1070(d) and NASDAQ Rule 1070(d) regarding the examination waiver. *See, e.g.,* FINRA Rule 1021(e)(2) and NASDAQ Rule 1021(e)(2) regarding the two-principal requirement waiver.

[31] *See* NASDAQ Rule 1060(b) and NASDAQ OMX BX Rule 1060(b).

[32] 15 U.S.C. 78s(b)(2).

[33] 17 CFR 200.30–3(a)(12).

## DEPARTMENT OF STATE

**[Public Notice 7145]**

### Culturally Significant Object Imported for Exhibition Determinations: "The Roman Mosaic from Lod, Israel"

**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, and Delegation of Authority No. 236–3 of August 28, 2000, I hereby determine that the object to be included in the exhibition "The Roman Mosaic from Lod, Israel," imported from abroad for temporary exhibition within the United States, is of cultural significance. The object is imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit object at the Metropolitan Museum of Art, New York, New York, from on or about September 28, 2010, until on or about April 3, 2011, the Legion of Honor Museum, San Francisco, California, from on or about April 23, 2011, until on or about July 24, 2011, 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 description of the exhibit object, 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: August 25, 2010.

**Ann Stock,**

*Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2010–21848 Filed 8–31–10; 8:45 am]

**BILLING CODE 4710–05–P**

## DEPARTMENT OF STATE

**[Public Notice 7148]**

### Culturally Significant Objects Imported for Exhibition Determinations: "Richard Hawkins—Third Mind"

**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, and Delegation of Authority No. 236–3 of August 28, 2000, I hereby determine that the objects to be included in the exhibition "Richard Hawkins—Third Mind," 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 Art Institute of Chicago, Chicago, IL, from on or about October 22, 2010, until on or about January 16, 2011; at the Hammer Museum, Los Angeles, CA, from on or about February 13, 2011, until on or about May 22, 2011, and at possible additional exhibitions or venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** For further information, including a list of the exhibit objects, contact Carol B. Epstein, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6473). The address is U.S. Department of State, SA–5, L/PD, Fifth Floor, Washington, DC 20522–0505.

Dated: August 25, 2010.

**Ann Stock,**

*Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2010–21842 Filed 8–31–10; 8:45 am]

**BILLING CODE 4710–05–P**

## DEPARTMENT OF STATE

**[Public Notice 7146]**

### Culturally Significant Objects Imported for Exhibition Determinations: "Contemporary Argentine Masterworks"

**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, and Delegation of Authority No. 236–3 of August 28, 2000, I hereby determine that the objects to be included in the exhibition "Contemporary Argentine Masterworks," 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 Smithsonian Institution International Gallery, Washington, DC, from on or about October 4, 2010, until on or about January 23, 2011, 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: August 25, 2010.

**Ann Stock,**

*Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2010–21846 Filed 8–31–10; 8:45 am]

**BILLING CODE 4710–05–P**

## DEPARTMENT OF STATE

**[Public Notice 7147]**

### Culturally Significant Objects Imported for Exhibition Determinations: "Sheila Hicks: 50 Years"

**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, and Delegation of Authority No. 236–3 of August 28, 2000, I hereby determine that the objects to be included in the exhibition "Sheila Hicks: 50 Years," 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 Addison Gallery of American Art, Phillips Academy, Andover, MA, from on or about November 5, 2010, until on or about February 27, 2011; at the Institute of Contemporary Art, University of Pennsylvania, Philadelphia, PA, from on or about March 25, 2011, until on or about August 7, 2011; at the Mint Museum Craft + Design, Charlotte, NC, from on or about October 1, 2011, until on or about January 29, 2012, and at possible additional exhibitions or venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** For further information, including a list of the exhibit objects, contact Carol B. Epstein, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202/632–6473). The address is U.S. Department of State, SA–5, L/PD, Fifth Floor, Washington, DC 20522–0505.

Dated: August 25, 2010.

**Ann Stock,**

*Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2010–21844 Filed 8–31–10; 8:45 am]

**BILLING CODE 4710–05–P**

## DEPARTMENT OF STATE

**[Delegation of Authority 332]**

### Delegation From the Secretary of Certain Certification Functions in Maritime Law Enforcement to the Assistant Secretary for International Narcotics and Law Enforcement Affairs

By virtue of the authority vested in the Secretary of State, including the authority of section 1 of the State Department Basic Authorities Act, as amended (22 U.S.C. 2651a), I hereby delegate to the Assistant Secretary for International Narcotics and Law Enforcement Affairs, the certification authorities under 46 U.S.C. 70502(c)(2) & (d)(2), and 18 U.S.C. 2237(d) .

Notwithstanding this delegation of authority, the Secretary, the Deputy Secretary, or the Deputy Secretary for Management and Resources may exercise any function or authority covered by this delegation.

As used in this delegation of authority, the word "function" includes any duty, obligation, power, authority, responsibility, right, privilege, discretion, or activity. Any reference in this delegation of authority to any act, order, determination, delegation of authority, regulation, or procedure shall be deemed to be a reference to such act, order, determination, delegation of authority, regulation, or procedure as amended from time to time.

Delegation of Authority Number 316 of September 2, 2008, is hereby superseded.

This Delegation of Authority shall be published in the **Federal Register**.

Dated: August 6, 2010.

**Hillary Rodham Clinton,**

*Secretary of State.*

[FR Doc. 2010–21855 Filed 8–31–10; 8:45 am]

**BILLING CODE 4710–17–P**

## DEPARTMENT OF STATE

**[Public Notice 7141]**

### In the Matter of the Designation of Tehrik-e Taliban Pakistan (TTP) also known as Tehrik-I-Taliban Pakistan also known as Tehrik-e-Taliban also known as Pakistani Taliban also known as Tehreek-e-Taliban as a Foreign Terrorist Organization pursuant to Section 219 of the Immigration and Nationality Act, as Amended

Based upon a review of the Administrative Record assembled in this matter, and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that there is a sufficient factual basis to find that the relevant circumstances described in section 219 of the Immigration and Nationality Act, as amended (hereinafter "INA") (8 U.S.C. 1189), exist with respect to Tehrik-e Taliban Pakistan (TTP), also known as Tehrik-I-Taliban Pakistan, also known as Tehrik-e-Taliban, also known as Pakistani Taliban, also known as Tehreek-e-Taliban.

Therefore, I hereby designate the aforementioned organization and its aliases as a foreign terrorist organization pursuant to section 219 of the INA.

This determination shall be published in the **Federal Register**.

Dated: August 12, 2010.

**Hillary Rodham Clinton,**

*Secretary of State.*

[FR Doc. 2010–21854 Filed 8–31–10; 8:45 am]

**BILLING CODE 4710–10–P**

## DEPARTMENT OF STATE

**[Public Notice 7143]**

### In the Matter of the Designation of Hakimullah Mehsud Also Known as Hakeemullah Mehsud Also Known as Zulfiqar as a Specially Designated Global Terrorist Pursuant to Section 1(b) of Executive Order 13224, as Amended

Acting under the authority of and in accordance with section 1(b) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13268 of July 2, 2002, and Executive Order 13284 of January 23, 2003, I hereby determine that the individual known as Hakimullah Mehsud, also known as Hakeemullah Mehsud, also known as Zulfiqar, committed, or poses a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.

Consistent with the determination in section 10 of Executive Order 13224 that "prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously," I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

Dated: August 12, 2010.

**Hillary Rodham Clinton,**

*Secretary of State.*

[FR Doc. 2010–21852 Filed 8–31–10; 8:45 am]

**BILLING CODE 4710–10–P**

## DEPARTMENT OF STATE

**[Public Notice 7142]**

### In the Matter of the Designation of Tehrik-e Taliban Pakistan (TTP) Also Known as Tehrik-I-Taliban Pakistan Also Known as Tehrik-e-Taliban Also Known as Pakistani Taliban Also Known as Tehreek-e-Taliban as a Specially Designated Global Terrorist Pursuant to Section 1(b) of Executive Order 13224, as Amended

Acting under the authority of and in accordance with section 1(b) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13268 of July 2, 2002, and Executive Order 13284 of January 23, 2003, I hereby determine that the organization known as Tehrik-e Taliban Pakistan (TTP), also known as Tehrik-I-Taliban Pakistan, also known as Tehrik-e-Taliban, also known as Pakistani Taliban, also known as Tehreek-e-Taliban, committed, or poses a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.

Consistent with the determination in section 10 of Executive Order 13224 that "prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously," I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

Dated: August 12, 2010.

**Hillary Rodham Clinton,**

*Secretary of State.*

[FR Doc. 2010–21853 Filed 8–31–10; 8:45 am]

**BILLING CODE 4710–10–P**

## DEPARTMENT OF STATE

**[Public Notice 7144]**

### In the Matter of the Designation of Wali Ur Rehman as a Specially Designated Global Terrorist Pursuant to Section 1(b) of Executive Order 13224, as Amended

Acting under the authority of and in accordance with section 1(b) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13268 of July 2, 2002, and Executive Order 13284 of January 23, 2003, I hereby determine that the individual known as Wali Ur Rehman committed, or poses a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.

Consistent with the determination in section 10 of Executive Order 13224 that "prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously," I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

Dated: August 12, 2010.

**Hillary Rodham Clinton,**

*Secretary of State.*

[FR Doc. 2010–21851 Filed 8–31–10; 8:45 am]

**BILLING CODE 4710–10–P**

## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

**[Docket No. PHMSA–2010–0246]**

### Pipeline Safety: Information Collection Activities

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, PHMSA invites comments on an information collection under Office of Management and Budget (OMB) Control No. 2137–0596, titled "National Pipeline Mapping Program." PHMSA is preparing to request approval from OMB for a renewal of the current information collection.

**DATES:** Interested persons are invited to submit comments on or before November 1, 2010.

**ADDRESSES:** Comments may be submitted in the following ways:

*E-Gov Web Site: http://www.regulations.gov.* This site allows the public to enter comments on any **Federal Register** notice issued by any agency.

*Fax:* 1–202–493–2251.

*Mail:* Docket Management Facility; U.S. DOT, 1200 New Jersey Avenue, SE., West Building, Room W12–140, Washington, DC 20590–0001.

*Hand Delivery:* Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Instructions:* Identify the docket number, PHMSA–2010–0246, at the beginning of your comments. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. You should know that 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.*). Therefore, you may want to review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or visit *http://www.regulations.gov* before submitting any such comments.

*Docket:* For access to the docket or to read background documents or comments, go to *http://www.regulations.gov* at any time or to Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. If you wish to receive confirmation of receipt of your written comments, please include a self-addressed, stamped postcard with the following statement: "Comments on PHMSA–2010–0246." The Docket Clerk will date stamp the postcard prior to returning it to you via the U.S. mail. Please note that due to delays in the delivery of U.S. mail to Federal offices in Washington, DC, we recommend that persons consider an alternative method (Internet, fax, or professional delivery service) of submitting comments to the docket and ensuring their timely receipt at DOT.

**FOR FURTHER INFORMATION CONTACT:** Cameron Satterthwaite by telephone at 202–366–1319, by fax at 202–366–4566, or by mail at U.S. DOT, PHMSA, 1200 New Jersey Avenue, SE., PHP–30, Washington, DC 20590–0001.

**SUPPLEMENTARY INFORMATION:** Section 1320.8(d), Title 5, Code of Federal Regulations requires PHMSA to provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. This notice identifies an information collection request that PHMSA will be submitting to OMB for renewal and extension. The information collection expires December 31, 2010, and is identified under Control No. 2137–0596, titled: "National Pipeline Mapping Program." The Pipeline Safety Laws (49 U.S.C. 60132) require an operator of a pipeline facility (except distribution lines and gathering lines) to submit geospatial data appropriate for use in the Department's National Pipeline Mapping System (NPMS). A complete data submission includes geospatial data, attribute data, metadata, public contact information for all liquefied natural gas, hazardous liquid, and gas transmission pipeline systems operated by a company. The operator must submit information in accordance with guidelines detailed in the NPMS operator standards document. Operators must update their submissions on an annual basis. The following information is provided for this information collection: (1) Title of the information collection; (2) OMB control number; (3) Type of request; (4) Abstract of the information collection activity; (5) Description of affected public; (6) Estimate of total annual reporting and recordkeeping burden; and (7) Frequency of collection. PHMSA will request a three-year term of approval for this information collection activity. PHMSA requests comments on the following information collection:

*Title:* National Pipeline Mapping Program.

*OMB Control Number:* 2137–0596.

*Type of Request:* Renewal of a currently approved information collection.

*Abstract:* Each operator of a pipeline facility (except distribution lines and gathering lines) must provide contact information and geospatial data on their pipeline system. This information should be updated on an annual basis. The provided information is incorporated into the National Pipeline Mapping System (NPMS) to support various regulatory programs, pipeline inspections, and authorized external customers. The periodic updates of operator pipeline data inform the NPMS of any changes to the data over the previous year and allow PHMSA to maintain and improve the accuracy of the information.

*Affected Public:* Operators of pipeline facilities (except distribution lines and gathering lines).

*Estimated number of responses:* 894.

*Estimated annual burden hours:* 16,312 hours.

*Frequency of collection:* Annual.

*Comments are invited on:*

(a) The need for the proposed collection of information 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 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 the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

Issued in Washington, DC, on August 26, 2010.

**Linda Daugherty,**

*Deputy Associate Administrator for Policy and Programs.*

[FR Doc. 2010–21840 Filed 8–31–10; 8:45 am]

**BILLING CODE 4910–60–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

### Reports, Forms, and Recordkeeping Requirements; Agency Information Collection Activity Under OMB Review

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below will be forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collections and their expected burden. The **Federal Register** Notice with a 60-day comment period was published on June 9, 2010 [FR Doc. 2010–0065, Vol. 75, No. 110, Pages 32838–32839].

**DATES:** Comments must be submitted on or before October 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** Charlene Doyle, NVS–431, Office of Regulatory Analysis and Evaluation, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Ms. Doyle's phone number is 202–366–1276 and her e-mail address is *charlene.doyle@dot.gov.*

**SUPPLEMENTARY INFORMATION:**

### National Highway Traffic Safety Administration

*Title:* National Child Restraint Use Special Study (NCRUSS).

*OMB Number:* 2127–0642.

*Type of Request:* Request for public comment on proposed collection of information.

*Abstract:* The National Highway Traffic Safety Administration (NHTSA) proposes to conduct information collections to assess the levels of child restraint system use and misuse for children riding in passenger vehicles, and to examine whether the levels of use and/or misuse are related to any specific characteristics of the drivers, their passengers, the child restraints, and/or the vehicles. Previous studies have shown that there is a gap between recommended child restraint use and observed use. Actions have been taken by NTHSA to close the gap. In March 1999, NHTSA published a final rule establishing a uniform child restraint attachment system known as LATCH, Lower Anchors and Tethers for CHildren (Federal Motor Vehicles Safety Standard 213, Child Restraint Systems and FMVSS 225, Child Restraint Anchorage Systems), in order to provide another, easier method of attaching a child restraint to the vehicle. This new collection of data is necessary in order to evaluate the effectiveness of FMVSS 225 and FMVSS 213, as well as to obtain an up to date snapshot of child restraint use and misuse across the United States. This information will be used in assessing what additional actions NHTSA should take to improve child passenger safety. In addition, NTHSA will publish the findings of this research study to provide information to States, localities, and other interested organizations in support of their efforts to reduce and prevent injuries among child occupants. NHTSA proposes to collect observational data on correct and incorrect use of child restraint systems in passenger vehicles, as well as interview information from drivers about their knowledge and perceptions of child restraint systems. The primary population for observation will be restrained and unrestrained child passengers riding in any seating position in passenger vehicles. Participation in the study will be voluntary. Interviews with drivers who agree to participate will be used to obtain the following data: demographic information on occupants, the driver's knowledge about the specific CRS in the vehicle, and the driver's general knowledge and experience with different types of restraint systems. While the interview is being conducted, a trained observer will collect information about the CRS in the vehicle, including the type of restraint that is used, the type of installation (seat belt or LATCH), how the CRS is installed, harness use, and seat belt fit. The observer will not remove the child or CRS from the vehicle.

*Affected Public:* Drivers of passenger vehicles who are transporting children and their passengers.

*Estimated Total Annual Burden:* 880 hours.

**ADDRESSES:** Send comments, within 30 days, to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725–17th Street, NW., Washington, DC 20503, Attention NHTSA Desk Officer.

*Comments are invited on:* Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A comment to OMB is most effective if OMB receives it within 30 days of publication.

**Authority:** 44 U.S.C. 3506(c)(2)(A).

**James F. Simons,**

*Director, Office of Regulatory Analysis and Evaluation.*

[FR Doc. 2010–21871 Filed 8–31–10; 8:45 am]

**BILLING CODE 4910–59–P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[Docket No. FD 35403]**

### Patriot Rail, LLC, Patriot Rail Holdings LLC, and Patriot Rail Corp.—Continuance in Control Exemption—Piedmont & Northern Railway, Inc.

Patriot Rail, LLC (PRL) and its subsidiaries, Patriot Rail Holdings LLC (PRH) and Patriot Rail Corp. (Patriot), have jointly filed a verified notice of exemption to continue in control of Piedmont & Northern Railway, Inc. (P&N), upon P&N's becoming a Class III rail carrier.[1]

This transaction is related to the verified notice of exemption filed in Docket No. FD 35402, *Piedmont & Northern Railway, Inc.—Operation Exemption—North Carolina Department of Transportation*, in which P&N seeks an exemption under 49 CFR 1150.31 to operate over approximately 13.04 miles of rail line owned by the North Carolina Department of Transportation, between Mt. Holly (milepost SFC 11.39) and Gastonia (milepost SFC 23.0), including the Belmont spur between Mt. Holly (milepost SFC 13.6/SFF 0.13) and Belmont (milepost SFF 1.56), in Gaston County, N.C.

The transaction is scheduled to be consummated on or after September 11, 2010 (30 days after the notice of exemption was filed).

Patriot currently controls the following six Class III rail carriers: Tennessee Southern Railroad Company, Rarus Railway Company, Utah Central Railway Company, Sacramento Valley Railroad, Inc., The Louisiana and North

[1] PRL is a noncarrier limited liability company that owns not less than 51% of the equity interests in PRH. PRH owns 100% of the stock of Patriot. Patriot is a noncarrier holding company that owns 100% of the stock of six railroad subsidiaries and P&N.

West Railroad Company LLC, and Temple & Central Texas Railway, Inc.

The parties state that: (1) The rail line to be operated by P&N does not connect with any other railroads in the corporate family; (2) the transaction is not part of a series of anticipated transactions that would connect this rail line with any other railroad in the corporate family; and (3) the transaction does not involve a Class I rail carrier. Therefore, the transaction is exempt from the prior approval requirements of 49 U.S.C. 11323. *See* 49 CFR 1180.2(d)(2).

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under sections 11324 and 11325 that involve only Class III rail carriers. Accordingly, the Board may not impose labor protective conditions here, because all of the carriers involved are Class III carriers.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than September 3, 2010 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35403, 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 Louis E. Gitomer, 600 Baltimore Ave., Suite 301, Towson, MD 21204.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: August 26, 2010.

By the Board.

**Rachel D. Campbell,**

*Director, Office of Proceedings.*

**Jeffrey Herzig,**

*Clearance Clerk.*

[FR Doc. 2010–21805 Filed 8–31–10; 8:45 am]

**BILLING CODE 4915–01–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

### Environmental Impact Statement; Opportunity Corridor, City of Cleveland, Cuyahoga County, OH

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of intent.

**SUMMARY:** The FHWA is issuing this notice to advise the public that an Environmental Impact Statement will be prepared for transportation improvements proposed in Cuyahoga County, Ohio.

**FOR FURTHER INFORMATION CONTACT:** Laura S. Leffler, Division Administrator, Federal Highway Administration, 200 North High Street, Room 328, Columbus, Ohio 43215, Telephone: (614) 280–6896.

**SUPPLEMENTARY INFORMATION:** The Federal Highway Administration (FHWA), in cooperation with the Ohio Department of Transportation (ODOT), will prepare an Environmental Impact Statement (EIS) on a proposal to construct new roadways on new alignments between Interstate 490 and the University Circle area of Cleveland, Ohio. The study area extends from Interstate 77/Interstate 490 in the west to East 105th Street and Chester Avenue (U.S. 322) in the east and is located entirely in the City of Cleveland, Ohio. The study area runs generally parallel to the existing railroad transportation corridor containing Greater Cleveland Regional Transit Authority's (GCRTA) Red Line and freight tracks owned and operated by Norfolk Southern Corporation (NS) and CSX Corporation (CSX).

The purpose of the transportation improvement is to create the transportation infrastructure to improve mobility and access in southeast Cleveland and support the revival and redevelopment of large tracts of vacant industrial and residential land within an area bounded by Cedar Avenue on the north, east 55th Street on the West, Woodhill Road/East 93rd Street on the east and Union Avenue on the south. Actions under consideration include (1) six various alternatives to construct a boulevard type roadway including a multi-lane urban arterial with curbs, an elevated landscape median, multi-modal facilities, landscaping and lighting, and (2) taking no action. The current six various alternatives have been born out of a previous planning study called the University Circle Access Boulevard. The project development process including the refinement of Conceptual Alternatives and the development of Feasible Alternatives will be included in the Draft EIS.

Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State and local agencies and to private organizations and citizens who have previously expressed or are known to have interest in this proposal. A series of public meetings and hearings will be held in the project area. Public notice will be given of the exact time and place of the meetings and the hearing to be held for the project. The Draft EIS will be available for public and agency review and comment prior to the Public Hearing.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments, and suggestions are invited from all interested parties. Comments or questions concerning this proposed action or the EIS should be directed to the FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

**Authority:** 23 U.S.C. 315; 49 CFR 1.48.

Issued on: August 19, 2010.

**Laura S. Leffler,**

*Division Administrator, Federal Highway Administration, Columbus, Ohio.*

[FR Doc. 2010–21911 Filed 8–31–10; 8:45 am]

**BILLING CODE 4910–22–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

### Notice of Final Federal Agency Actions on East Lake Sammamish Master Plan Trail in King County, WA

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of Limitation on Claims for Judicial Review of Actions by FHWA and Other Federal Agencies.

**SUMMARY:** This notice announces actions taken by FHWA and other Federal agencies that are final within the meaning of 23 U.S.C. 139(*l*)(1). The actions relate to a proposed transportation enhancement project, the East Lake Sammamish Trail, starting at Gilman Boulevard in Issaquah, Washington and ending at Bear Creek Trail in Redmond, Washington. Those actions grant licenses, permits, and approvals for the project.

**DATES:** By this notice, FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(*l*)(1). A claim seeking judicial review of the Federal agency actions on the transportation project will be barred unless the claim is filed on or before February 28, 2011. If the Federal law that authorizes judicial review of a claim provides a

time period of less than 180 days for filing such claim, then that shorter time period still applies.

**FOR FURTHER INFORMATION CONTACT:** For FHWA: Mr. Pete Jilek, Area Engineer, Federal Highway Administration, 711 S. Capital Way, Suite 501, Olympia, WA 98501; telephone 360–753–9480; e-mail *pete.jilek@dot.gov.* The FHWA Washington Division Office's normal business hours are 7 a.m. to 4:30 p.m. (Pacific time).

**SUPPLEMENTARY INFORMATION:** Notice is hereby given FHWA and other Federal agencies have taken final agency actions subject to 23 U.S.C. 139(*l*)(1) by issuing licenses, permits, and approvals for the following transportation project in the State of Washington: East Lake Sammamish Trail along the east side of Lake Sammamish from Gilman Boulevard in Issaquah, WA to Bear Creek Trail in Redmond, WA. The project will be an approximately 11-mile-long paved trail, providing an alternative non-motorized transportation corridor and recreational trail. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Final Environmental Impact Statement (FEIS) for the project, approved on April 20, 2010, in the FHWA Record of Decision (ROD) issued on August 4, and in other documents in the FHWA project records. The FEIS, ROD, and other project records are available by contacting FHWA at the addresses provided above. The FHWA FEIS and ROD can be viewed and downloaded from the project Web site at *http://www.kingcounty.gov/eastlakesammamishtrail,* or viewed at public libraries in the project area.

This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109 and 23 U.S.C. 128].

2. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303].

3. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536].

4. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*].

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

**Authority:** 23 U.S.C. 139(*l*)(1).

Issued on: August 26, 2010.

**Peter A. Jilek,**

*Urban Area Engineer, Federal Highway Administration.*

[FR Doc. 2010–21804 Filed 8–31–10; 8:45 am]

**BILLING CODE 4910–RY–P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[Docket No. EP 519 (Sub-No. 4)]**

### Notice of National Grain Car Council Meeting

**AGENCY:** Surface Transportation Board, DOT.

**ACTION:** Notice of National Grain Car Council meeting.

**SUMMARY:** Notice is hereby given of a meeting of the National Grain Car Council (NGCC), pursuant to section 10(a)(2) of the Federal Advisory Committee Act, Pub. L. No. 92–463, as amended (5 U.S.C., App. 2).

**DATES:** The meeting will be held on Thursday, September 16, 2010, beginning at 1:00 p.m. (CDT) and is expected to conclude at 5 p.m. (CDT).

**ADDRESSES:** The meeting will be held at the Omaha Hilton, 1001 Cass Street, Omaha, NE 68102. Phone 402–998–3400.

**FOR FURTHER INFORMATION CONTACT:** Thomas Brugman at (202) 245–0281. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at: (800) 877–8339].

**SUPPLEMENTARY INFORMATION:** The NGCC arose from a proceeding instituted by the Surface Transportation Board's predecessor agency, the Interstate Commerce Commission (ICC), in National Grain Car Supply—Conference of Interested Parties, EP 519. The NGCC was formed as a working group to facilitate private-sector solutions and recommendations to the ICC (and now the Board) on matters affecting grain transportation.

The general purpose of this meeting is to discuss rail carrier preparedness to transport the 2010 fall grain harvest. Agenda items include the following: Remarks by Board Chairman Daniel R. Elliott III, Vice-Chairman Francis P. Mulvey (who serves as Co-Chairman for the NGCC), and Commissioner Charles D. Nottingham; reports by rail carriers and shippers on grain-service related issues; a report by rail car manufacturers and lessors on current and future availability of various grain-car types; a presentation and discussion regarding the development of Positive Train Control; discussion of export grain in intermodal containers; a presentation by the White Paper subcommittee; and an open forum on BNSF Certificates of Transportation (COTs) for Processors, weather's effect on supply/demand of equipment, and export market impact on U.S. grain car supply. The full agenda and a copy of the White Paper are posted on the Board's Web site at *http://www.stb.dot.gov/stb/rail/graincar_council.html.*

The meeting, which is open to the public, will be conducted pursuant to the NGCC's charter and Board procedures. Further communications about this meeting may also be announced through the Board's Web site.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Dated: August 27, 2010.

**Kulunie L. Cannon,**

*Clearance Clerk.*

[FR Doc. 2010–21812 Filed 8–31–10; 8:45 am]

**BILLING CODE 4915–01–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[Summary Notice No. PE–2010–38]**

### Petition for Exemption; Summary of Petition Received

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of petition for exemption received.

**SUMMARY:** This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

**DATES:** Comments on this petition must identify the petition docket number involved and must be received on or before September 21, 2010.

**ADDRESSES:** You may send comments identified by Docket Number FAA–2010–0496 using any of the following methods:

• *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov*

and follow the instructions for sending your comments electronically.

• *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.

• *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.

• *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Privacy:* We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

*Docket:* To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Mark Forseth, ANM–113, (425) 227–2796, Federal Aviation Administration, 1601 Lind Avenue, SW., Renton, WA 98057–3356, or Katherine Haley, (202) 493–5708, Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on August 27, 2010.

**Pamela Hamilton-Powell,**

*Director, Office of Rulemaking.*

### Petition for Exemption

*Docket No.:* FAA–2010–0496.

*Petitioner:* The Boeing Company.

*Section of 14 CFR Affected:* 14 CFR part 25, Appendix K, § K25.1.4(a)(3).

*Description of Relief Sought:* Boeing requests a time-limited, partial exemption from the requirements for a low-fuel alert (ETOPS) on certain model 777 airplanes.

[FR Doc. 2010–21797 Filed 8–31–10; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

**[TD 9374]**

### Proposed Collection; Comment Request for Regulation Project

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final and temporary regulation, TD 9374, Nuclear Decommissioning Costs.

**DATES:** Written comments should be received on or before November 1, 2010 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Gerald J. Shields, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the regulations should be directed to R. Joseph Durbala at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–3634, or through the Internet at *RJoseph.Durbala@irs.gov*.

**SUPPLEMENTARY INFORMATION:**

*Title:* Nuclear Decommissioning Costs.

*OMB Number:* 1545–2091.

*Regulation Project Number:* TD 9374.

*Abstract:* Statutory changes permit taxpayers that have been subject to limitations on contributions to qualified nuclear decommissioning funds in previous years to make a contribution to the fund of the previously-excluded amount. The temporary regulation provides guidance concerning the calculation of the amount of the contribution and the manner of making the contribution.

*Current Actions:* There is no change to this existing regulation.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* 100.

*Estimated Time per Respondent:* 25 hours.

*Estimated Total Annual Burden Hours:* 2,500.

*The following paragraph applies to all of the collections of information covered by this notice:*

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Request for Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: August 24, 2010.

**R. Joseph Durbala,**

*IRS Tax Analyst.*

[FR Doc. 2010–21753 Filed 8–31–10; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Form 1098

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 1098, Mortgage Interest Statement.

**DATES:** Written comments should be received on or before November 1, 2010 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Gerald J. Shields, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, (202) 622–3634, at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov.*

**SUPPLEMENTARY INFORMATION**

*Title:* Mortgage Interest Statement.

*OMB Number:* 1545–0901.

*Form Number:* Form 1098.

*Abstract:* Form 1098 is used to report $600 or more of mortgage interest received from an individual in the course of the mortgagor's trade or business.

*Current Actions:* There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Individuals and Households.

*Estimated Number of Respondents:* 171,000.

*Estimated Time per Respondent:* 7 minutes.

*Estimated Total Annual Burden Hours:* 8,038,699.

*The following paragraph applies to all of the collections of information covered by this notice:*

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Request for Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: August 24, 2010.

**R. Joseph Durbala,**

*IRS Tax Analyst.*

[FR Doc. 2010–21754 Filed 8–31–10; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Rev. Proc. 2007–35

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Revenue Procedure Revenue Procedure 2007–35, Statistical Sampling for purposes of Section 199.

**DATES:** Written comments should be received on or before November 1, 2010 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Gerald J. Shields, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the revenue procedure should be directed to R. Joseph Durbala, at (202) 622–3634, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *RJoseph.Durbala@irs.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title:* Statistical Sampling for purposes of Section 199.

*OMB Number:* 1545–2072. *Revenue Procedure Number:* RP–2007–35.

*Abstract:* This revenue procedure provides for determining when statistical sampling may be used in purposes of section 199, which provides a deduction for income attributable to domestic production activities, and establishes acceptable statistical sampling methodologies.

*Current Actions:* Extension of a previously approved collection.

*Affected Public:* Business or other for-profit institutions, and individuals or households or farms.

*Estimated Number of Respondents:* 300.

*Estimated Time per Respondent:* 8 hours.

*Estimated Total Annual Burden Hours:* 2,400.

*The following paragraph applies to all of the collections of information covered by this notice:*

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Request for Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: August 24, 2010.

**R. Joseph Durbala,**

*IRS Tax Analyst.*

[FR Doc. 2010–21751 Filed 8–31–10; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

**[PS–89–91]**

### Proposed Collection; Comment Request for Regulation Project

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing proposed regulations, PS–89–91 (TD 8622), Exports of Chemicals That Deplete the Ozone Layer; Special Rules for Certain Medical Uses of Chemicals That Deplete the Ozone Layer (Sec. Sec. 52.4682–2(b), 52.4682–2(d), 52.4682–5(d), and 52.4682–5(f).

**DATES:** Written comments should be received on or before November 1, 2010 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Gerald J. Shields, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the regulations should be directed to R. Joseph Durbala at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–3634, or through the Internet at *RJoseph.Durbala@irs.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title:* Exports of Chemicals That Deplete the Ozone Layer; Special Rules for Certain Medical Uses of Chemicals That Deplete the Ozone Layer.

*OMB Number:* 1545–1361.

*Regulation Project Number:* PS–89–91.

*Abstract:* This regulation provides reporting and recordkeeping rules relating to taxes imposed on exports of ozone-depleting chemicals (ODCs), taxes imposed on ODCs used as medical sterilants or propellants in metered-dose inhalers, and floor stocks taxes on ODCs. The rules affect persons who manufacture, import, export, sell, or use ODCs.

*Current Actions:* There is no change to this existing regulation.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Recordkeepers:* 705.

*Estimated Time per Recordkeeper:* 12 minutes.

*Estimated Total Annual Recordkeeping Burden Hours:* 141.

*Estimated Number of Respondents:* 600.

*Estimated Time per Respondent:* 6 minutes.

*Estimated Total Annual Reporting Burden Hours:* 60.

*The following paragraph applies to all of the collections of information covered by this notice:*

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Request for Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: August 24, 2010.

**R. Joseph Durbala,**

*IRS Tax Analyst.*

[FR Doc. 2010–21762 Filed 8–31–10; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

**[IA–33–92]**

### Proposed Collection: Comment Request for Regulation Project

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, IA–33–92 (TD 8507), Information Reporting for Reimbursements of Interest on Qualified Mortgages (§ 1.6050H–2).

**DATES:** Written comments should be received on or before November 1, 2010 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Gerald J. Shields, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the regulation should be directed to R. Joseph Durbala, at (202) 622–3634, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *RJoseph.Durbala@irs.gov*.

**SUPPLEMENTARY INFORMATION:**

*Title:* Information Reporting for Reimbursements of Interest on Qualified Mortgages.

*OMB Number:* 1545–1339.

*Regulation Project Number:* IA–33–92.

*Abstract:* Section 6050H of the Internal Revenue Code relates to the information reporting requirements for reimbursements of interest paid in connection with a qualified mortgage. This information is required by the Internal Revenue Service to encourage compliance with the tax laws relating to the deductibility of payments of mortgage interest. The information is used to determine whether mortgage interest reimbursements have been correctly reported on the tax return of the taxpayer who receives the reimbursement.

*Current Actions:* There is no change to this existing regulation.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations.

The burden for the collection of information is reflected in the burden of Form 1098, Mortgage Interest Statement.

The following paragraph applies to all of the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Request for Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: August 24, 2010.

**R. Joseph Durbala,**

*IRS Tax Analyst.*

[FR Doc. 2010–21761 Filed 8–31–10; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

**[REG–251520–96]**

### Proposed Collection; Comment Request for Regulation Project

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, REG–251520–96 (TD 8785), Classification of Certain Transactions Involving Computer Programs (§ 1.861–18).

**DATES:** Written comments should be received on or before November 1, 2010 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Gerald J. Shields, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection should be directed to R. Joseph Durbala, at (202) 622–3634, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *RJoseph.Durbala@irs.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title:* Classification of Certain Transactions Involving Computer Programs.

*OMB Number:* 1545–1594.

*Regulation Project Number:* REG–251520–96.

*Abstract:* Section 1.861–18 of this regulation provides rules for classifying transactions involving the transfer of computer programs. This regulation grants the taxpayer consent to change its method of accounting for such transactions by filing Form 3115 with its original return for the year of change.

*Current Actions:* There is no change to this existing regulation.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations.

The burden for the collection of information in this regulation is reflected in the burden of Form 3115.

*The following paragraph applies to all of the collections of information covered by this notice:*

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Request for Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: August 24, 2010.

**R. Joseph Durbala,**

*IRS Tax Analyst.*

[FR Doc. 2010–21763 Filed 8–31–10; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Form 8851

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8851, Summary of Archer MSAs.

**DATES:** Written comments should be received on or before November 1, 2010 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Gerald J. Shields, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the form and instructions

should be directed to R. Joseph Durbala, at (202) 622–3634, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *RJoseph.Durbala@irs.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title:* Summary of Archer MSAs.

*OMB Number:* 1545–1743.

*Form Number:* 8851.

*Abstract:* Internal Revenue Code section 220(j)(4) requires trustees, who establish medical savings accounts, to report the following: (a) Number of medical savings accounts established before July 1 of the taxable year (beginning January 1, 2001), (b) name and taxpayer identification number of each account holder and, (c) number of accounts which are accounts of previously uninsured individuals. Form 8851 is used for this purpose.

*Current Actions:* There are no changes being made to the form at this time.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* 200,000.

*Estimated Time per Respondent:* 7 hours, 42 minutes.

*Estimated Total Annual Burden Hours:* 1,540,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Request for Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: August 24, 2010.

**R. Joseph Durbala,**

*IRS Tax Analyst.*

[FR Doc. 2010–21765 Filed 8–31–10; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Revenue Procedure 2008–67

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Revenue Procedure 2008–67, Extension of the Amortization Period.

**DATES:** Written comments should be received on or before November 1, 2010 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Gerald J. Shields, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the revenue procedure should be directed to R. Joseph Durbala at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3634, or through the Internet at *RJoseph.Durbala@irs.gov*.

**SUPPLEMENTARY INFORMATION:**

*Title:* Extension of the Amortization Period.

*OMB Number:* 1545–1890.

*Revenue Procedure Number:* Revenue Procedure 2004–44.

*Abstract:* Revenue Procedure 2004–44 describes the process for obtaining an extension of the amortization period for the minimum funding standards set forth in section 412(e) of the Code.

*Current Actions:* There are no changes being made to the revenue procedure at this time.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations, not-for-profit institutions, and farms.

*Estimated Number of Respondents:* 25.

*Estimated Annual Average Time per Respondent:* 100 hours.

*Estimated Total Annual Hours:* 2,500.

*The following paragraph applies to all of the collections of information covered by this notice:*

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Request for Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: August 24, 2010.

**R. Joseph Durbala,**

*IRS Tax Analyst.*

[FR Doc. 2010–21766 Filed 8–31–10; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Revenue Procedure 2004–47

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Revenue Procedure 2004–47, Relief From Ruling Process For Making Late Reverse QTIP Election.

**DATES:** Written comments should be received on or before November 1, 2010 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Gerald J. Shields, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for copies of the revenue procedure should be directed to R. Joseph Durbala at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–3634, or through the Internet at *RJoseph.Durbala@irs.gov*.

**SUPPLEMENTARY INFORMATION:**

*Title:* Relief From Ruling Process For Making Late Reverse QTIP Election.

*OMB Number:* 1545–1898.

*Revenue Procedure Number:* Revenue Procedure 2004–47.

*Abstract:* Revenue Procedure 2004–47 provides alternative relief for taxpayers who failed to make a reverse QTIP election on an estate tax return. Instead of requesting a private letter ruling and paying the accompanying user fee the taxpayer may file certain documents with the Cincinnati Service Center directly to request relief.

*Current Actions:* There are no changes being made to the revenue procedure at this time.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Individuals or households.

*Estimated Number of Respondents:* 6.

*Estimated Annual Average Time per Respondent:* 9 hours.

*Estimated Total Annual Hours:* 54.

*The following paragraph applies to all of the collections of information covered by this notice:*

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Request for Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: August 24, 2010.

**R. Joseph Durbala,**

*IRS Tax Analyst.*

[FR Doc. 2010–21769 Filed 8–31–10; 8:45 am]

**BILLING CODE 4830–01–P**

Federal Register

**Wednesday,**
**September 1, 2010**

## Part II

# Department of Veterans Affairs

**38 CFR Part 5**
**Service-Connected and Other Disability Compensation; Proposed Rule**

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 5

**RIN 2900–AM07**

## Service-Connected and Other Disability Compensation

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) proposes to reorganize and rewrite in plain language its regulations concerning service-connected and other disability compensation. These revisions are proposed as part of VA's reorganization of all of its compensation and pension regulations in a logical, claimant-focused, and user-friendly format. The intended effect of the proposed revisions is to assist claimants, beneficiaries, and VA personnel in locating and understanding these regulations.

**DATES:** Comments must be received by VA on or before November 1, 2010.

**ADDRESSES:** Written comments may be submitted through *http://www.regulations.gov;* by mail or hand-delivery to: Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to "RIN 2900–AM07—Service-Connected and Other Disability Compensation." Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 273–9515 (not a toll-free number) for an appointment. In addition, during the comment period comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** William F. Russo, Director of Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, or call (202) 273–9515 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:** The Secretary of Veterans Affairs established the Office of Regulation Policy and Management to provide centralized management and coordination of VA's rulemaking process. One of the major functions of this office is to oversee a Regulation Rewrite Project (the Project) to improve the clarity and consistency of existing VA regulations. The Project was created in response to a recommendation made in the October 2001 "VA Claims Processing Task Force: Report to the Secretary of Veterans Affairs". The Task Force recommended that the compensation and pension regulations be rewritten and reorganized in order to improve VA's claims adjudication process. Therefore, the staff assigned to the Project began its efforts by reviewing, reorganizing, and redrafting the content of the regulations in 38 CFR part 3 governing the compensation and pension program of the Veterans Benefits Administration. These regulations are among the most difficult VA regulations for readers to understand and apply.

Once rewritten, the proposed regulations will be published in several portions for public review and comment. This is one such portion. It includes proposed rules regarding service-connected and other disability compensation. After review and consideration of public comments, final versions of these proposed regulations will ultimately be published in a new part 5 in 38 CFR.

### Outline

Overview of New Part 5 Organization
Overview of This Notice of Proposed Rulemaking
Table Comparing Proposed Part 5 Rules with Current Part 3 Rules

**Content of Proposed Regulations**

Service-Connected and Other Disability Compensation
- 5.240 Disability compensation.
- 5.241 Service-connected disability.
- 5.242 General principles of service connection.
- 5.243 Establishing service connection.
- 5.244 Presumption of sound condition.
- 5.245 Service connection based on aggravation of preservice injury or disease.
- 5.246 Secondary service connection—disability that is proximately caused by service-connected disability.
- 5.247 Secondary service connection—nonservice-connected disability aggravated by service-connected disability.
- 5.248 Service connection for cardiovascular disease secondary to service-connected lower extremity amputation.
- 5.249 Special service connection rules for combat-related injury or disease.
- 5.250 Service connection for posttraumatic stress disorder.
- 5.251 Current disabilities for which VA cannot grant service connection.

Rating Service-Connected Disabilities
- 5.280 General rating principles.
- 5.281 Multiple 0-percent service-connected disabilities.
- 5.282 Special consideration for paired organs and extremities.
- 5.283 Total and permanent total ratings and unemployability.
- 5.284 Total disability ratings for disability compensation purposes.
- 5.285 Continuance of total disability ratings.

Additional Disability Compensation Based on a Dependent Parent
- 5.300 Establishing dependency of a parent.
- 5.302 General income rules—parent's dependency.
- 5.303 Deductions from income—parent's dependency.
- 5.304 Exclusions from income—parent's dependency.

Disability Compensation Effective Dates
- 5.311 Effective dates—award of disability compensation.
- 5.312 Effective dates—increased disability compensation.
- 5.313 Effective dates—discontinuance of a total disability rating based on individual unemployability.
- 5.314 Effective dates—discontinuance of additional disability compensation based on parental dependency.
- 5.315 Effective dates—additional disability compensation based on decrease in the net worth of a dependent parent.

Endnote Regarding Amendatory Language
Paperwork Reduction Act
Regulatory Flexibility Act
Executive Order 12866
Unfunded Mandates
Catalog of Federal Domestic Assistance Numbers and Titles
List of Subjects in 38 CFR Part 5

### Overview of New Part 5 Organization

We plan to organize the new part 5 regulations so that most provisions governing a specific benefit are located in the same subpart, with general provisions pertaining to all compensation and pension benefits also grouped together. This organization will allow claimants, beneficiaries, and their representatives, as well as VA adjudicators, to find information relating to a specific benefit more quickly than the organization provided in current part 3.

The first major subdivision would be "Subpart A—General Provisions." It would include information regarding the scope of the regulations in new part

5, delegations of authority, general definitions, and general policy provisions for this part. This subpart was published as proposed on March 31, 2006. *See* 71 FR 16464.

"Subpart B—Service Requirements for Veterans" would include information regarding a veteran's military service, including the minimum service requirement, types of service, periods of war, and service evidence requirements. This subpart was published as proposed on January 30, 2004. *See* 69 FR 4820.

"Subpart C—Adjudicative Process, General" would inform readers about claims and benefit application filing procedures, VA's duties, rights and responsibilities of claimants and beneficiaries, general evidence requirements, and general effective dates for new awards, as well as revision of decisions and protection of VA ratings. This subpart was published in three separate notices of proposed rulemaking (NPRMs) due to its size. The first, concerning the duties of VA and the rights and responsibilities of claimants and beneficiaries, was published on May 10, 2005. *See* 70 FR 24680. The second, concerning general evidence requirements, effective dates, revision of decisions, and protection of existing ratings, was published as proposed on May 22, 2007. *See* 72 FR 28770. The third, concerning VA benefit claims, was published on April 14, 2008. *See* 73 FR 2136.

"Subpart D—Dependents and Survivors" would inform readers how VA determines whether an individual is a dependent or a survivor for purposes of determining eligibility for VA benefits. It would also provide the evidence requirements for these determinations. This subpart was published as proposed on September 20, 2006. *See* 71 FR 55052.

"Subpart E—Claims for Service Connection and Disability Compensation" would define service-connected disability compensation, including direct and secondary service connection, and disability compensation paid pursuant to section 1151, title 38, United States Code as if the disability were service connected. This subpart would inform readers how VA determines entitlement to service connection and entitlement to disability compensation. The subpart would also contain those provisions governing presumptions related to service connection, rating principles, and effective dates, as well as several special ratings. This subpart will be published in three NPRMs due to its size. The first, concerning presumptions related to service connection, was published as proposed on July 27, 2004. *See* 69 FR 44614. The second, concerning special ratings, was published on October 17, 2008. *See* 73 FR 62004. This NPRM, which includes regulations relating to service-connected and other disability compensation, is the third of the NPRMs making up Subpart E.

"Subpart F—Nonservice-Connected Disability Pensions and Death Pensions" would include information regarding the three types of nonservice-connected pension: Old-Law Pension, Section 306 Pension, and Improved Pension. This subpart would also include those provisions that state how to establish eligibility and entitlement to Improved Pension, and the effective dates governing each type of pension. This subpart was published as two separate NPRMs due to its size. The portion concerning Old-Law Pension, Section 306 Pension, and elections of Improved Pension was published as proposed on December 27, 2004. *See* 69 FR 77578. The portion concerning eligibility and entitlement requirements for Improved Pension was published as proposed on September 26, 2007. *See* 72 FR 54776.

"Subpart G—Dependency and Indemnity Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary" would contain regulations governing claims for dependency and indemnity compensation (DIC); accrued benefits; and various special rules that apply to the disposition of VA benefits, or proceeds of VA benefits, when a beneficiary dies. This subpart was published as two NPRMs due to its size. The portion concerning accrued benefits, special rules applicable upon the death of a beneficiary, and several effective date rules, was published as proposed on October 1, 2004. *See* 69 FR 59072. The portion concerning DIC benefits and general provisions relating to proof of death was published on October 21, 2005. *See* 70 FR 61326.

"Subpart H—Special and Ancillary Benefits for Veterans, Dependents, and Survivors" would pertain to special and ancillary benefits available, including benefits for children with various birth defects. This subpart was published as proposed on March 9, 2007. *See* 72 FR 10860.

"Subpart I—Benefits for Certain Filipino Veterans and Survivors" would pertain to the various benefits available to Filipino veterans and their survivors. This subpart was published as proposed on June 30, 2006. *See* 71 FR 37790.

"Subpart J—Burial Benefits" would pertain to burial allowances.

"Subpart K—Matters Affecting the Receipt of Benefits" would contain provisions regarding bars to benefits, forfeiture of benefits, and renouncement of benefits. This subpart was published as proposed on May 31, 2006. *See* 71 FR 31056.

"Subpart L—Payments and Adjustments to Payments" would include general rate-setting rules, several adjustment and resumption regulations, and election-of-benefit rules. Because of its size, proposed regulations in subpart L were published in two separate NPRMs. The first, concerning payments to beneficiaries who are eligible for more than one benefit, was published as proposed on October 2, 2007. *See* 72 FR 56136. The second, concerning payments and adjustments to payments, was published on October 31, 2008. *See* 73 FR 65212.

The final subpart, "Subpart M—Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries," would include regulations governing apportionments, benefits for incarcerated beneficiaries, and guardianship.

Some of the regulations in this NPRM cross-reference other compensation and pension regulations. If those regulations have been published in this or earlier NPRMs for the Project, we cite the proposed part 5 section. We also include, in the relevant portion of the Supplementary Information, the **Federal Register** document citation (including the Regulation Identifier Number and Subject Heading) where a proposed part 5 section published in an earlier NPRM may be found. However, where a regulation proposed in this NPRM would cross-reference a proposed part 5 regulation that has not yet been published, we cite to the current part 3 regulation that deals with the same subject matter. The current part 3 section we cite may differ from its eventual part 5 counterpart in some respects, but this method will assist readers in understanding these proposed regulations where no part 5 counterpart has yet been published.

Because of its large size, proposed part 5 will be published in a number of NPRMs, such as this one. VA will not adopt any portion of part 5 as final until all of the NPRMs have been published for public comment.

In connection with this rulemaking, VA will accept comments relating to a prior rulemaking issued as a part of the Project, if the matter being commented on relates to both NPRMs.

**Overview of This Notice of Proposed Rulemaking**

This NPRM pertains to service-connected and other disability compensation. These regulations would be contained in proposed Subpart E of

new 38 CFR part 5. Although these regulations have been substantially restructured and rewritten for greater clarity and ease of use, most of the basic concepts contained in these proposed regulations are the same as in their existing counterparts in 38 CFR part 3. However, a few regulations with substantive differences are proposed, as are some regulations that do not have counterparts in 38 CFR part 3.

**Table Comparing Proposed Part 5 Rules With Current Part 3 Rules**

The following table shows the relationship between the proposed regulations contained in this NPRM and the current regulations in part 3:

| Proposed part 5 section or paragraph | Based in whole or in part on 38 CFR part 3 section or paragraph (or "New") |
|---|---|
| 5.240(a) | 3.4(a) and (b)(1). |
| 5.240(b) | 3.4(b)(2). |
| 5.241 introduction | New. |
| 5.241(a) and (b) | 3.1(k), 3.303(a) first and second sentences. |
| 5.241(c) | New. |
| 5.242(a) | 3.303(a). |
| 5.242(b) | 3.304(b)(3). |
| 5.243(a) | New. |
| 5.243(b) | 3.303(a) and (d). |
| 5.243(c) and (d) | 3.303(b). |
| 5.244(a) | 3.304(b). |
| 5.244(b) | New. |
| 5.244(c)(1) | 3.304(b)(1), first sentence. |
| 5.244(c)(2) | New. |
| 5.244(d)(1) | 3.304(b). |
| 5.244(d)(2) | New. |
| 5.245(a)(1) | 3.306(a). |
| 5.245(a)(2) | New. |
| 5.245(b)(1) | New. |
| 5.245(b)(2) | New. |
| 5.245(b)(3) | 3.306(b)(1). |
| 5.245(b)(4) | 3.306(b)(2). |
| 5.245(c) | 3.306(b). |
| 5.246 | 3.310(a). |
| 5.247 | 3.310(b). |
| 5.248 | 3.310(c). |
| 5.249(a)(1) | 3.102, 3.304(d). |
| 5.249(a)(2) | New. |
| 5.249(b) | New. |
| 5.250(a) | 3.304(f). |
| 5.250(b) | New. |
| 5.250(c) | 3.304(f)(1). |
| 5.250(d) | 3.304(f)(2) and (4). |
| 5.250(e) | 3.304(f)(3). |
| 5.250(f) | 3.304(f)(5). |
| 5.251(a) | 3.303(c). |
| 5.251(b)(1) through (3). | New. |
| 5.251(c) | New. |
| 5.251(d) | New. |
| 5.251(e) | 3.380. |
| 5.280 | 3.321(a), (b)(1), (3), and (c). |
| 5.281 | 3.324. |
| 5.282(a) | 3.383(a). |
| 5.282(b) | 3.383(a)(1) through (5). |
| 5.282(c)(1) and (2) | 3.383(b)(1). |
| 5.282(c)(3) | 3.383(c). |
| 5.282(c)(4) | 3.383(d). |
| 5.283 | 3.340. |
| 5.284 | 3.341. |
| 5.285 | 3.343(a) and (c). |
| 5.300(a)(1) | 3.250(a)(1) and (3). |
| 5.300(a)(2) | New. |
| 5.300(b) | 3.250(a)(2). |
| 5.300(b)(1) | 3.250(b). |
| 5.300(b)(1)(i) | 3.250(b)(1). |
| 5.300(b)(1)(ii) | 3.250(c). |
| 5.300(b)(2)(i) | 3.250(a)(2). |
| 5.300(b)(2)(ii) | 3.250(b)(2). |
| 5.300(c) | 3.250(b). |
| 5.300(d) | 3.660(a)(1). |
| 5.300(e) | 3.250(d). |
| 5.302(a) | 3.262(a). |
| 5.302(b) | 3.262(b), 3.262(e)(3). |
| 5.302(c) | 3.261(a)(3), 3.250(b)(2). |
| 5.302(d) | 3.262(k)(1) and (2). |
| 5.302(e) | 3.262(k)(2) and (3). |
| 5.303(a) | 3.262(a)(2). |
| 5.303(b) | 3.261(a)(24), 3.262(i)(1) and (j)(4). |
| 5.303(c) | 3.262(a)(1). |
| 5.304 introduction | New. |
| 5.304(a) | 3.261(a)(7). |
| 5.304(b)(1) | 3.262(h)(1). |
| 5.304(b)(2) | 3.262(h)(2). |
| 5.304(b)(3) | 3.262(h)(3). |
| 5.304(b)(4) | 3.262(h)(4). |
| 5.304(c) | 3.261(a)(12). |
| 5.304(d), except (d)(6) | 3.261(a)(20). |
| 5.304(d)(6) | New. |
| 5.304(e) | 3.261(a)(20). |
| 5.304(f) | 3.261(a)(13). |
| 5.304(g) | 3.261(a)(28), 3.262(t), and 3.262(t)(2). |
| 5.304(h) | 3.262(k)(4). |
| 5.304(i) | 3.261(a)(31). |
| 5.304(j) | 3.262(a)(2), last sentence. |
| 5.304(k) | 3.261(a)(22). |
| 5.304(l) | 3.261, 3.262. |
| 5.311 | 3.400(b)(2). |
| 5.312(a) | New. |
| 5.312(b) | 3.400(o)(2). |
| 5.313(a) | New. |
| 5.313(b) | 3.501(e)(2). |
| 5.313(c) | 3.501(f). |
| 5.314(a) | New. |
| 5.314(b) | 3.500(h), 3.660(a)(2). |
| 5.314(c) | 3.500(h), 3.500(n)(2), 3.660(a)(2). |
| 5.314(d) | 3.500 (g)(2), 3.500(h), 3.660(a)(2). |
| 5.315 | 3.660(d). |

Readers who use this table to compare the proposed provisions with the existing regulatory provisions, and who observe a substantive difference between them, should consult the text that appears later in this document for an explanation of significant changes in each regulation. Not every paragraph of every current part 3 section regarding the subject matter of this rulemaking is accounted for in the table. In some instances, other portions of the part 3 sections that are addressed in these proposed regulations will appear in subparts of part 5 that are being published separately for public comment. For example, a reader might find a reference to paragraph (a) of a part 3 section in the table, but no reference to paragraph (b) of that section because paragraph (b) will be addressed in a separate NPRM. The table also does not include provisions from part 3 regulations that will not be repeated in part 5. Such provisions are discussed specifically under the appropriate part 5 heading in this preamble. Readers are invited to comment on the proposed part 5 provisions and also on our proposals to omit those part 3 provisions from part 5.

**Content of Proposed Regulations**

*Service-Connected and Other Disability Compensation*

Section 5.240 Disability Compensation

The first proposed regulation in this NPRM, based on current § 3.4(a) and (b), would provide a definition of "disability compensation" and a rule concerning additional disability compensation payable to veterans who have dependents. The material in current § 3.4(a) about the death compensation program will have no counterpart in part 5. VA currently pays death compensation to fewer than 300 beneficiaries. Except for one small group of beneficiaries covered under § 3.4(c)(2), death compensation is payable only if the veteran died prior to January 1, 1957. VA has not received a claim for death compensation in over 10 years, and we do not expect to receive such claims any more. We intend to revise proposed § 5.0, 71 FR 16464 (Mar. 31, 2006), the scope provision for part 5, to provide direction that any new claims for death compensation or actions concerning death compensation benefits be adjudicated under part 3.

The proposed definition of "disability compensation" in § 5.240(a) would be simpler than the rules in current § 3.4(a) and (b)(1), because it does not unnecessarily repeat information found elsewhere. For example, current § 3.4(a) states that "[i]f the veteran was discharged or released from service, the discharge or release must have been under conditions other than dishonorable." Similarly, current § 3.1(d) defines "[v]eteran" to mean "a person who served in the active military, naval, or air service and who was discharged or released under conditions other than dishonorable."

The proposed part 5 definition of "veteran" in § 5.1 includes the same information as current § 3.1(d). *See* 71 FR at 16474. Therefore, we propose not to repeat the information in § 5.240. Comparing current §§ 3.4(b)(1) and 3.1(k) reveals another example of unnecessary repetition. Section 3.4(b)(1) states the rule for basic entitlement to disability compensation in terms of a service-connected disability, while current § 3.1(k) defines "service-connected" with respect to disability as meaning that "such disability was incurred or aggravated * * * in line of duty in the active military, naval, or air service." Section 5.241 in this NPRM would define "service-connected disability" based on current § 3.1(k). We propose to state the definition of service-connected disability once, in proposed § 5.241 below.

In addition, proposed § 5.240(a) would define disability compensation to include compensation for a disability that is treated "as if" it were service connected under 38 U.S.C. 1151, "Benefits for persons disabled by treatment or vocational rehabilitation". Thus, "disability compensation" in part 5 would be distinguishable from "service-connected disability compensation". In most cases, the procedures governing the payment of disability compensation are the same, regardless of whether compensation is authorized by 38 U.S.C. 1110, 1131, or 1151. However, where it is important to distinguish between them, our part 5 regulations will do so either by specifically discussing section 1151 or by placing the descriptor "service-connected" before the words "disability compensation." *See, e.g.,* proposed § 5.20(b), 69 FR 4820 (Jan. 30, 2004). A more complete explanation of what constitutes a "service-connected disability" would be set out in the next proposed regulation in this NPRM, § 5.241. Therefore, proposed § 5.240(a) would cross-reference that rule.

Current § 3.4(b)(2) provides that additional compensation may be paid to a veteran with a dependent if the veteran has "disability evaluated as 30 per centum or more disabling." VA has consistently interpreted the authorizing statute, 38 U.S.C. 1115, as authorizing additional disability compensation for a dependent whether the veteran has at least a 30-percent rating for a single disability or for combined disabilities. Proposed § 5.240(b) would make this interpretation explicit by stating that "[a]dditional disability compensation is payable to a veteran who has a spouse, child, or dependent parent if the veteran is entitled to disability compensation based on a single or a combined disability rating of 30 percent or more."

In § 5.240(b) we would also clarify the relationship between the additional disability compensation that section 1115 authorizes and the rates of disability compensation under 38 U.S.C. 1114. Section 1114 provides the rates and amounts of service-connected disability compensation. The additional disability compensation that section 1115 authorizes is above and beyond any rate that section 1114 authorizes. The second sentence of § 5.240(b) would state that "[t]he additional disability compensation authorized by 38 U.S.C. 1115 is payable in addition to monthly disability compensation payable under 38 U.S.C. 1114."

Section 5.241 Service-Connected Disability

Proposed § 5.241, which would explain when a disability is considered to be "service connected", would be based on current § 3.1(k) and the first two sentences of current § 3.303(a). The portion of the definition in current § 3.1(k) that relates to service-connected death was addressed in proposed Subpart G of part 5, in a separate NPRM. *See* 70 FR at 61342.

In the introductory sentence, we would clarify that a service-connected disability must be a "current disability". *See Disabled Am. Veterans* v. *Sec'y of Veterans Affairs,* 419 F.3d 1317, 1318 (Fed. Cir. 2005) (*DAV*) ("[g]enerally, a veteran who claims entitlement to disability compensation benefits must show * * * a current disability"); *see also Hogan* v. *Peake,* 544 F.3d 1295, 1297 (Fed. Cir. 2008) ("[t]o establish a right to benefits, a veteran must show that a current disability is 'service connected' " (citing *DAV*)). Although neither § 3.1(k) nor § 3.303(a) refers to a "current disability", the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has held that VA's interpretation of 38 U.S.C. 1110 and 1131, which govern entitlement to service connection, as requiring a current disability to establish service connection is reasonable. *See Gilpin* v. *West,* 155 F.3d 1353, 1356 (Fed. Cir. 1998) (holding that VA's interpretation of 38 U.S.C. 1110 as requiring a current disability is reasonable because "[m]any of the statutes governing the provision of benefits for veterans only allow such benefits be given for disability existing on or after the date of application") (citing 38 U.S.C. 5110(a), 5111(a), 1710, and 1712); *Degmetich* v. *Brown,* 104 F.3d 1328, 1332 (Fed. Cir. 1997) (same as to VA's interpretation of 38 U.S.C. 1131). Thus, the inclusion of a "current disability" requirement would codify these court holdings but would not produce a different result for claims adjudicated under part 5.

Proposed paragraph (a) would essentially repeat the content of current § 3.1(k) and the first two sentences of current § 3.303(a). We would clarify that a service-connected disability must have been "caused by an injury or disease incurred, or presumed to have been incurred, in the line of duty during active military service."

Proposed paragraph (b) would incorporate the principle of aggravation, which is also included in § 3.1(k). We would state the principle in a separate paragraph in order to clearly indicate that it is separate from evidence of incurrence, which would be governed by § 5.241(a).

In proposed paragraph (c), we would include in the definition of "service-connected disability" a disability that is secondary to a service-connected disability. This should help convey that secondary service connection is a type of service connection and that regulatory references to a "service-connected disability" include a secondarily service-connected disability. This principle is not contained in § 3.1(k) specifically but is generally established by current § 3.310(a). Therefore, this would not be a substantive change from current practice.

Section 5.242 General Principles of Service Connection

Proposed § 5.242 would be the part 5 counterpart to two general principles VA applies in adjudicating claims for service connection. The first, based on 38 U.S.C. 1154(a), would pertain to VA's consideration in service connection claims of the places, types, and circumstances of the veteran's service. The second, based on 10 U.S.C. 1219, would pertain to VA's consideration of certain statements a veteran might have signed in service.

The third sentence of current § 3.303(a) states that "[e]ach disabling condition shown by a veteran's service records, or for which he seeks a service connection must be considered on the basis of the places, types and circumstances of his service as shown by service records, the official history of each organization in which he served, his medical records and all pertinent medical and lay evidence." Paragraph (a) of proposed § 5.242 would be derived from this sentence, which is derived almost verbatim from 38 U.S.C. 1154(a). Section 1154(a) requires VA to give "due consideration * * * to the places, types, and circumstances of such veteran's service as shown by such

veteran's service record, the official history of each organization in which such veteran served, such veteran's medical records, and all pertinent medical and lay evidence". We do not interpret this statute as adding to the evidence-gathering duties set forth in 38 U.S.C. 5103A, which requires VA to make "reasonable efforts to obtain relevant records * * * that the claimant adequately identifies". 38 U.S.C. 5103A(b)(1).

The requirement that a claimant identify records with potentially relevant information is repeated in section 5103A(c)(3) and is consistent with the claimant's duty to actively participate in the claims process. It would be far too burdensome to require VA to seek out, obtain, and review every official record regarding the unit(s) and circumstance(s) of every veteran's service, and, more importantly, doing so in the vast majority of cases would be unproductive. Hence, proposed § 5.242(a) would require VA to duly consider only "evidence of record" concerning matters such as the places, types, and circumstances of the veteran's service and the history of organizations in which the veteran served, which would be consistent with current § 3.303(a) requiring VA to base its determinations as to service connection on the entire "evidence of record".

The regulatory and statutory history of the third sentence of § 3.303(a) began in 1941, Public Law 77–361, 55 Stat. 847. The statute required "that in each case where a veteran is seeking service connection for any disability[,] due consideration shall be given to the places, types, and circumstances of his service as shown by his service record, the official history of each organization in which he served, his medical records, and all pertinent medical and lay evidence." VA implemented this language in 38 CFR 2.1077(b) (Cum. Supp. 1938–1943), using substantially the same language. 7 FR 1981 (Mar. 13, 1942). VA regulations contained this same language until 1961, when VA revised it to read as it does in current § 3.303(a). The regulatory history does not reveal why VA revised this language.

We propose not to repeat in § 5.242(a) the phrase "[e]ach disabling condition shown by a veteran's service records" for two reasons. First, the phrase creates a distinction between disabilities shown in a veteran's service record and those not shown. This distinction is irrelevant because VA considers all service connection claims "on the basis of the places, types and circumstances" regardless of whether a disability is shown in the service record or in the evidence of record subsequent to service. Second, the phrase could be misconstrued to mean that, absent any claim by a veteran, VA has a duty to review service records to determine entitlement to service connection for "[e]ach disabling condition" which might possibly exist. Congress did not intend to impose such a duty on VA when it enacted Public Law 77–361. Moreover, such a duty would impose an unreasonable burden on VA's limited resources by requiring VA to comb through veterans' service records for potential claims.

Proposed § 5.242(b) would restate current § 3.304(b)(3), which provides that "[s]igned statements of veterans relating to the origin, or incurrence of any disease or injury made in service if against his or her own interest is of no force and effect if other data do not establish the fact" and that "[o]ther evidence will be considered as though such statement were not of record." This rule is derived from 10 U.S.C. 1219, which states that "[a] member of an armed force may not be required to sign a statement relating to the origin, incurrence, or aggravation of a disease or injury that he has" and that "[a]ny such statement against his interests, signed by a member, is invalid."

The language of current § 3.304(b)(3) does not limit its application to cases involving the presumption of sound condition. Despite the fact that it falls under the "Presumption of soundness" subheading, we believe VA intended this provision to mirror section 1219 and be applied broadly. Section 1219 precludes a service department from using a statement of the sort the statute describes for any purpose. The statute does not describe a context in which such a statement by the servicemember would be invalid. We propose, by locating the rule in the section on general principles of service connection, to make clear that VA also applies the rule broadly. The remaining provisions of current § 3.304(b) are covered under proposed § 5.244, "Presumption of sound condition."

Proposed § 5.242(b) would resolve an ambiguity in the current rule and state the full scope of the statute while limiting its application to a statement that was against a veteran's interest at the time he or she signed the statement. The current rule pertains only to a signed statement about "origin" or "incurrence" of an injury or disease. The proposed rule would also pertain to a signed statement about "aggravation of an injury or disease," which would be consistent with the statute.

The current rule is unclear whether a veteran's statement "against his or her own interest" means a statement that was against the veteran's interest at the time the veteran signed it, or is against the veteran's current interest. Specifying that VA will exclude a statement against the signer's interest at the time signed ensures that the rule protects veterans against VA decisions based on possibly unreliable evidence.

Current § 3.304(b)(3) bars VA consideration of a statement signed in service if against a veteran's interest, which therefore permits VA to consider the statement if in the veteran's interest. The proposed rule would likewise permit VA to consider a statement the veteran signed while in service if the statement was made in the veteran's interest. The current rule bars VA consideration of a signed statement against the veteran's interest to prove a fact "if other data do not establish the fact." This logically permits VA to consider a statement made against a veteran's interest if other data establish the fact. The proposed rule would remove this conditional permission for VA to consider a signed statement made against the veteran's interest, which would make the rule simpler and easier to administer. VA could still consider the other data (that is, evidence) that establish the fact, rather than the statement made against the veteran's interest.

Section 5.243 Establishing Service Connection

Proposed § 5.243 would state the general requirements for establishing service connection. It would be based on concepts in statutes, such as 38 U.S.C. 101(16), 1110, and 1131, and current § 3.303, as interpreted and applied by the U.S. Court of Appeals for Veterans Claims (CAVC) and the Federal Circuit. It would not state the requirements for establishing secondary service connection, which are addressed in proposed §§ 5.246 and 5.247.

Proposed § 5.243(a) would identify the three basic requirements for establishing service connection of a disability: Current disability, incurrence or aggravation of an injury or disease in service, and a causal link between the two. These principles, long embedded in veterans' disability law, have been formally in use as a specific three-part test since 1995 when the CAVC articulated them in its decision in *Caluza* v. *Brown,* 7 Vet. App. 498, 505 (1995). *See Shedden* v. *Principi,* 381 F.3d 1163, 1166–67 (Fed. Cir. 2004) (affirming that the CAVC "has correctly noted that in order to establish service connection or service-connected

aggravation for a present disability the veteran must show: (1) The existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service" (citing *Caluza*)). Stating these principles, which reflect current law, would provide clear guidance as to the requirements for establishing service connection.

Proposed § 5.243(a) would not in any way restore the well-grounded-claim requirement eliminated by section 4 of the Veterans Claims Assistance Act of 2000, Public Law 106–475, 114 Stat. 2098. That requirement, based on 38 U.S.C. 5107 as it existed prior to passage of Public Law 106–475, set a well-grounded-claim threshold that had to be met before VA was obligated to provide assistance to VA claimants in developing evidence to support their claims. *See generally, Gilbert* v. *Derwinski,* 1 Vet. App. 49, 55 (1991). The three *Caluza* requirements are foundational principles that stand apart from the now-eliminated well-grounded-claim requirement. The courts still recognize the three-part test as a means of establishing service connection. *See Shedden,* 381 F.3d at 1166–67 (noting that there are three elements that must be satisfied in order for an appellant to establish service connection: A present disability; in-service incurrence or aggravation of a disease or injury; and a causal relationship between the two). The proposed regulation would simply incorporate current law and practice in a straightforward manner by using currently accepted and understood terminology.

Proposed paragraph (a) would include two notes. Note 1 would make clear that service records alone may be sufficient to meet all of the requirements listed in § 5.243(a) when those records clearly show that an injury or disease incurred or aggravated in service produced disability that is permanent by its very nature. For example, VA would never require a veteran who had suffered an amputation of a limb during service to produce current evidence that the amputation currently exists or that it is causally related to the in-service amputation.

Note 2 would make clear that VA recognizes that certain chronic diseases and chronic residuals of injury can have temporary remissions. It would provide that VA will not deny service connection for lack of a current disability solely because a chronic disease, or a chronic residual of an injury, enters temporary remission. The note would give examples of the types of chronic diseases and chronic residuals of injury subject to temporary remission.

Proposed § 5.243(b) would be based on the second sentence of current § 3.303(a) and on part of current § 3.303(d). The second sentence of § 3.303(a) provides that a veteran can establish that an injury or disease resulting in disability was incurred or aggravated in active military service "by affirmatively showing inception or aggravation during service or through the application of statutory presumptions." Section 5.243(b) would restate the substance of the second sentence of § 3.303(a) as it relates to the second element of proof of service connection listed in proposed § 5.243(a). We would use the term "evidence" rather than "affirmatively showing," because a fact can only be affirmatively shown with evidence.

Current § 3.303(d) states that "[s]ervice connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service." We have rewritten this in proposed § 5.243(b) to state that "[p]roof of incurrence of a disease during active military service does not require diagnosis during service if the evidence otherwise establishes that the disease was incurred in service." The rewritten language maintains the current regulation's caution to VA employees that an initial diagnosis after discharge from service does not preclude service connection. This would not be a substantive change.

The phrase "all the evidence, including that pertinent to service" in current § 3.303(d) is redundant of the existing language in § 3.303(a), which provides that "[d]eterminations as to service connection will be based on review of *the entire evidence of record*" (emphasis added). It is a statutory requirement and fundamental to VA adjudications (except claims of clear and unmistakable error) that VA considers "all information and lay and medical evidence of record in a case". 38 U.S.C. 5107(b). Proposed § 5.242(a) explicitly applies this principle to service connection claims. In *Cosman* v. *Principi,* 3 Vet. App. 503, 506 (1992), the CAVC concluded that the "all the evidence" language in § 3.303(d) does not mean that only positive evidence must be of record to support a finding that a disease was incurred in service when there is a post-service diagnosis, but rather means only that "all the evidence be considered and that the equipoise rule of 38 U.S.C. § 5107(b) applies to questions of service connection under [§ ] 3.303(d)." *Id.* Because the phrase "all the evidence, including that pertinent to service" in current § 3.303(d) provides no unique rule, we propose not to repeat it in § 5.243(b).

Proposed § 5.243(c)(1) would restate the first sentence of current § 3.303(b). This sentence states that VA will grant service connection for a current disability if competent evidence establishes that the veteran had a chronic disease in service, or within an applicable presumptive period, and that the current disability is the result of the same chronic disease, unless the veteran's current disability is clearly due to an intercurrent cause. VA's long-standing practice is to apply the principles of chronicity and continuity to residuals of injury. This practice provides a fair and efficient means to determine service connection in certain cases, and it is logical to apply these principles to injuries as well as to diseases. Therefore, proposed § 5.243(c)(1) would also apply to an injury incurred or aggravated in service where the current disability is due to "the chronic residuals of the same injury."

The third and second sentences of current § 3.303(b) would be restated as a Note to § 5.243(c)(2) with minor, nonsubstantive changes.

Proposed § 5.243(d), based on portions of current § 3.303(b), would provide rules for establishing service connection based on the continuity of signs or symptoms. That is, if the chronicity provisions do not apply, VA will grant service connection if there is competent evidence of signs or symptoms of an injury or disease during service or the presumptive period, of continuing signs or symptoms, and of a relationship between the signs or symptoms demonstrated over the years and the veteran's current disability. *See Savage* v. *Gober,* 10 Vet. App. 488, 498 (1997).

Current part 3 refers only to "symptoms". We would add "signs" because the contemporary view of the medical profession distinguishes between signs and symptoms. A sign is "any objective evidence of a disease, i.e., such evidence as is perceptible to the examining physician, as opposed to the subjective sensations (symptoms) of the patient." *Dorland's Illustrated Med. Dictionary* 1733 (31st ed. 2007). A symptom is "any subjective evidence of disease or of a patient's condition, i.e., such evidence as perceived by the patient." *Id.* at 1843. Subjective and objective evidence are equally relevant to establishing continuity of

symptomatology, and the inclusion of more specific terminology does not represent a departure from current VA practice.

Section 5.244 Presumption of Sound Condition

Proposed § 5.244 would assemble in one regulation the statutory and regulatory principles concerning the presumption of sound condition at entry into military service. For purposes of basic entitlement to wartime disability compensation, 38 U.S.C. 1111, "Presumption of sound condition", states that "every veteran [who served during a period of war] shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service." Section 1137 of title 38, U.S.C., "Wartime presumptions for certain veterans", extends this presumption to all veterans who served after December 31, 1946, including veterans who served during peacetime.

In part 5, we would not repeat current § 3.305, which implements the presumption of sound condition for veterans of entirely peacetime service before World War II. *See* 38 U.S.C. 1132, "Presumption of sound condition". The presumption under section 1132 applies only to a very small and decreasing population of veterans. If a veteran of pre-World War II peacetime service initiates a claim for service connection after part 5 goes into effect, we would apply section 1132 without a specific implementing regulation. All generally applicable rules in part 5 for developing and evaluating evidence and rebutting presumptions would apply to claims from pre-World War II peacetime veterans. Neither section 1132 nor 38 CFR 3.305 imposes an extraordinary burden on VA to rebut the presumption (compared to the statute and the current regulation applying the presumption of sound condition to veterans who served during or after World War II). *See* 38 U.S.C. 1111; 38 CFR 3.304(b). A claimant would have the same assistance in developing a claim and the same protection against rebuttal of the presumption that he or she would have if we included a part 5 counterpart to § 3.305.

Proposed paragraph (a) would define the presumption of sound condition generally. Current § 3.304(b) states that "[t]he veteran will be considered to have been in sound condition when examined, accepted and enrolled for service". We would describe the time as of which VA presumes a veteran was sound with the phrase "upon entry into active military service", rather than with the phrase "when examined, accepted and enrolled for service". This proposed phrase would be plain language with the same meaning as "when examined, accepted and enrolled for service." In addition to its simplicity, the proposed phrase should prevent readers from mischaracterizing the examination as at the time of entry. Examinations for entry could have been some time prior to entry (as with entry through a deferred enlistment program), rather than contemporaneous with entry.

Proposed paragraph (a) would state the limitations on the presumption more simply, and more consistently with the overall scheme of service connection, compared to the statute and current regulation. Where 38 U.S.C. 1111 provides that a veteran is presumed to have been in sound condition "except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment", *see also* current § 3.304(b), we would state that the veteran is presumed to have been sound "except [for injury or disease] as noted in the report of a medical examination conducted for entry into active military service." Precluding a presumption of sound condition for injury or disease noted in the entry examination report is consistent with 38 U.S.C. 1110 and 1131, which authorize VA to pay disability compensation for "disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military * * * service". The proposed language would make it easier to understand how the presumption functions in the scheme of VA disability compensation than the part 3 language. Additionally, the change from "defects, infirmities, or disorders" to "injury or disease" affords consistency of terms among proposed § 5.241, defining service-connected disability; proposed § 5.244, governing the presumption of sound condition; and proposed § 5.245, governing the presumption of aggravation. The language was chosen for consistency. VA does not intend it to expand or limit the scope of section 1111.

Proposed § 5.244(b) would follow long-standing VA practice and clarify that the presumption of sound condition attaches even if the military service department did not conduct an entry medical examination or if there is no record of an entry examination. To relate this rule to the authorizing statute, if there was no entry medical examination, then there could be no "defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment" that would serve to prevent the presumption from arising. *See* 38 U.S.C. 1111. The same reasoning would apply if there were no record of an entry examination. It is fair and reasonable to apply the presumption of sound condition the same way to a veteran whose record of examination is missing as to a veteran whose service records show no examination was done in connection with entry.

Proposed § 5.244(c)(1) would be derived from current § 3.304(b)(1), which provides in part that "[h]istory of preservice existence of conditions recorded at the time of examination does not constitute a notation of such conditions but will be considered together with all other material evidence in determinations as to inception."

Proposed § 5.244(c)(2) would be new. It would clarify that the presumption of sound condition is rebuttable even if an entrance physical examination report shows that the examiner tested for and did not find the condition in question, provided that other evidence of record is sufficient to overcome the presumption. *See Kent* v. *Principi,* 389 F.3d 1380, 1383 (Fed. Cir. 2004).

Proposed paragraph (d) would state the statutory burden of proof for rebutting the presumption of sound condition. VA bears this burden. The paragraph would provide the standards VA must apply to determine whether the evidence meets this burden. The paragraph would be consistent with current § 3.304(b). Proposed paragraph (d)(1) would require, in the case of veterans with any wartime service and of veterans with peacetime service after December 31, 1946, clear and unmistakable evidence that the injury or disease both preexisted service and was not aggravated by service to rebut the presumption of sound condition at the time of entry into military service.

Paragraph (d)(2) would refer the reader to proposed § 5.245, "Service connection based on aggravation of preservice injury or disease", for the substance of the rules governing whether service aggravated a preexisting injury or disease. Proposed § 5.245 would implement the statutory presumption of aggravation. 38 U.S.C. 1153.

The Federal Circuit suggested that VA could meet the "not aggravated by [active military] service" element of rebuttal for the presumption of sound

condition under 38 U.S.C. 1111 with a standard similar to that contained in 38 U.S.C. 1153. *Wagner* v. *Principi,* 370 F.3d 1089, 1096 (Fed. Cir. 2004) (noting that "[t]he government may show a lack of aggravation by establishing that there was no increase in disability during service or that any 'increase in disability [was] due to the natural progress of the' preexisting condition" (quoting 38 U.S.C. 1153)).

We adopt this suggestion as it applies to veterans with any wartime service and of veterans with peacetime service after December 31, 1946. It is rational to treat aggravation consistently in the context of the presumption of sound condition and in the context of the presumption of aggravation. The significant difference is that in the context of the presumption of sound condition, VA must determine whether there was aggravation if the disability claimed for service connection was not noted on examination for entry. In the presumption of aggravation, VA must determine whether there was aggravation of the disability claimed for service connection if the injury or disease resulting in the disability was noted on examination for entry. The criteria for finding that active military service did not aggravate a preexisting injury or disease are the same for purposes of both rebutting the presumption of sound condition and rebutting the presumption of aggravation. We would state the criteria in detail in proposed § 5.245, which would govern the presumption of aggravation. The discussion of proposed § 5.245, below, provides additional information about these factors.

Current § 3.304(b)(1) and (b)(2) includes complex provisions concerning the factors VA considers in determining whether the presumption of sound condition has been rebutted. Among other things, these provisions include standards that could be construed as requiring VA employees adjudicating claims to use medical judgment. Among these are provisions for assessment of "accepted medical principles," "clinical factors," the "clinical course," and the like. The sentences containing the quoted language advise claim adjudicators to consider certain aspects of the evidence. However, it is now clear that VA employees may not exercise their own medical judgment in adjudicating disability compensation claims. *See Gambill* v. *Shinseki,* 576 F.3d 1307, 1329 (Fed. Cir. 2009) (noting that "rating specialists are not permitted to make their own medical judgments"); *Colvin* v. *Derwinski,* 1 Vet. App. 171, 172 (Vet. App. 1991) (holding that, in making decisions, VA must consider only "medical evidence to support [its] findings rather than provide [its] own medical judgment."), *overruled in part on other grounds, Hodge* v. *West,* 155 F.3d 1356, 1360 (Fed. Cir. 1998). Moreover, VA's duty to assist claimants with their claims includes providing a medical examination or obtaining a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim. 38 U.S.C. 5103A(d); 38 CFR 3.159(c)(4). Therefore, we propose to omit provisions that might be misconstrued as requiring VA personnel adjudicating claims to exercise their own medical judgment or allowing VA to solicit a VA medical opinion when it is not necessary to decide the claim.

As mentioned above in discussing § 5.242(b), the proposed rewrite of the regulation implementing the presumption of soundness would not repeat current § 3.304(b)(3).

Section 5.245 Service Connection Based on Aggravation of Preservice Injury or Disease

Proposed § 5.245 would be derived from current § 3.306, "Aggravation of preservice disability". Current § 3.306(a) provides for the presumption of aggravation "where there is an increase in disability during [active military, naval, or air] service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease", as does 38 U.S.C. 1153. Current § 3.306(b) then provides the standard of proof for rebutting the presumption by finding that the increase in severity of a preexisting disease was due to the natural progress of the disease, for veterans of wartime service or of peacetime service after December 21, 1946.

We propose not to repeat in part 5 the current § 3.306(c) provisions for applying the presumption of aggravation to veterans of entirely peacetime service prior to World War II for the same reasons we propose not to repeat the presumption of sound condition as it applies to this population of veterans.

In proposed § 5.245(a), based on current § 3.306(a), we would replace the phrase "active military, naval, or air service" with "active military service". "Active military service" is defined in proposed § 5.1 as having the same meaning as "active military, naval, or air service". *See* 71 FR at 16473. We make this change throughout part 5.

We would restate the presumption in the active voice to provide that "VA will presume that active military service aggravated a preexisting injury or disease if there was an increase in disability resulting from the injury or disease during service (or during any applicable presumptive period)." In addition to improving clarity, this restatement would put the focus of the regulation on the severity of disability, consistent with 38 U.S.C. 1153 and the basic scheme of VA disability compensation as being for disability. 38 U.S.C. 1110, 1131. Section 1153 of title 38, United States Code, provides that "[a] preexisting injury or disease will be considered to have been aggravated by active military * * * service, where there is an increase in *disability* during such service * * *" (emphasis added). Current § 3.306(b), which explains how to implement the presumption of aggravation, states that "[a]ggravation may not be conceded where the disability underwent no increase in severity".

Proposed § 5.245(a) would state the presumption and when the presumption applies. Paragraph (b) would prescribe how to determine whether the evidence in a claim triggers the presumption. Paragraph (c) would prescribe the standard of proof and factors VA must consider to rebut the presumption.

To clarify when to apply the presumption of aggravation and when to apply the presumption of sound condition, proposed paragraph (a) would state that the presumption under § 5.245 applies only "[w]hen an injury or disease was noted in the report of examination for entry into active military service." This is so because, if an injury or disease was not noted in the report of examination for entry, the veteran would be presumed sound on entry as to that injury or disease and the injury or disease would not have preexisted active military service.

The presumption of sound condition (proposed § 5.244(a)) would apply, unless it is rebutted. To rebut the presumption of sound condition as to any injury or disease, VA would have to determine by clear and unmistakable evidence that the injury or disease both preexisted service and was not aggravated by service. Thus, if VA determines that the presumption of sound condition has been rebutted as to an injury or disease, VA will necessarily have found by clear and unmistakable evidence that service did not aggravate the injury or disease, and the presumption of aggravation would not apply. Further, if service connection is granted based on application of the presumption of soundness in proposed § 5.244, the disability rating principles in 38 CFR 4.22, "Rating of disabilities aggravated by active service", would not apply. *See Wagner,* 370 F.3d at 1096 ("However, if the government fails to rebut the presumption of soundness

under section 1111, the veteran's claim is one for service connection. This means that no deduction for the degree of disability existing at the time of entrance will be made if a rating is awarded.").

Proposed § 5.245(b)(1) through (b)(3) would provide points to consider in determining whether disability increased during service (or during any applicable presumptive period). Current § 3.306(b) provides that "[a]ggravation may not be conceded where the disability underwent no increase in severity during service". The Federal Circuit has held that a disability is not presumed aggravated by service when there was no increase in the severity of disability during service. *See, e.g., Davis* v. *Principi,* 276 F.3d 1341, 1345 (Fed. Cir. 2002) (citation omitted).

Proposed § 5.245(b)(3) would restate current § 3.306(b)(1). Proposed paragraphs (b)(1) and (b)(2) would be new. Paragraph (b)(1) would provide an explicit meaning for "increase in disability" as the term is used in 38 U.S.C. 1153. Paragraph (b)(2) would provide that a temporary flare-up of a preexisting injury or disease is not an "increase in disability". These paragraphs would be consistent with long-standing VA practice and judicial precedents holding that temporary flare-ups of symptoms are not "increase in disability" as the phrase is meant in section 1153. *Davis,* 276 F.3d at 1346 (*citing Maxson* v. *West,* 12 Vet. App. 453, 459 (1999); *Verdon* v. *Brown,* 8 Vet. App. 529, 537 (1996); *Hunt* v. *Derwinski,* 1 Vet. App. 292, 296 (1991)).

*Hunt* established that temporary flare-ups of symptoms of a preexisting injury or disease in service are not an "increase in disability". 1 Vet. App. at 297. The Federal Circuit has stated that "[a] corollary to the Secretary's usage [of 'disability'] is that an increase in disability must consist of worsening of the enduring disability and not merely a temporary flare-up of symptoms associated with the condition causing the disability." *Davis,* 276 F.3d at 1344. In *Maxson,* 12 Vet. App. at 460, the CAVC held that the presumption of aggravation is applicable "only after it has been demonstrated * * * that a permanent increase in disability has occurred or, pursuant to section 3.306(b)(2), has been deemed to have occurred." (We discuss below the part 5 counterpart of current § 3.306(b)(2), proposed paragraph (b)(4).) Codifying in part 5 judicial precedents that prescribe the meaning of "increase in disability" would help VA apply the presumption of aggravation consistently. The rules in proposed paragraphs (b)(1) and (b)(2) would codify these precedents.

Proposed § 5.245(b)(2) would provide for an exception "as provided in paragraph (b)(4)". Proposed paragraph (b)(4) would provide a liberalized standard for the presumption of aggravation for combat veterans and former prisoners of war (POWs), which would be consistent with current § 3.306(b)(2) and 38 U.S.C. 1154(b). The Federal Circuit has recognized that section 1154(b) affords combat veterans and former POWs different treatment and held that "evidence of temporary flare-ups symptomatic of an underlying preexisting [injury or disease], alone, is not sufficient for a non-combat veteran to show increased disability under [38 U.S.C. 1153] unless the underlying condition is worsened." *Davis,* 276 F.3d at 1346–47. Because a combat veteran or former POW is unlikely to have contemporaneous medical records of a development of signs or symptoms of a preexisting injury or disease, it would be difficult for a combat veteran or former POW to prove that a development of signs or symptoms of a preexisting injury or disease was of a permanent nature rather than just a temporary flare-up.

Proposed § 5.245(b)(4) would be derived from the sentence of current § 3.306(b)(2) about establishing aggravation with evidence of "symptomatic manifestations of a preexisting disease or injury during or proximately following action with the enemy or following a status as a prisoner of war". We would use "signs or symptoms" rather than "symptomatic manifestations". As noted in our discussion of proposed § 5.243 above, the term "signs or symptoms" would be consistent with contemporary medical usage. *See Dorland's Illustrated Med. Dictionary* at 1733 (defining "sign" in contrast to "symptom"); *see also* 38 CFR 3.317 (using "signs or symptoms" and defining "signs"). We would use the term "signs or symptoms" throughout part 5. We would also use "combat" rather than "action with the enemy" because they mean the same thing and 38 U.S.C. 1154(b) uses "combat". It would be appropriate to include this provision among factors for determining the severity of a disability increased in service because it would afford veterans of combat or of former prisoner-of-war status a specific evidentiary rule for finding aggravation of a preexisting injury or disease in exception to the temporary flare-up provision of proposed paragraph (b)(2).

Proposed § 5.245(c), based on current § 3.306(b), would address rebuttal of the presumption of aggravation. Section 1153 provides that "[a] preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease." The statute does not specify whether a specific finding regarding natural progress prevents the application of the presumption of aggravation or rebuts the presumption. VA's long-standing interpretation of § 1153 is that such a finding rebuts the presumption. 26 FR 1561, 1581 (Feb. 24, 1961). The statute is also silent about natural progress of injuries. Consistent with section 1153, the rebuttal under proposed § 5.245(c) would apply to specific findings of natural progress to diseases, not to injuries.

The statute does not define "natural progress". 38 U.S.C. 1153. The only regulatory definition of "natural progress" is in current § 3.306(c), "Peacetime service prior to December 7, 1941". Though the standard of proof to rebut the presumption is more stringent for wartime veterans or veterans who served after World War II than it is for pre-World War II peacetime veterans, VA does not construe "natural progress" to be something different between these groups of veterans. Therefore, the definition of "natural progress" in § 5.245(c) would be derived from § 3.306(c), which defines natural progress as "the increase in severity * * * *normally to be expected by reason of the inherent character of the condition*" (emphasis added). This is a wordy way to say the increase in severity was normal for the condition, with "normal" meaning "conforming, adhering to, or constituting a typical or usual standard, pattern, level, or type." *Webster's II New College Dictionary* 746 (Houghton Mifflin 2001 ed.). We intend no change in the meaning of "natural progress". The restatement in proposed § 5.245(c) is not substantive.

Part 5 would not repeat current § 3.322. Section 3.322(a) addresses how to rate a disability that is service connected as aggravated in service. It is materially the same as, and redundant of, 38 CFR 4.22, which is in VA's Schedule for Rating Disabilities in part 4 of this chapter. In the flow of processing claims for VA disability compensation, VA must grant service connection before it determines a rate of disability compensation. VA cannot apply the rule in current § 3.322(a) until reaching the rating phase of a claim. Rules about how to determine a rate of disability compensation are more germane to part 4 than to part 5. There is no benefit to veterans to state the rule in two places, and it simplifies the rules

for obtaining service connection to omit a counterpart to § 3.322(a) from part 5.

Current § 3.322(b) provides that, if an injury or disease incurred in peacetime service is aggravated during wartime service, or conversely, if an injury or disease incurred in wartime service is aggravated during peacetime service, the entire disability that results from the injury or disease will be service connected based on wartime service. Because there is no longer a distinction between wartime and peacetime rates of disability compensation, there is no current need to explain how to treat conditions incurred in wartime or peacetime service that are aggravated during peacetime or wartime service, respectively. The only situation in which payment of wartime versus peacetime disability compensation could arise presently would be in retroactive awards based on clear and unmistakable error. However, in such cases, VA must apply the version of § 3.322 in effect at the time the erroneous decision was rendered, not the current version of that section. Since § 3.322(b) no longer serves a useful purpose, we have not included similar material in part 5.

Section 5.246 Secondary Service Connection—Disability That Is Proximately Caused by Service-Connected Disability

Proposed § 5.246 would be based on current § 3.310(a). To be consistent throughout part 5, proposed § 5.246 would contain a few nonsubstantive differences from current § 3.310(a), including its use of the phrase "proximately caused by" rather than "proximately due to".

In addition, proposed § 5.246 would refer to a service-connected "disability" rather than to a service-connected "disease or injury" as used in current § 3.310(a). This would not be a substantive change but, rather, would be the use of clear and consistent terminology. In part 3, we often refer to a "service-connected disease or injury" where, to be technically correct, we intend to refer to the disability for which VA actually grants service connection. As explained in this and other NPRMs, VA does not service connect an event that occurred during service; rather, VA service connects a current disability associated with such an event. We hope that using terminology that is more precise will eliminate any confusion on this point.

We propose not to repeat the second sentence of current § 3.310(a), which states that "[w]hen service connection is thus established for a secondary condition, the secondary condition shall be considered a part of the original condition." Regarding this sentence, the CAVC stated that, "[b]ased on the regulatory history, [the court] finds that the plain meaning of the regulation is and has always been to require VA to afford secondarily service-connected conditions the same treatment (no more or less favorable treatment) as the underlying service-connected conditions for all determinations." *Roper* v. *Nicholson,* 20 Vet. App. 173, 181 (2006); *accord Ellington* v. *Peake,* 541 F.3d 1364, 1370 (Fed. Cir. 2008) (approving CAVC's *Roper* decision construing § 3.310(a)). There is no statute or regulation pertaining to secondary service connection that inhibits a veteran's rights, diminishes a veteran's benefits, or reduces VA's duties to a veteran as they relate to a secondarily service-connected disability. Consequently, the second sentence of § 3.310(a) conveys no benefit to the veteran who obtains secondary service connection for a disability. Its omission would infringe no rights. Rather, its omission would clarify that an award of secondary service connection would have its own disability rating and effective date separate from the underlying service-connected condition. Omitting the sentence would also simplify the secondary-service-connection regulation, consistent with that purpose of part 5.

Section 5.247 Secondary Service Connection—Nonservice-Connected Disability Aggravated by Service-Connected Disability

Proposed § 5.247 would be derived from current § 3.310(b). It would restate the current rule in plain language. We intend no change in meaning. For the reasons discussed above in relation to proposed § 5.246, proposed § 5.247 would use the phrase "proximately caused" rather than "proximately due to", and it would refer to a nonservice-connected or service-connected "disability" rather than to a nonservice-connected or service-connected "disease or injury".

Section 5.248 Service Connection for Cardiovascular Disease Secondary to Service-Connected Lower Extremity Amputation

The rule concerning awards of secondary service connection for cardiovascular disease is currently stated in § 3.310(c). We propose to state this rule as a separate regulation in § 5.248 because it is a discrete rule of secondary service connection that effectively establishes an irrebuttable presumption of service connection. We intend no substantive change.

Section 5.249 Special Service Connection Rules for Combat-Related Injury or Disease

Proposed § 5.249 would provide special service connection rules for veterans who served in combat. It would implement 38 U.S.C. 1154(b) and is based on current §§ 3.102 (last sentence), 3.304(d), and 3.305(c). The proposed rule would specifically clarify that VA will accept a combat veteran's description of an event, disease, or injury in service as sufficient to establish that an injury or disease was incurred or aggravated in service.

We would explicitly state that the regulation applies only to determinations of incurrence or aggravation of an injury or disease in service, whereas the current laws state that VA may accept lay evidence "as sufficient proof of service-connection." 38 U.S.C. 1154(b); *see also* 38 CFR 3.304(d). Despite the language used in the current laws (that is, that lay evidence is "proof of service connection"), VA does not generally allow a combat veteran's lay evidence of an in-service injury, by itself, to establish a current disability or a nexus between that injury and a current disability. This interpretation of the authorizing statute and the implementing regulations is consistent with judicial precedent. *See Collette* v. *Brown,* 82 F.3d 389, 392 (Fed. Cir. 1996) (holding that "[s]ection 1154(b) does not create a statutory presumption that a combat veteran's alleged disease or injury is service-connected" but, rather, still requires a veteran to "meet his evidentiary burden with respect to service connection" while "considerably lighten[ing] the burden"). Also pursuant to section 1154(b), proposed § 5.249(a) would explicitly provide that the finding of incurrence or aggravation relating to combat with the enemy would be subject to rebuttal under a heightened "clear and convincing evidence" standard.

Proposed paragraph (a)(2) would be new. Paragraph (a)(2) would codify the definition of "engaged in combat with the enemy" in VAOPGCPREC 12–99. Where the General Counsel uses the term "instrumentality", we would use the term "instrument or weapon", which is more readily understood. Whether any particular set of circumstances constitutes engagement in combat with the enemy for the purposes of 38 U.S.C. 1154(b) must be resolved on a case-by-case basis. *See* VA General Counsel's opinion, VAOPGCPREC 12–99, 65 FR 6257, 6258, Feb. 8, 2000 (discussing the

meaning of "engaged in combat with the enemy" as used in 38 U.S.C. 1154(b)). Based on the plain language of 38 U.S.C. 1154(b), the phrase "engaged in combat with the enemy" requires that the veteran have personally participated in events constituting an actual fight or encounter with a military foe or hostile unit or instrumentality. *Id.* We would add this clarification in proposed § 5.249(a)(2). We also propose to clarify that participation in such events includes performing certain noncombatant duties, such as providing medical care to the wounded.

Proposed § 5.249(b) would be a new provision. It would provide that, when a veteran has received one of the listed combat decorations, VA will not require additional evidence to verify that the veteran engaged in combat with the enemy, unless there is clear and convincing evidence to the contrary. Such decorations are reliable proof that a veteran engaged in combat. We realize that new types of combat decorations may be issued in the future and have provided for that contingency in proposed § 5.249(b)(17). We additionally propose to include the Combat Action Badge in § 5.249(b)(16). On February 11, 2005, the Army announced this new decoration, with the intent to provide special recognition to ground combat arms soldiers who are trained and employed in direct combat missions similar to Infantry and Special Forces.

Section 5.250 Service Connection for Posttraumatic Stress Disorder

Proposed § 5.250 would be dedicated entirely to the adjudication of claims for service connection for posttraumatic stress disorder (PTSD). This new regulation would contain the substance of current § 3.304(f) with some technical revision and additional content stating VA's policy and procedures for adjudicating these claims.

Proposed § 5.250(a) would list the elements of proof of a PTSD claim, which are similar to the requirements to establish service connection for any other current disability and would be derived from current § 3.304(f). Paragraph (a)(1) would require evidence of a current disability. Paragraph (a)(2) would require a link between "current signs or symptoms" of PTSD and "an in-service stressor". In PTSD cases, the in-service injury is always the "stressor" that caused the PTSD. We refer to "signs or symptoms" because the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994) (DSM–IV) includes objective phenomena among the diagnostic criteria for PTSD, for example, "physiological reactivity," "hypervigilance," and "exaggerated startle response." *Id.* at diagnostic code 309.81 B(5), D(4) and (5). VA uses the diagnostic criteria of the DSM–IV to diagnose PTSD. *See* 38 CFR 4.125(a).

Proposed paragraph (a)(3) would require "credible supporting evidence that the claimed in-service stressor occurred." Although this is an evidentiary requirement, we would state it as an element of a PTSD claim because it is often the central issue to the adjudication of such a claim, being the focus of most of the evidentiary development. Multiple judicial opinions have upheld the validity of the requirement. *See, e.g., Nat'l Org. of Veterans' Advocates, Inc,* v. *Sec'y of Veterans Affairs,* 330 F.3d 1345, 1350–51 (Fed. Cir. 2003); *Moran* v. *Principi,* 17 Vet. App. 149, 155–59 (2003). Given the number of court decisions the "credible supporting evidence" requirement has engendered, we propose to identify the two salient features of such evidence: (1) It can be from any source other than the claimant's statement; and (2) It must corroborate the occurrence of the alleged in-service stressor. *See Moran,* 17 Vet. App. at 159. The definition would make no substantive change in the regulation, but it would lend it certainty.

Proposed § 5.250(b) would be new. It would require, generally, that VA seek verification of a stressor before denying a claim solely on the ground that the stressor is not verified. The revision is designed to make it clear when VA must seek verification from the appropriate entity, such as the U.S. Army and Joint Services Records Research Center. Verification will not be possible when the claimant's statements describing the claimed in-service stressor are too vague to enable the appropriate agency to try to corroborate the events described. Therefore, the proposed rule would not require VA to seek verification when the claimant fails to provide information requested by VA that is needed to try to verify the event(s) described in his or her statement.

Proposed § 5.250(c) would be derived from current § 3.304(f)(1). Proposed paragraph (d) would explicitly state that the presumptions at proposed § 5.249, "Special service connection rules for combat-related injury or disease", would apply to establish an in-service stressor for combat veterans. The current rule, in § 3.304(f)(2), repeats the language of the evidentiary presumption applicable to combat veterans, where this rule would simply refer the reader to that presumption. The proposed rule would also reference former prisoners of war because current § 3.304(f)(4) treats such veterans in the same manner as combat veterans for purposes of PTSD claims. Again, no substantive changes are intended.

Proposed § 5.250(e) is based on § 3.304(f)(3), which governs cases where a VA psychiatrist or psychologist has confirmed the stressor. The first sentence of paragraph (f)(3) is 103 words and the second is 100 words. We have reorganized these sentences by breaking them into subparagraphs, which will make this provision easier to read and apply.

Proposed paragraph (f) would be a plain-language rewrite of current § 3.304(f)(5) with no substantive differences.

Section 5.251 Current Disabilities for Which VA Cannot Grant Service Connection

Proposed § 5.251 would list disabilities for which VA cannot grant service connection and distinguish them from similarly named disabilities for which VA can grant service connection. Current § 3.303(c) identifies certain disabilities that "are not diseases or injuries within the meaning of applicable legislation." We would restate the rule in proposed § 5.251(a) by identifying specific disabilities for which "VA will not grant service connection * * * because they are not the result of an injury or disease for purposes of service connection". By using the "not the result of" language, the proposed rule would recognize that the listed conditions are indeed disabilities, but clarify that they are not caused by an injury or disease. Also, in paragraph (a) we would omit the phrase "within the meaning of applicable legislation" because the "applicable legislation", 38 U.S.C. 1110 and 1131, is cited as the statutory authority for § 5.251.

In addition, proposed § 5.251 would update some of the terms used to identify the listed disabilities. In proposed paragraphs (a)(1) and (a)(2), we would refer to "[c]ongenital or developmental defects (such as congenital or developmental refractive error of the eye)" and to "[d]evelopmental personality disorders", rather than to "refractive error of the eye" and to "personality disorders", respectively, as stated in current § 3.303(c). These changes would distinguish disorders that do not result from injury or disease, like myopia or personality disorder, from similarly named disorders for which VA permits service connection, such as "malignant or pernicious myopia" or "personality

change due to general medical condition", both discussed below.

Personality disorders have onset by adolescence or early adulthood. DSM–IV at 629. Although technically redundant, paragraph (a)(2) uses the term "developmental personality disorder" to distinguish clearly between "personality disorder" and "personality change". This clarification is necessary because in paragraph (b)(2), we would state that VA is not precluded from granting service connection for the disability of "[p]ersonality change" if it is the result of an organic mental disorder, *see* 38 CFR 4.130 Diagnostic Code 9327, or is an interseizure manifestation of psychomotor epilepsy, *see* 38 CFR 4.122(b), 4.124a Diagnostic Code 8914. Section 5.251(a)(2) and (b)(2) would help ensure that personality changes due to general medical conditions are given appropriate consideration, in light of the above rating-schedule provisions.

In proposed paragraph (a)(3), we would refer to "[d]evelopmental intellectual disability (mental retardation)" rather than to "mental deficiency", as stated in current § 3.303(c). The term "intellectual disability" would represent current medical terminology. "Mental deficiency" is an archaic term, replaced decades ago by "mental retardation", and more recent medical usage has replaced the term "mental retardation" with "intellectual disability." *See* Robert L. Schalock, et al., *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability,* Intellectual and Developmental Disabilities, April 2007, at 116–124. VA would use the term "developmental intellectual disability" to distinguish the intellectual disability formerly called mental retardation from impairment of intellect resulting from injury or disease incurred during active service.

In proposed paragraph (b), we would set forth several disabilities that are distinguishable from the disabilities listed in the rule in paragraph (a). Paragraph (b) would list those disabilities for which VA can grant service connection because, although the disabilities manifest like those precluded in paragraph (a), they are scientifically distinguishable and actually result from an injury or disease. VA currently distinguishes these two categories of disabilities based on long-standing internal VA guidance, which is implicit in current § 3.303(c) and may be discerned from multiple sections of the VA Schedule for Rating Disabilities in part 4 of this chapter. It would be advantageous to claimants and to VA employees to state these rules explicitly. Thus, this would not be a substantive change in VA practice, even if proposed paragraph (b) would be the first explicit regulatory discussion of these disabilities.

Proposed paragraph (b)(1) would list "[m]alignant or pernicious myopia" as a disability for which VA will grant service connection because malignant or pernicious myopia is associated with a disease, while other types of myopia are congenital or developmental refractive errors of the eye. *Compare* "myopia" *with* "malignant m., pernicious m." *Dorland's Illustrated Med. Dictionary,* at 1243.

In proposed paragraph (b)(2), we would use the term "personality change" to identify the personality altering effects of an injury or disease that VA can service connect. This paragraph would distinguish personality change from "developmental personality disorder", which VA cannot service connect. The VA Schedule for Rating Disabilities in part 4 of this chapter (Schedule for Rating Disabilities) identifies personality changes by several different names. *See* § 4.122(b) of this chapter (referring to interseizure manifestation of psychomotor epilepsy); § 4.124a of this chapter, Diagnostic Code 8045 (neurobehavioral effects of traumatic brain injury not otherwise classified); § 4.130 of this chapter, Diagnostic Code 9304 (dementia due to head trauma), Diagnostic Code 9326 (dementia due to other neurologic or general medical conditions or that are substance induced), and Diagnostic Code 9327 (organic mental disorder, including personality change due to a general medical condition).

Proposed paragraph (b)(3) would allow service connection of an "intellectual disability", or "mental retardation" as referred to in part 4 of this chapter, that results from a service-connected disability. We would use the term "nondevelopmental intellectual disability" to distinguish it from "developmental intellectual disability", or "mental retardation" as it is called in § 4.127, which may not be service connected. As with personality change due to general medical condition or injury, this rule would codify long-standing VA practice without implementing any substantive change. For example, the Schedule for Rating Disabilities allows compensation for disability resulting from mental retardation and personality disorder "as provided in § 3.310(a) of this chapter." *See* 38 CFR 4.127. Section 3.310(a) provides for compensation for disability proximately due to or the result of service-connected injury or disease (secondary service connection).

Despite using the terms "personality disorder" and "mental retardation", § 4.127 allows VA to compensate those disabilities that proposed § 5.251(b)(2) and (3) would refer to as "personality change" and "nondevelopmental intellectual disability", respectively. VA's regulation for rating residuals of traumatic brain injury also demonstrates that VA service connects intellectual disability resulting from injury incurred in service. *See* § 4.124a of this chapter, Diagnostic Code 8045, "Residuals of traumatic brain injury", which provides criteria for "[f]acets of cognitive impairment and other residuals of [traumatic brain injury] not otherwise classified". Consistent with § 4.127 regarding secondary service connection for "mental retardation", proposed § 5.251(b)(3) would allow service connection for "nondevelopmental intellectual disability" proximately caused by a service-connected disability. With the changes in terminology discussed above, we propose to explicitly identify in proposed § 5.251(b)(1) through (3) the disabilities that are distinguishable from those listed in current § 3.303(c). The listing of these distinguishable disabilities would not result in a substantive change to existing regulations.

Section 4.127 of this chapter permits service connection for a disability from a mental disorder superimposed on mental retardation or a personality disorder. In § 5.251(c) we would make clear that this concept applies to all disabilities, not only mental disorders. A veteran could incur a disability affecting the same body part or system as a defect listed in proposed § 5.251(a). Proposed § 5.251(c) would clarify that proposed § 5.251(a) does not preclude granting service connection for such a separate disability.

VA has long held that the rules in the last sentence of current § 3.303(c), upon which proposed § 5.251(a)(1) would be based, do not preclude granting service connection for disability due to an inherited disease. We propose to clarify, in § 5.251(d), that congenital or developmental defects are distinguishable from "inherited or familial diseases" and that § 5.251(a) does not bar service connection for disability due to an inherited or familial disease. For the text of proposed § 5.261(f), which is cross-referenced in proposed § 5.251(d), *see* 69 FR 44625 (July 27, 2004).

Proposed § 5.251(e) would be derived from current § 3.380, "Diseases of allergic etiology", which essentially

advises the reader not to assume that diseases of allergic etiology are constitutional or developmental abnormalities. Section 3.380 also states:

> Service connection must be determined on the evidence as to existence prior to enlistment and, if so existent, a comparative study must be made of its severity at enlistment and subsequently. Increase in the degree of disability during service may not be disposed of routinely as natural progress nor as due to the inherent nature of the disease. Seasonal and other acute allergic manifestations subsiding on the absence of or removal of the allergen are generally to be regarded as acute diseases, healing without residuals. The determination as to service incurrence or aggravation must be on the whole evidentiary showing.

These provisions are hortatory and provide no rights or duties beyond those already contained in other regulations. We note that 38 CFR 3.303(a) prescribes that VA must decide claims for service connection "based on review of the entire evidence of record". Proposed § 5.4(b) would expand that rule to apply to all compensation and pension claims, stating that "VA decisions will be based on a review of the entire record". Under that provision, VA must consider the entire record in determining whether an increase in severity is due to the natural progress of a disease; this principle applies to allergies just like any other disease. Thus, VA cannot assume that any increase in severity of a particular disease must be due to the natural progress of that disease. Therefore, we would not include the quoted portion of current § 3.380 in part 5.

*Rating Service-Connected Disabilities*

Section 5.280 General Rating Principles

Proposed § 5.280 would be based on current § 3.321(a), pertaining to use of the Schedule for Rating Disabilities in part 4 of this chapter, and current § 3.321(b)(1), (b)(3), and (c), pertaining to extra-schedular disability compensation ratings. The part 5 counterpart of current § 3.321(b)(2), pertaining to extra-schedular pension ratings, would be § 5.381(b)(5). *See* 72 FR at 54793 (Sep. 26, 2007).

We are not repeating the language in current § 3.321(a), or similar language in § 3.321(b)(1), that "[t]he provisions contained in the rating schedule will represent as far as can practicably be determined, the average impairment in earning capacity in civil occupations resulting from disability." This language is redundant of similar language in current § 4.1 of this chapter and is beyond the scope of the topic of part 5. It represents a basic precept of the rating schedule appropriately stated in part 4. It is not an actual instruction for extra-schedular rating. Omitting the statement from part 5 simplifies the part 5 regulation. As the language conveys no specific right to claimants, its omission cannot deprive a claimant of any right.

We also propose not to repeat the phrase in current § 3.321(b)(1) that "the Secretary shall from time to time readjust this schedule of ratings in accordance with experience." This phrase quotes 38 U.S.C. 1155 verbatim. It imposes no duty on VA not stated completely in the statute. It conveys no right applicable to any specific claim. The statutory charge to the Secretary to readjust the rating schedule is not pertinent to instructions for extra-schedular rating. VA affords an extra-schedular rating to those for whom the schedule cannot provide an adequate rating for the reasons stated in the regulation, regardless of what the schedule provides at any given time. Omitting the phrase from part 5 is not a substantive change in the regulation on extraschedular ratings.

Proposed § 5.280 would update certain VA terminology consistent with current usage and with choices of terms used consistently throughout part 5. Where current § 3.321(b)(1) requires that a VA "field station" submit a claim for extra-schedular "evaluation", proposed § 5.280(b) would require that a "Veterans Service Center (VSC)" submit a claim for extra-schedular "rating". The terms "rate" and "rating" are used throughout part 5, rather than "evaluate", "evaluating", and "evaluation", when referring to the process of applying the Schedule for Rating Disabilities in part 4 of this chapter to the facts of an individual claim for benefits. Where current § 3.321(c) provides that a field station may submit a claim to "[VA] Central Office" for an advisory opinion under certain circumstances, proposed § 5.280(c) would provide that a VSC may submit a claim to "the Director of the Compensation and Pension Service", to reflect long-standing VA practice accurately. We intend no substantive change with these changes of terminology.

Additionally, we would not repeat current § 3.323(a). Paragraph (a)(1) is another instance of providing rating instructions in part 3 that do not afford specific rights to claimants or impose any duty on VA other than those contained in part 4. *See* § 4.25 of this chapter, "Combined ratings table"; § 4.26 of this chapter, "Bilateral factor." Current § 3.323(a)(2) reads as follows:

> (2) *Wartime and peacetime service.* Evaluation of wartime and peacetime service-connected compensable disabilities will be combined to provide for the payment of wartime rates of compensation. (38 U.S.C. 1157) Effective July 1, 1973, it is immaterial whether the disabilities are wartime or peacetime service-connected since all disabilities are compensable under 38 U.S.C. 1114 and 1115 on and after that date.

This paragraph no longer serves a useful purpose. As it indicates, there has been no distinction between wartime and peacetime rates of disability compensation for many years. Any retroactive award involving those distinctions would be based on statutes and regulations in effect at the time.

Section 5.281 Multiple 0-Percent Service-Connected Disabilities

Proposed § 5.281 would be based on current § 3.324. We propose to change the term "noncompensable" in the section heading to "0 percent" for simplicity. "0 percent" would be more understandable for many regulation users. VA interprets current § 3.324 as requiring the relevant disabilities be permanent and the combined effect of the disabilities interfere with normal employability. The proposed regulation would state this clearly.

Section 5.282 Special Consideration for Paired Organs and Extremities

Proposed § 5.282 would be based on current § 3.383. The rule would provide for disability compensation for certain paired organs and extremities, where disability from one of the pair is service-connected and disability from the other is not. Consistent with current § 3.383, proposed § 5.282(a) would state that "VA will not pay compensation for the nonservice-connected disability if the veteran's willful misconduct proximately caused it." The term "proximately caused" would be equivalent to "the result of". "Veteran's" rather than "veteran's own" would eliminate redundancy, as "veteran's own" means the same thing as "veteran's". Though "own" might add emphasis, it would add no meaning.

Proposed § 5.282(b)(1) would provide that VA will pay compensation for the combination of service-connected and nonservice-connected "impairment of vision" of both eyes if "(i) The impairment of vision in each eye is rated at a visual acuity of 20/200 or less; or (ii) The peripheral field of vision for each eye is 20 degrees or less."

Current § 3.383 refers to "loss or loss of use" of certain body parts. In § 5.282(b)(2) and (b)(4), we propose to use "anatomical loss or loss of use" of the named body part. The proposed usage would be like that in 38 U.S.C. 1114(k), which provides increased

compensation benefits for "anatomical loss or loss of use" of certain body parts. "Loss" means "anatomical loss" in the phrase "loss or loss of use" in current § 3.383. The proposed usage of the phrase "anatomical loss" would preclude misconstruing "loss" as some other type of loss that is neither anatomical loss nor loss of use.

Proposed § 5.282(c) would be based on rules in current § 3.383(b) requiring offset against VA disability compensation for money or property veterans recover in a judgment, settlement, or compromise of a cause of action concerning their qualifying nonservice-connected disability. We propose to omit current § 3.383(b)(2), which pertains to the October 28, 1986, effective date for the offset provisions. Any award that would be granted under proposed § 5.282 would require offset because the award would be made "on or after October 28, 1986." Retaining the effective date of a statutory change occurring over 23 years ago would serve no useful purpose.

Section 5.283 Total and Permanent Total Ratings and Unemployability

Proposed § 5.283 would be based on current § 3.340, "Total and permanent total ratings and unemployability." Proposed § 5.283 would expand several dense paragraphs of current § 3.340 into individually designated rules for clarity, would update certain obsolete terms, and would promote consistency of terms throughout part 5. None of the differences between current § 3.340 and proposed § 5.283 would be substantive.

Current § 3.340(a) prescribes the criteria for total disability and distinguishes it from permanent disability by stating that "[t]otal disability may or may not be permanent." Proposed § 5.283(a)(1) would include this distinction by stating that "[f]or compensation purposes, a total disability rating may be granted without regard to whether the impairment is shown to be permanent."

Proposed § 5.283(a)(2) would refer to §§ 4.16 and 4.17 of this chapter rather than to "paragraph 16, page 5 of the rating schedule" and to "paragraph 17, page 5 of the rating schedule", respectively, as current § 3.340(a)(2) does. Current §§ 4.16 and 4.17 of this chapter are the counterparts of the references in current § 3.340(a)(2) to rules in the 1945 edition of the Schedule for Rating Disabilities. This change would update references to paragraphs of the 1945 edition of the Schedule for Rating Disabilities to the equivalent sections of the current Schedule for Rating Disabilities in part 4 of this chapter.

Proposed § 5.283(a)(3), based on current § 3.340(a)(3), would reformat the factors to consider in determining whether to rate a disability that has undergone some recent improvement as total based on its history. The proposed rule would state the factors in the same sequence as the current rule but would designate the factors individually for clarity.

Proposed § 5.283(b), based on current § 3.340(b), would reformat the factors VA must consider in determining whether a total disability is permanent. The proposed rule would state the factors in the same sequence as the current rule but would designate the factors individually for clarity.

Current § 3.340(b) provides that a total disability is permanent when it is reasonably certain that "such disability" will continue throughout the life of the disabled person. "Such disability" refers to the disability described in current § 3.340(a) as total, that is, "any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation." Proposed § 5.283(b) would restate the definition of total disability in place of "such", so the user need not trace the regulation to find what is meant by "such" disability.

Proposed § 5.283(b)(1) would use the phrases "anatomical loss or loss of use" of certain body parts and "anatomical loss or loss of sight of both eyes" where current § 3.340(b) uses the phrase "loss or loss of use" of certain body parts or the sight of both eyes. As stated in our preamble discussion of § 5.282, the proposed usage would be like that in 38 U.S.C. 1114(k), which provides increased compensation benefits for "anatomical loss or loss of use" of certain body parts. "Loss" means "anatomical loss" in the phrase "loss or loss of use" in current § 3.340(b). The proposed usage of the phrase "anatomical loss" would preclude misconstruing "loss" as some other type of loss that is neither anatomical loss nor loss of use.

Proposed § 5.283(b)(1) and (3) would use the phrase "permanently so significantly disabled as to need regular aid and attendance" where current § 3.340(b) uses the phrase "permanently helpless". We would replace the term "helpless" with the term "so significantly disabled as to need regular aid and attendance" to conform to the Veterans' Housing Opportunity and Benefits Improvement Act of 2006 (Pub. L. 109–233), which amended certain sections of title 38, U.S.C., to replace the obsolete term "helpless" with the term "significantly disabled" (and similar terminology) when describing persons who need regular aid and attendance. *See, e.g.,* 38 U.S.C. 1114(l), 1115(1)(E), and 1502(b). Additionally, where current § 3.340(b) refers to the state of being "permanently helpless or bedridden", proposed § 5.283(b)(3) would refer to the state of being "permanently bedridden" apart from the state of being "permanently so significantly disabled as to need regular aid and attendance". This would preclude any ambiguity about whether bedridden status must also be permanent to qualify as a criterion of a "permanent total disability". The differences between proposed § 5.283(b)(1) and (3) and current § 3.340(b) would not be substantive.

Section 5.284 Total Disability Ratings for Disability Compensation Purposes

Proposed § 5.284 would be based on current § 3.341, "Total disability ratings for compensation purposes." To eliminate redundancy with part 4, we would not repeat the second sentence of current § 3.341(a), which prohibits VA from considering the age of a veteran in determining whether the veteran is unemployable even though his or her schedular rating is less than 100 percent. That rule is sufficiently stated in § 4.19 of this chapter. The omission would not be substantive.

Proposed § 5.284(c) would omit the reference in current § 3.341(c) to "the period beginning after January 31, 1985" because any VA ratings pursuant to this proposed rule would take place after January 31, 1985. The omission would not be substantive.

Section 5.285 Continuance of Total Disability Ratings

Proposed § 5.285 would be based on paragraphs (a) and (c) of current § 3.343, "Continuance of total disability ratings." (The part 5 counterpart to § 3.343(b), "Tuberculosis; compensation", was published in another NPRM as proposed § 5.347. *See* 73 FR 62004 (Oct. 17, 2008)). The proposed rule would be more succinct than current § 3.343, for example, by changing the phrase "temporary interruptions in employment which are of short duration" in current § 3.343(c) to "brief interruptions in employment" in proposed § 5.285(b)(4).

Proposed § 5.285 would reorganize current § 3.343. It would first state the rule that "VA will not reduce a total disability rating that was based on the severity of a person's disability or disabilities without examination showing material improvement in physical or mental condition." Proposed § 5.285(a) would clarify in a separate sentence that "VA may reduce a total

disability rating that was based on the severity of a person's disability or disabilities without examination if the rating was based on clear error." This rule would constrain VA from reducing total disability ratings based on the severity of a person's disability or disabilities unless VA examines the totally disabled person and considers the listed factors. Paragraph (a)(1) would articulate the factors VA must consider before it can reduce a total rating. Paragraph (a)(2) would prescribe the circumstances that require VA to reexamine the person before it may reduce a total rating, and when the reexamination must occur. Paragraph (a)(3) would clarify that the rules contained in paragraph (a), (a)(1), and (a)(2) do not apply when a total rating is purely based on hospital, surgical, or home treatment or individual unemployability. This clarification is currently imbedded in the first sentence of current § 3.343(a).

Proposed § 5.285(b) would be based on current § 3.343(c), "Individual unemployability." Proposed paragraph (b) would reorganize the elements of § 3.343(c) without making any substantive changes. The proposed rule would not repeat the instruction in § 3.343(c)(1) to apply the procedural protections for reductions of disability ratings to the reduction of a total disability rating based on individual unemployability (TDIU). The procedural protections apply to all reductions of compensation, not just to TDIU reductions. Including the reference to procedural protections here could lead readers to believe incorrectly that those protections do not apply elsewhere. The paragraph would therefore begin with the substance of the rules governing the reduction of a TDIU rating. The contents of the proposed rule are the same as in § 3.343(c), but the constituent elements of the long paragraph in § 3.343(c) would be reformatted for clarity and to avoid ambiguity. Proposed paragraph (b)(1) would state VA's standard of proof for reducing a TDIU rating. Paragraph (b)(2) would prescribe specific types of evidence VA must receive to meet the standard of proof for reduction of a TDIU rating of a veteran in vocational rehabilitation, education, or training. Paragraph (b)(3) would provide that a veteran's participation in certain VA programs will be considered evidence of employability for purposes of reducing a TDIU rating. Paragraph (b)(4) would restate current § 3.343(c)(2) with the change for succinctness mentioned above. Paragraph (b)(4) would also omit the reference in current § 3.343(c) to "the period beginning after January 1, 1985" because any VA ratings pursuant to this proposed rule would take place after January 1, 1985. The omission would not be substantive.

*Additional Disability Compensation Based on a Dependent Parent*

Parental dependency is significant in the context of VA disability compensation for veterans because VA pays a veteran additional compensation under certain circumstances if the veteran has a dependent parent. *See* 38 U.S.C. 1115, "Additional compensation for dependents"; 38 U.S.C. 1135, "Additional compensation for dependents"; and proposed § 5.240(b) included in this NPRM. Proposed §§ 5.300 and 5.302 through 5.304 would address parental dependency for purposes of disability compensation for veterans.

Section 5.300 Establishing Dependency of a Parent

VA is authorized by statute to pay additional compensation to a veteran with service-connected disability rated 30-percent or more disabling who has a parent who is dependent upon the veteran for support. 38 U.S.C. 1115(1)(D), (2). Proposed § 5.300 would describe how to establish the dependency of a parent. For consistency throughout part 5 and for simplicity in this rule, we would use the singular "parent" or "parent's" where current § 3.250 uses the plural. This would not be a substantive change.

Proposed paragraph (a) would be substantively equivalent to current § 3.250(a), which prescribes specific income requirements for a conclusive finding of the dependency of a parent. Proposed § 5.300(a)(1)(i) would clarify that the income threshold for a mother or father not living together would be the same for a remarried parent and parent's spouse not living together. This is implicit under current § 3.250(a) because, if a remarried parent and parent's spouse were not living together, the appropriate income limitation category would be the amount under current § 3.250(a)(1)(i) for "a mother or father not living together". Proposed § 5.300(a)(2) would clarify that net worth is not a consideration when a parent's income is at or below the prescribed levels in proposed paragraph (a)(1). This information is implicit in current § 3.250(a)(1) and (2), but it is not clearly stated.

When proposed paragraph (a) would not apply, VA must determine dependency on a case-by-case basis. Proposed § 5.300(b) would explain when VA must make a factual finding of dependency. Proposed paragraph (b)(1) would provide the general rule for establishing factual dependency. Proposed paragraph (b)(2) would state the requirements for consideration of net worth when VA must establish factual dependency.

Proposed paragraph (b)(1)(ii) would restate current § 3.250(c). We removed the qualification of "habitual contributions" and made the rule simpler. Contributions from the veteran to a parent would be considered income under the rule governing income. *See* proposed § 5.302, "General income rules—parent's dependency". A single contribution to the parent, for example, of $50,000, would be considered income. The regularity of the contribution would not be determinative. This would be consistent with current VA practice. The object of the rule would be to ensure that a Veterans Service Representative does not assume a parent is a veteran's dependent merely because the veteran gives the parent money. Also, even if the parent's receipt of money from the veteran is the parent's only income, *i.e.,* the parent is entirely dependent on the veteran, if the veteran's contribution is sufficient to provide reasonable maintenance for the parent, the parent will not be considered a veteran's dependent for purposes of proposed paragraph (b)(1). We intend no substantive change.

Proposed § 5.300(c) would define the term "family member" by incorporating provisions contained in the introduction to current § 3.250(b) and in current § 3.250(b)(2). The introduction to current § 3.250(b) describes a family member as a member under legal age or an adult member of the family who is dependent due to mental or physical incapacity. However, paragraph (b)(2), incorporating language in 38 U.S.C. 102(b)(2), defines a family member as one whom the father or mother is under a legal or moral obligation to support. We propose to combine this information into one definition. We also propose to define family member as a relative. This has always been VA's intent, which is why current § 3.250(b) and (b)(2) refers to a "member of the family" rather than to a member of the household. This change would standardize the application of this section nationally and would be consistent with long-standing VA practice.

We have not repeated in proposed § 5.300(c) a provision of current § 3.250(b)(2) that limits VA's consideration of the expenses a parent incurs for the support of a relative whom the parent is under a legal or moral obligation to support to expenses of a relative "in the ascending as well as

descending class", which we construe to mean relatives in a parent's direct line. ("Ascendant" means "[o]ne who precedes in lineage, such as a parent or grandparent." *Black's Law Dictionary* 121 (8th ed. 2004). "Descendant" means "[o]ne who follows in lineage, in direct (not collateral) descent from a person. Examples are children and grandchildren." *Id.* at 476.) This current provision excludes, for example, the expenses of an orphaned niece or nephew who is still a minor for whom the parent is providing support.

This restriction to the ascending and descending class is not required by statute. The authorizing statute, 38 U.S.C. 102, merely states that "[d]ependency of a parent * * * shall be determined in accordance with regulations prescribed by the Secretary [of Veterans Affairs]." 38 U.S.C. 102(a). We do not believe that the restriction is necessary, particularly because the qualifying expenses are already limited to expenses of persons who are relatives whom the parent has a moral or legal obligation of support. We also note that there is no such restriction with respect to expense deductions used in calculating VA's largest income-based program, Improved Pension. *See, e.g.,* current § 3.272(g)(1)(i); proposed § 5.413(b)(2)(i), 72 FR at 54776. VA's rules for determining income for purposes of administering its income-based programs should be consistent unless the law requires otherwise.

Current § 3.660(a)(1) provides, in part, that "in compensation claims subject to § 3.250(a)(2), notice must be furnished of any material increase in corpus of the estate or net worth." Current § 3.250(a)(2) provides that VA may consider the factual dependency of a veteran's parents. Paragraph (d) of proposed § 5.300 would substitute "report" for "notice" because notifications are typically provided by VA and not by claimants. In addition, proposed § 5.300(d) would clarify that the report regarding an increase in the parent's income or net worth must be furnished by the veteran who is receiving additional disability compensation based on a dependent parent, and that failure to report such an increase may result in creation of indebtedness based on an overpayment subject to recovery by VA. Consistent with current § 3.660(a)(1), this reporting requirement would only apply when a parent's increased income exceeds the amounts specified in proposed § 5.300(a)(1).

Section 5.302 General Income Rules—Parent's Dependency

Current §§ 3.261 and 3.262 provide the regulatory framework VA uses to calculate income for purposes of determining eligibility for Section 306 Pension, parents' DIC, and additional disability compensation for the dependency of a parent. Current §§ 3.261 and 3.262 are lengthy and complex because those sections combine provisions concerning the evaluation of income in three very different contexts. As a result, §§ 3.261 and 3.262 can be difficult to understand and use. Therefore, in part 5 we propose to divide the subject matter addressed by current §§ 3.261 and 3.262 into separate regulations, each dealing with the evaluation of income for a specific purpose. This division is also consistent with the benefit-specific organizational plan of proposed new part 5. Proposed §§ 5.302 through 5.304 would pertain only to calculating income for the purpose of determining a veteran's entitlement to additional disability compensation for parent's dependency. Income regulations for pension and parent's DIC are addressed in NPRMs dealing with those subjects.

Because there are numerous similarities between the way income is calculated for determining a parent's dependency and for determining eligibility for parents' DIC, and to promote as much consistency as the subject matter allows, we have based the structure of proposed §§ 5.302 through 5.304 on their proposed counterparts for income calculations for purposes of parents' DIC eligibility. *See* § 5.531, "General income rules"; § 5.532, "Deductions from income"; and § 5.533, "Exclusions from income", 70 FR at 61326. The text of proposed §§ 5.302 through 5.304 would also reflect the differences in the way that income is calculated for parent's dependency purposes.

Proposed § 5.302(a) would state the basic rule that VA must count all payments of any kind from any source in determining income. Beginning with this basic rule would simplify the proposed regulation because the all-inclusive nature of the rule would eliminate any need to catalog types of countable income. *All* income that a parent receives is income for parent's dependency purposes unless there is a specific exclusion. For example, with this beginning point, provisions such as the first sentence of current § 3.262(j)(2) (providing that, with respect to life insurance, "the full amount of payments is considered income as received") become redundant and need not be carried forward.

Because VA must count all payments, it is necessary to know what VA includes in, and excludes from, the term "payments". To eliminate redundancy, we would cross-reference proposed § 5.370, "Definitions for Improved Pension", 72 FR at 54776, which defines "payments". This definition would apply throughout part 5.

Proposed § 5.302(b) would provide that, if a parent is married, "income" would be the combined income of the parent and the parent's spouse, except where the marriage has been terminated or the parent is separated from his or her spouse. We would also state that "[i]ncome is combined whether the parent's spouse is the veteran's other parent or the veteran's stepparent" and that "[t]he income of the parent's spouse will be subject to the same rules that are applicable to determining the income of the veteran's parent." This would be a clearer statement of the principle in the introduction to current § 3.262(b), which provides that "[i]ncome of the spouse will be determined under the rules applicable to income of the claimant." The income rules in proposed § 5.302 would be applicable to a parent. The spouse of a veteran's parent will always be either the veteran's other parent (in which case the rules would expressly apply) or the veteran's stepparent. In the context of additional disability compensation to a veteran for parent's dependency, the veteran, and not the parent, is the claimant.

Current § 3.250(b)(2) provides that "[i]n determining whether other members of the family under legal age are factors in necessary expenses of the mother or father, consideration will be given to any income from business or property (including trusts) actually available, directly or indirectly, to the mother or father for the support of the minor but not to the corpus of the estate or the income of the minor which is not so available." Proposed § 5.302(c), based on §§ 3.250(b)(2) and 3.261(a)(3), would refer to the veteran's "parent" rather than to the veteran's "mother or father" to make it clear that these regulatory provisions refer to the veteran's parent whose dependency is at issue, rather than to the mother or father of the minor. Under the applicable definition of "family member" (*see* proposed § 5.300(c)) the minor family member would not necessarily be another child of the veteran's parent. Also, to be consistent with the new proposed definition of "family member", we propose to refer to a family member who is under "21 years of age" rather than to

a family member who is under "legal age", as stated in current 3.250(b)(2).

Proposed § 5.302(d), based on current § 3.262(k)(2), would state the rule that income from a parent's property is income of the parent. Property ownership is an important indicator of the right to income from that property, but it is not always controlling. To eliminate redundancy, we would cross-reference § 5.410(f), 72 FR at 54776, for how VA determines ownership of property. This provision would apply throughout part 5.

Proposed § 5.302(e) would state the rules for calculating the amount of profit from the sale of real or personal property. Current § 3.262(k)(3) provides that the basis for calculating net profit on the sale of such property is the value of the property at the date of entitlement to benefits (in this case, the veteran's entitlement to additional disability compensation based on parent's dependency), if the property was owned prior to the date of entitlement. However, it does not state the basis for calculating the net profit on the sale of property acquired after the date of entitlement. We propose to adopt the commonly used principle that the value to be deducted from the sales price to determine profit in such circumstances is the cost of the property, including improvements. This rule would be one with which many claimants should be familiar. It would be, for example, similar to the rule used in determining profit for Federal income tax purposes.

Section 5.303 Deductions From Income—Parent's Dependency

Even though all income is counted except where there is specific authority to exclude it, VA permits deductions from income in some instances. That is, the amount of income ultimately counted is the difference between income and certain deductible expenses directly associated with that income. Proposed § 5.303 would list permitted deductions.

Proposed § 5.303(b), concerning the deductibility of expenses associated with recoveries for death and disability, would be based on rules found in current §§ 3.261(a)(24) and 3.262(i)(1) and (j)(4). Current § 3.262(i)(1) refers to "the Bureau of Employees' Compensation, Department of Labor (of the United States)." The Bureau of Employees' Compensation was abolished in 1974. *See* 20 CFR 1.5. Its functions are now carried out by the Office of Workers' Compensation Programs of the U.S. Department of Labor. *See* 20 CFR 1.6(b). This change would be reflected in proposed § 5.303(b)(2).

Section 5.304 Exclusions From Income—Parent's Dependency

Proposed § 5.304 would list income that VA does not count when calculating a parent's income. Proposed paragraph (c) would be based on current § 3.261(a)(12), which excludes the "[s]ix-months' death gratuity". However, we propose to change the description to "[d]eath gratuity payments by the Secretary concerned under 10 U.S.C. 1475 through 1480." The phrase "six-months' death gratuity" is obsolete. While the death gratuity consisted of six-months' pay when originally enacted (*see* Pub. L. 66–99, § 1, 41 Stat. 367 (1919)), that is no longer the case. Over the years, these death gratuity payments have evolved into a fixed sum, rather than a variable amount equal to six-months' pay. *See* 10 U.S.C. 1478. As covered in proposed paragraph (c), this exclusion would extend to death gratuity payments in lieu of payments under 10 U.S.C. 1478 made to certain survivors of "Persian Gulf conflict" veterans as authorized by the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991. *See* Public Law 102–25, § 307, 105 Stat. 82 (1991). Note that the phrase "Secretary concerned" is defined in proposed § 5.1. *See* 71 FR at 16474.

Proposed § 5.304 would combine rules from current § 3.262 that permit a parent to exclude from his or her income the value of certain income received by that parent. One of these is found in current § 3.262(f), which requires VA to treat "[b]enefits received under noncontributory programs, such as old age assistance, aid to dependent children, and supplemental security income" as charitable donations. We propose to remove the references to the Old Age Assistance program and the Aid to Dependent Children program because these programs no longer exist. The Old Age Assistance program was phased out and totally replaced by the Supplemental Security Income program in 1972 and the Aid to Dependent Children program became a federal block grant known as Temporary Assistance to Needy Families in 1996.

There are a number of other Federal statutes that exempt specific kinds of income from consideration in determining either eligibility for all Federal income-based programs, or eligibility for all of VA's income-based benefit programs. Because those exclusions affect more than a parent's dependency, they will be addressed in § 5.412, 72 FR at 54776, "Income exclusions for calculating countable annual income". Proposed § 5.304 would list only those income exclusions that are unique to a parent's dependency allowance.

Current § 3.261(a)(20) excludes VA benefit payments for World War I adjusted compensation. We would remove this exclusion because there is currently only one World War I veteran. We do not envision receiving any new claims for this benefit.

Proposed § 5.304(h), based on current § 3.262(k)(4), would provide an exclusion for net profit from the sale of the parent's principal residence when that profit is used to purchase another principal residence within specified time constraints. In drafting proposed § 5.304(h), we intentionally omitted the rule in current § 3.262(k)(4) that makes the exclusion available only when the net profit is applied to the purchase of a new principal residence after January 10, 1962. Inclusion of that effective date has been rendered unnecessary due to the passage of time. This is particularly true in view of the fact that, to qualify for this exclusion, the application of the net profit from the sale of the old residence to the purchase of a replacement residence must be reported to VA within 1 year after the date it was so applied.

Current § 3.261(a)(11) excludes "mustering-out pay" from income for purposes of determining parental dependency. We propose to omit this provision from § 5.304. Mustering-out pay was repealed by Public Law 89–50, 79 Stat. 173, in 1965.

We propose to omit an exclusion listed in current § 3.261(a)(20) because it is now obsolete. That section excludes "[s]ervicemember's indemnity" from income for purposes of determining parental dependency. The Servicemen's Indemnity Act of 1951, Public Law 82–23, 65 Stat. 33, authorized VA to pay indemnity in the form of $10,000 automatic life insurance coverage to the survivors of members of the Armed Forces who died in service. However, the Act authorizing this benefit was repealed in 1956. *See* Public Law 84–881, § 502(9), 70 Stat. 886 (1956).

*Disability Compensation Effective Dates*

This section would begin with a note cross-referencing effective date rules for temporary total disability compensation ratings under current 38 CFR 4.29 based upon a veteran's hospitalization for treatment or observation of a service-connected disability or under current 38 CFR 4.30 based on convalescence. We propose not to include, in part 5, provisions similar to those in current §§ 3.401(h) and 3.501(m) because current §§ 4.29 and 4.30 contain effective date rules that apply in

situations covered by §§ 3.401(h) and 3.501(m).

Section 5.311 Effective Dates—Award of Disability Compensation

Proposed § 5.311, based on current § 3.400(b)(2), would provide the effective date rules for an award of disability compensation. We propose to omit the distinction in current § 3.400(b)(2)(i) and (ii) between awards of compensation based on direct service connection and those based on presumptive service connection. In proposed § 5.1, we would define "direct service connection" as distinguishable from service connection based on a legal presumption. 71 FR at 16473. This distinction would be unnecessary in § 5.311 because the effective date rules in current § 3.400(b)(2)(i) and (ii) are the same. By combining the two rules we would eliminate redundancy. No substantive change would be intended.

Proposed § 5.311(a) would implement 38 U.S.C. 5110(b)(1), which permits VA to make retroactive payments of disability compensation when a veteran files a benefit claim within 1 year after separation from service. There are several differences between proposed § 5.311(a) and its current part 3 equivalent, § 3.400(b)(2).

Current § 3.400(b)(2)(i) states that the effective date of disability compensation is the "[d]ay following separation from active service or date entitlement arose if claim is received within 1 year after separation after service; otherwise, date of receipt of claim, or date entitlement arose, whichever is later." We propose to replace the word "separation" with the statutory phrase "discharge or release". We would define the term "discharge or release" in proposed § 5.1. 71 FR at 16464. We also propose to replace "active service" with "active military service." In proposed § 5.1, we would define "active military service" to mean the same as the statutory term "active military, naval, or air service". 71 FR at 16473.

In paragraph (b) of § 5.311, we propose to restate the rule contained in the phrase "otherwise, date of receipt of claim, or date entitlement arose, whichever is later" in current § 3.400(b)(2)(i) and (ii). Rather than repeat this language, we propose to simply reference the general part 5 effective date rule found at § 5.150(a). 72 FR 28,770, 28,876 (May 22, 2007).

Section 5.312 Effective Dates—Increased Disability Compensation

Proposed § 5.312, based on current § 3.400(o)(2), would state the effective date rules for an award of increased disability compensation. It would implement 38 U.S.C. 5110(a) and (b)(2) as they pertain to an award of increased disability compensation. An increase in disability compensation most often results from an increase in a disability rating governed by the Schedule for Rating Disabilities in part 4 of this chapter. Section 5110(b)(2) and current § 3.400(o)(2) also govern the effective date of an award of or increase in special monthly compensation (SMC) to a veteran with a current disability compensation award, even though the Schedule for Rating Disabilities does not govern SMC; no other statute or regulation provides an effective date of an award of SMC to a veteran with a current compensation award. We would title the section to refer to an increase in disability compensation, consistent with 38 U.S.C. 5110(b)(2) and current § 3.400(o)(2), and draft the regulation to apply to an award of increased disability compensation, rather than to an increase in a disability rating. This would not be a change in scope of the current regulation or otherwise a substantive change.

Proposed § 5.312(a) would be new. It would inform readers of the type of awards that VA considers to be subject to 38 U.S.C. 5110(b)(2): A higher disability rating under subpart B of the Schedule for Rating Disabilities in part 4 of this chapter; a higher disability rating under the extra-schedular provision in evaluation under § 5.280(b); a higher disability rating under § 4.16 of this chapter, "Total disability ratings for compensation based on unemployability of the individual"; and an award or higher rate of special monthly compensation.

The note after proposed § 5.312(a) would explain that this section does not establish the effective date of an award of secondary service connection under § 5.246 or § 5.247. This would be consistent with the holding of the CAVC in *Ross* v. *Peake,* 21 Vet. App. 528, 532 (2008), that "an award of 'increased compensation' within the meaning of section 5110(b)(2) does not encompass an award of secondary service connection because, by definition, secondary service connection requires the incurrence of an *additional* disability." We would apply the reasoning in *Ross* to claims for secondary service connection under § 5.246 and § 5.247.

Proposed § 5.312(b) would restate in plain language the current effective-date rule for an award of increased disability compensation. Current § 3.400(o)(2) provides for an effective date on the "[e]arliest date as of which it is factually ascertainable that an increase in disability had occurred if claim is received within 1 year from such date". This provision is based on 38 U.S.C. 5110(b)(2), which states that "[t]he effective date of an award of increased compensation shall be the earliest date as of which it is ascertainable that an increase in disability had occurred, if application is received within one year from such date." Rather than use the term "ascertainable", we would simply state in proposed § 5.312(b)(1) that the effective date will be "the date that the evidence warrants a higher disability rating, or an award or higher rate of special monthly compensation, if VA received a claim for increased disability compensation within 1 year after that date." This would be consistent with current VA practice and the authorizing statute. This would not be a substantive change.

Section 5.313 Effective Dates—Discontinuance of a Total Disability Rating Based on Individual Unemployability

Proposed § 5.313 would be based on current § 3.501(e)(2) and (f). Section 3.501(e)(2) states an effective date rule for discontinuance of a TDIU rating if a veteran regains employability. However, it does not provide guidance on what rating to assign in place of the TDIU rating. Section 3.501(f) provides an effective date rule for discontinuance of TDIU if a veteran fails to return an employment questionnaire to VA. It provides that the award will be reduced to the "amount payable for the schedular evaluation shown in the current rating as of the day following the date of last payment." It has been long-standing VA practice to also apply the schedular evaluation to cases where a veteran regains employability under § 3.501(e)(2). We propose to codify in § 5.313(b) this practice, which produces a fair result for veterans and is simple to administer. We also propose to replace the term "current rating" in § 3.501(f) with "existing schedular rating." The term "current rating" could be confusing because the most "current" rating would be for TDIU. Using "existing schedular rating" would clarify that we mean the rating that was in effect when TDIU was awarded.

We are proposing to rephrase effective date rules concerning reductions and discontinuances of VA benefits throughout part 5. Stating the first day VA will pay the new reduced rate or discontinue making payment, rather than stating the last day of the old rate or the last day of payment, would make these effective-date provisions easier to apply. Therefore, proposed paragraphs (b) and (c) would state that the reduction "will be effective" as specified

in each paragraph. Similar proposed changes would also appear in subsequent reduction and discontinuance effective date rules in the NPRM. VA intends no substantive change by this new language.

Section 5.314 Effective Dates—Discontinuance of Additional Disability Compensation Based on Parental Dependency

Proposed § 5.314 would be based on rules in current §§ 3.500(g), (h), and (n) and 3.660(a)(2), which govern the effective dates of discontinuance of awards of additional disability compensation to a veteran with a dependent parent when parental dependency ends. Current § 3.500(h) refers the reader to various statutes and other regulations, some of which pertain to disability compensation rules and some of which refer to rules concerning other benefits where parental dependency is relevant, such as death compensation for a parent. Proposed § 5.314 would only include information from the sources cross-referenced in current § 3.500(h) that relate to the discontinuance of additional disability compensation to a veteran when the financial dependency of a parent ends.

Current §§ 3.500(g)(2), (h), (n)(2), and 3.660(a)(2) contain rules that apply to discontinuance of additional disability compensation based on parental dependency that are related to events (marriage, divorce, annulment, and death) that occurred prior to October 1, 1982. We propose to omit these provisions. With the passage of time, they have become unnecessary. It is unlikely that VA would now retroactively discontinue additional disability compensation because of events involving a veteran's parent that occurred more than 28 years ago.

Proposed § 5.314 would be a counterpart to only the third sentence of § 3.660(a)(2) that pertains to discontinuance of additional disability compensation based on parental dependency. Current § 3.660(a)(2) addresses reduction or discontinuance of multiple VA benefits. Some, such as pension, are susceptible to reduction of the award of benefits because of increases in income or other financial events. The additional disability compensation based on parental dependency is not one of them. It is an all-or-nothing benefit. If the parent ceases to meet the criteria for the veteran's entitlement, VA discontinues the additional disability compensation. Consequently, proposed § 5.314 would refer only to discontinuance of the additional disability compensation.

Proposed paragraph (b) would clarify that, if a veteran's parent ceases to be dependent because the parent's economic status has improved, the effective date of the discontinuance of the additional disability compensation depends on whether the improvement is due to an increase in income or an increase in net worth. In the former case, the effective date would be the first day of the month after which the change occurred. In the latter case, the effective date would be the first day of the year after which the change occurred. This result is required by 38 U.S.C. 5112(b)(4).

Section 5.315 Effective Dates—Additional Disability Compensation Based on Decrease in the Net Worth of a Dependent Parent

Proposed § 5.315, based on current § 3.660(d), would provide the effective date rule that would apply if entitlement to additional disability compensation based on the dependency of a parent is reestablished after VA had previously denied or discontinued the additional disability compensation because of the parent's net worth. VA proposes to separate the new section into two paragraphs—an introductory paragraph, which explains when the rule would apply, and a paragraph explaining the rule itself. Consistent with other proposed regulations in this NPRM, VA proposes to use the term "net worth" instead of "corpus of estate".

**Endnote Regarding Amendatory Language**

We intend to ultimately remove part 3 entirely, but we are not including amendatory language to accomplish that at this time. VA will provide public notice before removing part 3.

**Paperwork Reduction Act**

This document contains no provisions constituting a new collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

**Regulatory Flexibility Act**

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This proposed rule would not affect any small entities. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rule would be exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

**Executive Order 12866**

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a "significant regulatory action," requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal 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 the Executive Order.

VA has examined the economic, interagency, budgetary, legal, and policy implications of this proposed rule and has determined that it is not a significant regulatory action under the Executive Order because it will not result in a rule that may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

**Unfunded Mandates**

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any 1 year. This proposed rule would have no such effect on State, local, or tribal governments, or on the private sector.

**Catalog of Federal Domestic Assistance Numbers and Titles**

The catalog of Federal Domestic Assistance program numbers for this proposal are: 64.100, Automobiles and Adaptive Equipment for Certain Disabled Veterans and Members of the Armed Forces; 64.101, Burial Expenses

Allowance for Veterans; 64.102, Compensation for Service-Connected Deaths for Veterans' Dependents; 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.106, Specially Adapted Housing for Disabled Veterans; 64.109, Veterans Compensation for Service-Connected Disability; 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death; 64.115, Veterans Information and Assistance; and 64.127, Monthly Allowance for Children of Vietnam Veterans Born with Spina Bifida.

**Signing Authority**

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on August 12, 2010, for publication.

**List of Subjects in 38 CFR Part 5**

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

Dated: August 19, 2010.

**William F. Russo,**

*Director, Regulations Management, Department of Veterans Affairs.*

For the reasons set forth in the preamble, VA proposes to amend 38 CFR part 5 (as proposed to be added at 69 FR 4832, January 30, 2004, and as amended by adding subpart E at 69 FR 44624, July 27, 2004) as follows:

## PART 5—COMPENSATION, PENSION, BURIAL, AND RELATED BENEFITS

1. The authority citation for part 5, subpart E, continues to read as follows:

**Authority:** 38 U.S.C. 501(a) and as noted in specific sections.

2. Sections 5.240 through 5.251 and their undesignated center heading are added to subpart E and §§ 5.252 through 5.259 are reserved to read as follows:

### Subpart E—Claims for Service Connection and Disability Compensation

### Service-Connected and Other Disability Compensation

Sec.

5.240 Disability compensation.
5.241 Service-connected disability.
5.242 General principles of service connection.
5.243 Establishing service connection.
5.244 Presumption of sound condition.
5.245 Service connection based on aggravation of preservice injury or disease.
5.246 Secondary service connection—disability that is proximately caused by service-connected disability.
5.247 Secondary service connection—nonservice-connected disability aggravated by service-connected disability.
5.248 Service connection for cardiovascular disease secondary to service-connected lower extremity amputation.
5.249 Special service connection rules for combat-related injury or disease.
5.250 Service connection for posttraumatic stress disorder.
5.251 Current disabilities for which VA cannot grant service connection.
5.252–5.259 [Reserved]

### Subpart E—Claims for Service Connection and Disability Compensation

### Service-Connected and Other Disability Compensation

#### § 5.240 Disability compensation.

(a) *Definition.* "Disability compensation" means a monthly payment VA makes to a veteran for a service-connected disability, as described in § 5.241, or for a disability compensated as if it were service connected, under § 5.350, "Benefits under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program."

(b) *Additional disability compensation based on having dependents.* Additional disability compensation is payable to a veteran who has a spouse, child, or dependent parent if the veteran is entitled to disability compensation based on a single or a combined disability rating of 30 percent or more. The additional disability compensation authorized by 38 U.S.C. 1115 is payable in addition to monthly disability compensation payable under 38 U.S.C. 1114.

(Authority: 38 U.S.C. 101(13), 1110, 1114, 1115, 1131, 1135, 1151)

#### § 5.241 Service-connected disability.

A "service-connected disability" is a current disability as to which any of the following is true:

(a) The disability was caused by an injury or disease incurred, or presumed to have been incurred, in the line of duty during active military service. See §§ 5.260 through 5.269 (concerning presumptions of service connection).

(b) The disability was caused by a preservice injury or disease aggravated, or presumed to have been aggravated, in the line of duty during active military service. See § 5.245, "Service connection based on aggravation of preservice injury or disease."

(c) The disability is secondary to a service-connected disability, pursuant to §§ 5.246–5.248 (governing awards of secondary service connection).

(Authority: 38 U.S.C. 1110, 1112, 1116, 1117, 1118, 1131, 1133, 1137)

#### § 5.242 General principles of service connection.

When a veteran seeks service connection:

(a) VA will give due consideration to any evidence of record concerning the places, types, and circumstances of the veteran's service as shown by the veteran's service record, the official history of each organization in which the veteran served, the veteran's medical records, and all pertinent medical and lay evidence; and

(b) VA will not consider a statement that a veteran signed during service that:

(1) Pertains to the origin, incurrence, or aggravation of an injury or disease; and

(2) Was against the veteran's interest at the time he or she signed it.

(Authority: 10 U.S.C. 1219; 38 U.S.C. 1154(a))

#### § 5.243 Establishing service connection.

(a) *Requirements.* Except as provided in §§ 5.246, "Secondary service connection—disability that is proximately caused by service-connected disability", and 5.247, "Secondary service connection—nonservice-connected disability aggravated by service-connected disability", and paragraph (c) of this section, proof of the following elements is required to establish service connection:

(1) A current disability;

(2) Incurrence or aggravation of an injury or disease in active military service; and

(3) A causal link between the injury or disease incurred in, or aggravated by, active military service and the current disability.

**Note 1 to paragraph (a):** *Permanent disability shown in service.* VA will consider all three elements of paragraph (a) of this section proven if service records establish that an injury or disease incurred in or aggravated by active military service produced a disability that is clearly permanent by its nature, such as the amputation of a limb or the anatomical loss of an organ.

**Note 2 to paragraph (a):** *Chronic disease or chronic residual of an injury in temporary remission.* VA will not deny service connection for lack of a current disability

solely because a chronic disease, or a chronic residual of an injury, enters temporary remission. Examples of chronic diseases and chronic residuals of injury subject to temporary remission include chronic tinnitus, malaria, mental illness, skin disease, and intervertebral disc syndrome.

(b) *Time of diagnosis is not necessarily controlling.* Proof of incurrence of a disease during active military service does not require diagnosis during service if the evidence otherwise establishes that the disease was incurred in service.

(c) *Chronic residuals of injuries and chronic diseases*—(1) *General rule.* VA will grant service connection for a current disability not clearly due to an intercurrent cause if:

(i) The current disability is caused by a chronic disease and competent evidence establishes that the veteran had the same chronic disease in service or within an applicable presumptive period; or

(ii) The veteran had an injury in service and currently has a disability due to chronic residuals of the same injury.

(2) *Proof that a disease or residual of an injury is chronic.* For purposes of this paragraph (c), VA will consider the following to be chronic:

(i) A chronic disease listed in § 5.261(d);

(ii) A disease shown to be chronic by competent evidence; or

(iii) A residual of an injury (such as scarring or nerve, muscle, skeletal, or joint impairment) shown to be chronic by competent evidence. (See also paragraph (d) of this section on establishing chronicity through evidence of continuity of signs or symptoms).

**Note to paragraph (c):** Proof that a disease was chronic in service requires a combination of manifestations in service sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time, as distinguished from merely isolated findings or a diagnosis in service including the word "chronic." *See also* § 5.260(c), "Rebutting a presumption of service connection set forth in §§ 5.261 through 5.268." Isolated findings in service, such as joint pain, any abnormality of heart action or heart sounds, any urinary findings of casts, or any cough, would not alone establish the presence in service of a chronic disease, such as arthritis, disease of the heart, nephritis, or pulmonary disease, first shown as a clear-cut clinical entity at some later date.

(d) *Continuity of signs or symptoms.* Where signs or symptoms noted in service, or during an applicable presumptive period, are not considered a chronic disease or residual of an injury under paragraph (c)(2) of this section, service connection is established when all of the following are shown by competent evidence:

(1) The veteran had signs or symptoms of an injury or disease during active military service or during an applicable presumptive period for a disease;

(2) The signs or symptoms continued from the time of discharge or release from active military service or from the end of the applicable presumptive period, until the present; and

(3) The signs or symptoms currently demonstrated are signs or symptoms of an injury or disease, or the residuals of an injury or disease, to which paragraph (d)(1) of this section refers.

(Authority: 38 U.S.C. 101(16), 501, 1110, 1131)

**§ 5.244 Presumption of sound condition.**

(a) *Presumption of sound condition.* VA will presume that a veteran was in sound condition upon entry into active military service, which means that the veteran was free from injury or disease except as noted in the report of a medical examination conducted for entry into active military service.

(b) *Report of entry examination not a condition for application of the presumption.* The presumption of sound condition applies even if:

(1) The veteran did not have a medical examination for entry into active military service; or

(2) There is no record of the examination.

(c) *Medical history recorded in entry examination reports*—(1) *Medical histories.* The presumption of sound condition applies if an examiner recorded a history of injury or disease in an entry examination report, but the examiner did not report any contemporaneous clinical findings related to such injury or disease. VA may consider the notation of history together with other evidence in determining whether the presumption of sound condition is rebutted under paragraph (d) of this section.

(2) *Medical examination reports.* The presumption of sound condition is rebuttable even if an entry medical examination shows that the examiner tested specifically for a certain injury or disease and did not find that injury or disease, if other evidence of record is sufficient to overcome the presumption.

(d) *Rebutting the presumption.*

(1) For veterans with any wartime service and for veterans with peacetime service after December 31, 1946, VA can rebut the presumption only with clear and unmistakable evidence that the injury or disease resulting in the disability for which the veteran claims service connection both:

(i) Preexisted service; and

(ii) Was not aggravated by service, which means that

(A) During service the disability resulting from the preexisting injury or disease did not increase in severity or

(B) Any such increase was due to the natural progress of a disease.

(2) To determine whether there was an increase in the severity of disability during service (or during any applicable presumptive period) resulting from a preexisting injury or disease, see § 5.245(b).

(3) If there was an increase in the severity of disability during service (or during any applicable presumptive period) resulting from a preexisting injury or disease, to determine whether the increase was due to the natural progress of a disease, see § 5.245(c).

(Authority: 38 U.S.C. 1110, 1111, 1131, 1137)

**§ 5.245 Service connection based on aggravation of preservice injury or disease.**

(a) *Presumption of aggravation.* When an injury or disease was noted in the report of examination for entry into active military service, VA will presume that active military service aggravated a preexisting injury or disease if there was an increase in disability resulting from the injury or disease during service (or during any applicable presumptive period).

(b) *Determining whether disability increased during service*—(1) *Increase in severity.* For purposes of this section, increase in disability during active military service means the disability resulting from the preexisting injury or disease permanently became more severe during service (or during any applicable presumptive period) than it was before active military service.

(2) *Temporary flare-ups.* Except as provided in paragraph (b)(4) of this section, temporary or intermittent flare-ups of signs or symptoms of a preexisting injury or disease do not constitute aggravation in service unless the underlying condition worsened, resulting in increased disability.

(3) *Effects of medical or surgical treatment.* The usual effects of medical or surgical treatment in service that ameliorates a preexisting injury or disease, such as postoperative scars, or absent or poorly functioning parts or organs, are not an increase in the severity of the underlying condition and they will not be service connected unless the preexisting injury or disease was otherwise aggravated by service.

(4) *Combat or prisoner-of-war service.* The development of signs or symptoms, whether temporary or permanent, of a

preexisting injury or disease during or proximately following combat with the enemy, as defined in § 5.249(a)(2), or following status as a prisoner of war will establish aggravation of the disability resulting from that preexisting injury or disease.

(c) *Rebutting the presumption—natural progress of a disease.* The presumption of aggravation is rebutted if VA specifically finds by clear and unmistakable evidence that the increase in the severity of disability during service (or during an applicable presumptive period) was normal for the disease, that is, active military service did not contribute to the increase.

(Authority: 38 U.S.C. 1153, 1154)

**§ 5.246 Secondary service connection—disability that is proximately caused by service-connected disability.**

Except as provided in § 5.365(a), VA will grant service connection for a disability that is proximately caused by a service-connected disability.

(Authority: 38 U.S.C. 501(a), 1110, 1131)

**§ 5.247 Secondary service connection—nonservice-connected disability aggravated by service-connected disability.**

VA will grant service connection for any increase in severity of a nonservice-connected disability if the increase was proximately caused by a service-connected disability, and the increase was not due to the natural progress of a nonservice-connected disease. However, VA cannot grant service connection under this section without medical evidence establishing the severity of the nonservice-connected disability before or contemporaneous with the increase in severity due to the service-connected disability. The agency of original jurisdiction (AOJ) will use the Schedule for Rating Disabilities in part 4 of this chapter to rate the severity level of the nonservice-connected disability prior to aggravation, any increase in severity due to the natural progress of the disease, and the current severity level of the disability. The AOJ will then determine the amount of aggravation by subtracting the rating prior to aggravation and any increase in severity due to the natural progress of the disease from the current severity level. The result will be the increase proximately caused by a service-connected disability. VA will grant service connection only for that increase.

(Authority: 38 U.S.C. 501(a), 1110, 1131)

**§ 5.248 Service connection for cardiovascular disease secondary to service-connected lower extremity amputation.**

VA will grant secondary service connection for ischemic heart disease or other cardiovascular disease that develops after a veteran has a service-connected amputation of one lower extremity at or above the knee or service-connected amputations of both lower extremities at or above the ankles.

(Authority: 38 U.S.C. 501(a), 1110, 1131)

**§ 5.249 Special service connection rules for combat-related injury or disease.**

(a) *Combat-related incurrence or aggravation of injury or disease shown by lay or other evidence.* (1) VA will accept that an injury or disease was incurred or aggravated in service if a veteran engaged in combat with the enemy during a period of war, campaign, or expedition, and there is satisfactory lay or other evidence that the injury or disease was incurred in or was aggravated by such combat. Lay evidence may include a veteran's description of an event, disease, or injury. VA will accept such evidence as sufficient proof of incurrence or aggravation in service of an injury or disease even though there is no official record of the incurrence or aggravation. The evidence must be consistent with the circumstances, conditions, or hardships of the veteran's combat with the enemy. Incurrence or aggravation established under this paragraph may be rebutted by clear and convincing evidence to the contrary.

(2) "Combat with the enemy" means personal participation in an actual fight or encounter with a military foe, hostile unit, or instrument or weapon of war either:

(i) As a combatant; or

(ii) While performing a duty in support of combatants, such as providing medical care to the wounded.

(b) *Decorations as evidence of combat.* When a veteran has received any of the combat decorations listed below, VA will presume that the veteran engaged in combat with the enemy, unless there is clear and convincing evidence to the contrary:

(1) Air Force Cross

(2) Air Medal with "V" Device

(3) Army Commendation Medal with "V" Device

(4) Bronze Star Medal with "V" Device

(5) Combat Action Ribbon

(6) Combat Infantryman Badge

(7) Combat Medical Badge

(8) Combat Aircrew Insignia

(9) Distinguished Service Cross

(10) Joint Service Commendation Medal with "V" Device

(11) Medal of Honor

(12) Navy Commendation Medal with "V" Device

(13) Navy Cross

(14) Purple Heart

(15) Silver Star

(16) Combat Action Badge

(17) Any other form of decoration that the Secretary concerned may designate for award exclusively to persons for actions performed while engaged in combat with the enemy.

(Authority: 38 U.S.C. 501(a), 1154(b))

*Cross References:* § 5.141 (evidence in claims of former prisoners of war); § 5.245(b)(4); § 5.250(b)(2).

**§ 5.250 Service connection for posttraumatic stress disorder.**

(a) *Elements of a claim for service connection for posttraumatic stress disorder (PTSD).* Service connection for PTSD requires:

(1) Medical evidence diagnosing PTSD in accordance with § 4.125(a) of this chapter;

(2) A link, established by medical evidence, between current signs or symptoms and an in-service stressor; and

(3) Except as provided in paragraphs (c), (d), and (e) of this section, credible supporting evidence that the claimed in-service stressor occurred. For purposes of this section, "credible supporting evidence" means credible evidence from any source, other than the claimant's statement, that corroborates the occurrence of the in-service stressor.

(b) *VA will not deny a claim without trying to verify the claimed stressor.* If the existence of the claimed stressor is not verified by credible evidence, VA will seek verification from the appropriate service department or other entity. The exception to this rule is when, upon VA's request, the claimant fails to provide the information needed by the appropriate service department or other entity to try to verify the claimed stressor.

(c) *Special rule for veterans diagnosed with PTSD during active service.* If the evidence establishes a diagnosis of PTSD during service and the claimed stressor is related to that service, in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's active service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.

(d) *Special rules for veterans who engaged in combat with the enemy or who were prisoners of war.* To determine if a stressor occurred during

combat with the enemy or while a prisoner of war, VA will apply the rules in § 5.249 or § 5.141, respectively.

(e)(1) *Stressor confirmed by VA psychiatrist or psychologist.* In the absence of clear and convincing evidence to the contrary, and provided the claimed in-service stressor is consistent with the places, types, and circumstances of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the stressor if:

(i) The stressor is related to the veteran's fear of hostile military or terrorist activity; and

(ii) A VA psychiatrist or psychologist, or a psychiatrist or psychologist with whom VA has contracted, confirms that the stressor is adequate to support a diagnosis of posttraumatic stress disorder and that the veteran's symptoms are related to the claimed stressor.

(2) For purposes of this paragraph, "fear of hostile military or terrorist activity" means:

(i) That a veteran experienced, witnessed, or was confronted with an event or circumstance that involved actual or threatened death or serious injury, or a threat to the physical integrity of the veteran or others, such as:

(A) From an actual or potential improvised explosive device;

(B) Vehicle-imbedded explosive device;

(C) Incoming artillery, rocket, or mortar fire;

(D) Grenade;

(E) Small arms fire, including suspected sniper fire; or

(F) Attack upon friendly military aircraft, and

(ii) The veteran's response to the event or circumstance involved a psychological or psycho-physiological state of fear, helplessness, or horror.

(f) *Special rules for establishing a stressor based on personal assault.* (1) VA will not deny a PTSD claim that is based on in-service personal assault without:

(i) Advising the veteran that evidence from sources other than the veteran's service records, including evidence described in paragraph (c)(2) of this section, may constitute credible supporting evidence of the stressor; and

(ii) Providing the veteran with an opportunity to furnish this type of evidence or advise VA of potential sources of such evidence.

(2) Evidence that may establish a stressor based on in-service personal assault includes, but is not limited to, the following:

(i) Records from law enforcement authorities, rape crisis centers, mental health counseling centers, hospitals, or physicians;

(ii) Pregnancy tests or tests for sexually transmitted diseases;

(iii) Statements from family members, roommates, fellow servicemembers, or clergy; or

(iv) Evidence of behavioral changes following the claimed assault (which may be shown in any of the following sources), including: A request for a transfer to another military duty assignment; deterioration in work performance; substance abuse; episodes of depression, panic attacks, or anxiety without an identifiable cause; or unexplained economic or social behavior changes.

(3) VA may submit any evidence that it receives to an appropriate medical or mental health professional for an opinion as to whether it indicates that a personal assault occurred.

(Authority: 38 U.S.C. 501(a), 1110, 1131, 1154)

**§ 5.251 Current disabilities for which VA cannot grant service connection.**

(a) *General rule.* VA will not grant service connection for the following disabilities because they are not the result of an injury or disease for purposes of service connection:

(1) Congenital or developmental defects (such as congenital or developmental refractive error of the eye);

(2) Developmental personality disorders; or

(3) Developmental intellectual disability (mental retardation).

(b) *Distinguishable disabilities.* VA will grant service connection for the following disabilities, which are scientifically distinguishable from those listed in paragraph (a) of this section and actually result from an injury or disease:

(1) Malignant or pernicious myopia;

(2) Personality change (as distinguished from personality disorder) as part of, or proximately caused by, an organic mental disorder or a service-connected general medical condition (such as psychomotor epilepsy), or due to injury. *See* § 5.246, "Secondary service connection—disability that is proximately caused by service-connected disability".

(3) Nondevelopmental intellectual disability as part of, or proximately caused by, a service-connected disability. *See* § 5.246, "Secondary service connection—disability that is proximately caused by service-connected disability."

(c) *Superimposed disabilities.* Paragraph (a) of this section does not preclude granting service connection for a disability that is superimposed on a disability listed in paragraph (a).

(d) *Hereditary diseases.* Paragraph (a)(1) of this section does not preclude granting service connection for disability due to an inherited or familial disease (as distinguished from congenital or developmental defects in paragraph (a)(1) of this section). *See* § 5.261(f) regarding presumptions related to certain inherited or familial diseases.

(e) *Diseases of allergic etiology.* Paragraph (a) of this section does not preclude granting service connection for disability due to diseases of allergic etiology, including, but not limited to, bronchial asthma and urticaria.

(Authority: 38 U.S.C. 501, 1110, 1131)

**§§ 5.252–5.259 [Reserved]**

3. Sections 5.280 through 5.285 and their undesignated center heading are added to subpart E and §§ 5.286 through 5.299 are reserved to read as follows:

**Rating Service-Connected Disabilities**

Sec.

5.280 General rating principles.
5.281 Multiple 0-percent service-connected disabilities.
5.282 Special consideration for paired organs and extremities.
5.283 Total and permanent total ratings and unemployability.
5.284 Total disability ratings for disability compensation purposes.
5.285 Continuance of total disability ratings.
5.286–5.299 [Reserved]

**Rating Service-Connected Disabilities**

**§ 5.280 General rating principles.**

(a) *Use of rating schedule.* VA will use the Schedule for Rating Disabilities in part 4 of this chapter to rate the degree of disabilities in claims for disability compensation and in eligibility determinations. Instructions for using the schedule are in part 4.

(b) *Extra-schedular ratings in unusual cases*—(1) *Disability compensation.* To accord justice to the exceptional case where the Veterans Service Center (VSC) finds the schedular ratings to be inadequate, the Under Secretary for Benefits or the Director of the Compensation and Pension Service, upon VSC submission, is authorized to approve on the basis of the criteria set forth in this paragraph (b) an extra-schedular rating commensurate with the average impairment of earning capacity due exclusively to the service-connected disability or disabilities. The governing norm in these exceptional cases is a finding that the application of the regular schedular standards is impractical because the case presents an

exceptional or unusual disability picture with such related factors as:

(i) Marked interference with employment, or

(ii) Frequent periods of hospitalization.

(2) *Effective date.* The effective date of an extra-schedular rating, either granting or increasing disability compensation, will be in accordance with § 5.311 in original and reopened claims and in accordance with § 5.312 in claims for increased benefits.

(c) *Advisory opinions.* The VSC may submit to the Director of the Compensation and Pension Service for advisory opinion cases in which it does not understand the application of the Schedule for Rating Disabilities in part 4 of this chapter or in which the propriety of an extra-schedular rating is questionable.

(Authority: 38 U.S.C. 501, 1155)

**§ 5.281 Multiple 0-percent service-connected disabilities**.

VA may assign a 10-percent combined rating to a veteran with two or more permanent service-connected disabilities that are each rated as 0-percent disabling under the Schedule for Rating Disabilities in part 4 of this chapter, if the combined effect of such disabilities interferes with normal employability. VA cannot assign this 10-percent rating if the veteran has any other compensable rating.

(Authority: 38 U.S.C. 501, 1155)

**§ 5.282 Special consideration for paired organs and extremities**.

(a) *General rule.* VA will pay disability compensation for the combination of service-connected and nonservice-connected disabilities involving paired organs and extremities described in paragraph (b) of this section as if the nonservice-connected disability were service connected, but VA will not pay compensation for the nonservice-connected disability if the veteran's willful misconduct proximately caused it.

(b) *Qualifying combination of disabilities.* Disability compensation under paragraph (a) of this section is payable for the following disability combinations:

(1) Service-connected impairment of vision in one eye and nonservice-connected impairment of vision in the other eye if:

(i) The impairment of vision in each eye is rated at a visual acuity of 20/200 or less; or

(ii) The peripheral field of vision for each eye is 20 degrees or less.

(2) Service-connected anatomical loss or loss of use of one kidney and nonservice-connected involvement of the other kidney.

(3) Service-connected hearing impairment in one ear compensable to a degree of 10 percent or more and nonservice-connected hearing impairment in the other ear that meets the provisions of § 5.366 of this chapter, "Disability due to impaired hearing."

(4) Service-connected anatomical loss or loss of use of one hand or foot and nonservice-connected anatomical loss or loss of use of the other hand or foot.

(5) Permanent service-connected disability of one lung rated as 50 percent or more disabling and nonservice-connected disability of the other lung.

(c) *Offset of judgment, settlement, or compromise*—(1) *Required offset.* If a veteran receives money or property of value in a judgment, settlement, or compromise from a cause of action for a qualifying nonservice-connected disability involving an organ or extremity described in paragraph (b) of this section, VA will offset the value of such judgment, settlement, or compromise against the increased disability compensation payable under this section.

(2) *Offset procedure.* Beginning the first of the month after the veteran receives the money or property as damages, VA will not pay the increased disability compensation payable under this section until the total amount of such increased compensation that would otherwise have been payable equals the total amount of any money received as damages and the fair market value of any property received as damages. VA will not withhold the increased disability compensation payable before the end of the month in which the money or property was received.

(3) *Exception for Social Security or workers' compensation benefits.* Benefits received for the qualifying nonservice-connected disability under Social Security or workers' compensation laws are not subject to the offset described in paragraph (c)(1) of this section, even if the benefits are awarded in a judicial proceeding.

(4) *Duty to report receipt of judgment, settlement, or compromise.* A veteran entitled to receive increased disability compensation under this section must report to VA the total amount of any money and the fair market value of any property received as damages described in paragraph (c)(1) of this section. Expenses related to the cause of action, such as attorneys' fees, cannot be deducted from the total amount to be reported.

(Authority: 38 U.S.C. 1160)

**§ 5.283 Total and permanent total ratings and unemployability**.

(a) *Total disability ratings*—(1) *General.* VA will consider total disability to exist when any impairment of mind or body renders it impossible for the average person to follow a substantially gainful occupation. VA generally will not assign total ratings for temporary exacerbations or acute infectious diseases except where the Schedule for Rating Disabilities in part 4 of this chapter (the Schedule) specifically prescribes total ratings for temporary exacerbations or acute infectious diseases. For compensation purposes, a total disability rating may be granted without regard to whether the impairment is shown to be permanent.

(2) *Schedular rating or total disability rating based on individual unemployability.* VA may assign a total rating for any disability or combination of disabilities in the following cases:

(i) The Schedule prescribes a 100-percent rating, or

(ii) in a case in which VA assigns a rating of less than 100 percent, if the veteran meets the requirements of § 4.16 of this chapter or, in pension cases, the requirements of § 4.17 of this chapter.

(3) *Ratings of total disability based on history.* In the case of a disability that has undergone some recent improvement, VA may nonetheless assign a rating of total disability, provided:

(i) That the disability was severe enough in the past to warrant a total disability rating;

(ii) That the disability:

(A) Required extended, continuous, or intermittent hospitalization;

(B) Produced total industrial incapacity for at least 1 year; or

(C) Results in recurring, severe, frequent, or prolonged exacerbations; and

(iii) That it is the opinion of the agency of original jurisdiction (AOJ) that, despite the recent improvement of the physical condition, the veteran will be unable to adjust into a substantially gainful occupation. The AOJ will consider the frequency and duration of totally incapacitating exacerbations since incurrence of the original injury or disease and the periods of hospitalization for treatment in determining whether the average person could reestablish himself or herself in a substantially gainful occupation.

(b) *Permanent total disability.* VA will consider a total disability to be permanent when an impairment of mind or body that makes it impossible for the average person to follow a substantially gainful occupation is reasonably certain to continue

throughout the life of the disabled person.

(1) VA will consider the following disabilities or conditions as constituting a permanent total disability: The permanent anatomical loss or loss of use of both hands, or of both feet, or of one hand and one foot; the anatomical loss or loss of sight of both eyes; being permanently so significantly disabled as to need regular aid and attendance; or being permanently bedridden.

(2) VA will consider an injury or disease of long-standing that is actually totally incapacitating as a permanent total disability, if the probability of permanent improvement under treatment is remote.

(3) VA may not assign a permanent total disability rating as a result of any incapacity from acute infectious disease, accident, or injury, unless there is present the permanent anatomical loss or loss of use of extremities or the permanent anatomical loss or loss of sight of both eyes, as described in paragraph (b)(1) of this section, or the person is permanently so significantly disabled as to need regular aid and attendance or permanently bedridden, or when it is reasonably certain that a subsidence of the acute or temporary symptoms will be followed by irreducible totality of disability by way of residuals.

(4) VA may consider the age of the disabled person in determining whether a total disability is permanent.

(c) *Insurance ratings.* A rating of permanent and total disability for insurance purposes will have no effect on a rating for compensation or pension.

(Authority: 38 U.S.C. 501(a), 1155)

**§ 5.284 Total disability ratings for disability compensation purposes**.

(a) *General.* Subject to the limitation in paragraph (b) of this section, total disability compensation ratings may be assigned under the provisions of § 5.283.

(Authority: 38 U.S.C. 1155)

(b) *Incarcerated veterans.* VA will not assign a total disability rating based on individual unemployability for compensation purposes while a veteran is incarcerated in a Federal, State, or local penal institution for conviction of a felony if the rating would first become effective during such period of incarceration. However, VA will reconsider the case to determine if continued eligibility for such rating exists if a total disability rating based on individual unemployability existed prior to incarceration for the felony and routine review was required.

(Authority: 38 U.S.C. 5313(c))

(c) *Program for vocational rehabilitation.* Each time VA assigns a total disability rating based on individual unemployability, the agency of original jurisdiction will inform the Vocational Rehabilitation and Employment Service of the rating so the Vocational Rehabilitation and Employment Service may offer to evaluate whether it is reasonably feasible for the veteran to achieve a vocational goal.

(Authority: 38 U.S.C. 1163)

**§ 5.285 Continuance of total disability ratings.**

(a) *General.* VA will not reduce a total disability rating that was based on the severity of a person's disability or disabilities without examination showing material improvement in physical or mental condition. VA may reduce a total disability rating that was based on the severity of a person's disability or disabilities without examination if the rating was based on clear error.

(1) VA will consider examination reports showing material improvement in conjunction with all the facts of record, including whether:

(i) The veteran improved under the ordinary conditions of life, i.e., while working or actively seeking work; or

(ii) The symptoms have been brought under control by prolonged rest or by following a regimen which precludes work.

(2) If either circumstance in paragraph (a)(1)(ii) of this section applies, VA will not reduce a total disability rating until VA has reexamined the person after a period of 3 to 6 months of employment.

(3) Paragraphs (a), (a)(1), and (a)(2) of this section do not apply to a total rating that was purely based on hospital, surgical, or residence treatment, or individual unemployability.

(b) *Individual unemployability.* (1) VA may reduce a service-connected total disability rating based on individual unemployability upon a showing of clear and convincing evidence of actual employability.

(2) When a veteran with a total disability rating based on individual unemployability is undergoing vocational rehabilitation, education, or training, VA will not reduce the rating because of that rehabilitation, education, or training unless the AOJ receives:

(i) Evidence of marked improvement or recovery in physical or mental conditions that demonstrates affirmatively the veteran's capacity to pursue the vocation or occupation for which the training is intended to qualify him or her;

(ii) Evidence of employment progress, income earned, and prospects of economic rehabilitation that demonstrates affirmatively the veteran's capacity to pursue the vocation or occupation for which the training is intended to qualify him or her; or

(iii) Evidence that the physical or mental demands of the course are obviously incompatible with total disability.

(3) Neither participation in, nor the receipt of remuneration as a result of participation in, a therapeutic or rehabilitation activity under 38 U.S.C. 1718 will be considered evidence of employability.

(4) If a veteran with a total disability rating based on individual unemployability begins a substantially gainful occupation, VA may not reduce the veteran's rating solely on the basis of having secured and followed such substantially gainful occupation unless the veteran maintains the occupation for a period of 12 consecutive months. For purposes of this subparagraph, VA will not consider brief interruptions in employment to be breaks in otherwise continuous employment.

(Authority: 38 U.S.C. 501(a), 1155, 1163(a))

*Cross References:* § 5.170 (Calculation of 5-year, 10-year, and 20-year protection periods); § 5.172 (Protection of continuous 20-year ratings).

**§§ 5.286–5.299 [Reserved]**

4. Sections 5.300, 5.302, 5.303, and 5.304 and their undesignated center heading are added to subpart E and §§ 5.301 and 5.305 through 5.310 are reserved to read as follows:

**Additional Disability Compensation Based on a Dependent Parent**

5.300 Establishing dependency of a parent.
5.301 [Reserved]
5.302 General income rules—parent's dependency.
5.303 Deductions from income—parent's dependency.
5.304 Exclusions from income—parent's dependency.
5.305–5.310 [Reserved]

## Additional Disability Compensation Based on a Dependent Parent

**Note:** Sections 5.300 and 5.302 through 5.304 of this part concern income rules for purposes of calculating benefits for a veteran receiving disability compensation under § 5.240(b). For establishing dependency for purposes of additional dependency and indemnity compensation, *see* subpart D of this part. For income rules relating to pension benefits, *see* subpart F of this part.

**§ 5.300 Establishing dependency of a parent.**

(a) *Conclusive dependency.* (1) VA will find that a veteran's parent is dependent if the parent is not residing in a foreign country and the parent's monthly income, as counted in accordance with §§ 5.302 through 5.304, does not exceed the following amounts:

(i) $400 for a mother or father, or a remarried parent and parent's spouse, not living together, or $660 for a mother and father, or a remarried parent and parent's spouse, living together; and

(ii) $185 for each additional family member, as defined by paragraph (c) of this section.

(2) If a parent meets the requirements of paragraph (a)(1) of this section, VA will not consider net worth.

**Note to paragraph (a):** Sections 5.300 and 5.302 through 5.304 of this part concern income rules for purposes of calculating benefits for a veteran receiving disability compensation under § 5.240(b). For establishing dependency for purposes of additional dependency and indemnity compensation, *see* subpart D of this part. For income rules relating to pension benefits, *see* subpart F of this part.

(b) *Factual dependency.* If a parent does not meet the requirements of paragraph (a)(1) of this section, the veteran must establish dependency of the parent based on the following rules:

(1) *Income requirement.* VA will find dependency if the parent does not have sufficient income to provide reasonable maintenance for the parent, a parent's spouse living together with the parent, and any additional family members, as defined in paragraph (c) of this section.

(i) Reasonable maintenance includes not just basic necessities such as housing, food, clothing, and medical care, but also other items generally necessary to provide those conveniences and comforts of living consistent with the parent's reasonable style of life.

(ii) A finding that the parent's income includes financial contributions from the veteran does not establish that the parent is the veteran's dependent. VA will consider such contributions in connection with all of the other evidence when deciding factual dependency.

(2) *Net worth considered.* (i) VA will not find that dependency of a parent exists when some part of the parent's net worth should reasonably be used for that parent's maintenance. See § 5.414, "Net worth determinations for Improved Pension," for the factors used to determine whether net worth should reasonably be used for maintenance.

(ii) Net worth of a minor family member will be considered income of the parent only if it is actually available to the veteran's parent for the minor's support.

(c) *Definition of family member.* For purposes of this section, the term "family member" means a relative who lives with the parent, other than a spouse, whom the parent is under a moral or legal obligation to support. This includes, but is not limited to, a relative under the legal age in the state where the parent resides, a relative of any age who is dependent on the parent because of physical or mental incapacity, and a relative who is physically absent from the household for a temporary purpose or for reasons beyond the relative's control.

(d) *Duty to report change in dependency status.* If a veteran is receiving additional disability compensation because of a parent's dependency and the parent's income exceeds the applicable amount specified in paragraph (a)(1) of this section, the veteran must report an increase in the parent's income or net worth to VA when the veteran acquires knowledge of the increase. Failure to report such an increase may create an overpayment subject to recovery by VA.

(e) *Remarriage of a parent.* Dependency will not be discontinued solely because a parent has married or remarried after VA has granted additional disability compensation for a dependent parent. Additional disability compensation for a parent's dependency will be continued if evidence is submitted showing that the parent continues to meet the requirement for a finding of conclusive dependency or factual dependency under this section.

(Authority: 38 U.S.C. 102, 1115, 1135)

**§ 5.301 [Reserved]**

**§ 5.302 General income rules—parent's dependency.**

(a) *All payments included in income.* VA will count all payments of any kind from any source in determining the income of a veteran's parent, except as provided in § 5.304, "Exclusions from income—parent's dependency." For the definition of "payments", see § 5.370(h).

(b) *Spousal income combined.* The dependent parent's income includes the income of the parent and the parent's spouse, unless the marriage has been terminated or the parent is separated from his or her spouse. Income is combined whether the parent's spouse is the veteran's other parent or the veteran's stepparent. The income of the parent's spouse will be subject to the same rules that are applicable to determining the income of the veteran's parent.

(c) *Income of family members under 21 years of age.* VA will count income earned by a family member who is under 21 years of age but will consider income from a business or property (including trusts) of such a family member only if that income is actually available to the veteran's parent for the support of that family member. For purposes of this section, "family member" is defined in § 5.300(c).

(d) *Income-producing property.* VA will count income from all property, real or personal, in which a veteran's parent has an interest. *See* § 5.410(f), "Income-producing property," for how VA determines ownership of property.

(e) *Calculation of income from profit on the sale of property.* The following rules apply when determining the amount of income a parent receives from net profit on the sale of business or non-business real or personal property, except for net profit on the sale of a parent's principal residence, which is governed by § 5.304(h).

(1) *Value deducted from sales price.* (i) If the parent purchased the property after VA established the veteran's entitlement to additional disability compensation based on the parent's dependency, VA will deduct the purchase price, including the cost of improvements, from the selling price to determine net profit.

(ii) If the parent purchased the property before VA established the veteran's entitlement to additional disability compensation based on the parent's dependency, VA will deduct the value of the property on the date of entitlement from the selling price to determine net profit.

(2) *Installment sales.* If the parent receives payments from the sale of the property in installments, such payments will not be considered income until the total amount received is equal to the purchase price of the property (including cost of improvements), or, where paragraph (e)(1)(ii) of this section applies, until the total amount received is equal to the value of the property on the date VA established the veteran's entitlement to additional disability compensation based on the parent's dependency. Principal and interest received with each payment will not be counted separately.

(Authority: 38 U.S.C. 102)

**§ 5.303 Deductions from income—parent's dependency.**

(a) *Expenses of a business or profession.* VA will deduct from a parent's income necessary operating expenses of a business, farm, or profession. See § 5.413 for how to calculate these expenses.

(b) *Expenses associated with recoveries for death or disability.* VA will deduct from a parent's income medical, legal, or other expenses incident to injury or death from recoveries for such injury or death. For purposes of this paragraph, the recovery may be from any of the following sources:

(1) Commercial disability, accident, life, or health insurance;

(2) The Office of Workers' Compensation Programs of the U.S. Department of Labor;

(3) The Social Security Administration;

(4) The Railroad Retirement Board;

(5) Any workmen's compensation or employer's liability statute; or

(6) Legal damages collected for personal injury or death.

(c) *Certain salary deductions not deductible.* For the purpose of calculating a parent's income, a salary may not be reduced by the amount of deductions made under a retirement act or plan or for income tax withholding.

(Authority: 38 U.S.C. 102)

**§ 5.304 Exclusions from income—parent's dependency.**

The following is a list of exclusions that VA will not count as income when calculating income for the purpose of establishing a parent's dependency.

(a) *Property rental value.* The rental value of a residence a parent owns and lives in.

(b) *Certain waived retirement benefits.* Retirement benefits from any of the following sources, if the benefits have been waived pursuant to Federal statute:

(1) Civil Service Retirement and Disability Fund;

(2) Railroad Retirement Board;

(3) District of Columbia (paid to firemen, policemen, or public school teachers); or

(4) Former United States Lighthouse Service.

(c) *Death gratuity.* Death gratuity payments by the Secretary concerned under 10 U.S.C. 1475 through 1480. This includes death gratuity payments in lieu of payments under 10 U.S.C. 1478 made to certain survivors of Persian Gulf conflict veterans authorized by sec. 307, Public Law 102–25, 105 Stat. 82.

(d) *Certain VA benefit payments.* The following VA benefit payments:

(1) Payments under 38 U.S.C. chapter 11, "Compensation for Service-Connected Disability or Death";

(2) Payments under 38 U.S.C. chapter 13, "Dependency and Indemnity Compensation for Service-Connected Death";

(3) Nonservice-connected VA disability and death pension payments;

(4) Payments under 38 U.S.C. 5121, "Payment of certain accrued benefits upon death of a beneficiary";

(5) Payments under 38 U.S.C. 2302, "Funeral expenses"; and

(6) The veteran's month-of-death rate paid to a surviving spouse under § 5.695.

(e) *Certain life insurance payments.* Payments under policies of Servicemembers' Group Life Insurance, United States Government Life Insurance, National Service Life Insurance, or Veterans' Group Life Insurance.

(f) *State service bonuses.* Payments of a bonus or similar cash gratuity by any State based upon service in the Armed Forces.

(g) *Fire loss reimbursement.* Proceeds from fire insurance.

(h) *Profit from sale of principal residence.* Net profit from the sale of the parent's principal residence.

(1) *Extent of exclusion.* VA will not count net profit realized from the sale of the parent's principal residence to the extent that it is applied within the calendar year of the sale, or the following calendar year, to the purchase price of another residence as the parent's principal residence.

(2) *Limitation on date of purchase of replacement residence.* This exclusion does not apply if the parent applied the net profit from the sale to the price of a residence purchased earlier than the calendar year preceding the calendar year of sale of the old residence.

(3) *Time limit for reporting application of profit to purchase of replacement residence.* To qualify for this exclusion, the veteran must report the application of the net profit from the sale of the old residence to the purchase of the replacement residence within 1 year after the date it was so applied.

(i) *Payment for civic obligations.* Payments received for discharge of jury duty or other obligatory civic duties.

(j) *Increased inventory value of a business.* The value of an increase of stock inventory of a business.

(k) *Employer contributions.* An employer's contributions to health and hospitalization plans for either an active or retired employee.

(l) Payments listed in § 5.706.

(Authority: 38 U.S.C. 102)

**§ 5.305–5.310 [Reserved]**

5. Sections 5.311 through 5.315 and their undesignated center heading are added to subpart E and §§ 5.316 through 5.319 are reserved to read as follows:

**Disability Compensation Effective Dates**

Sec.

5.311 Effective dates—award of disability compensation.
5.312 Effective dates—increased disability compensation.
5.313 Effective dates—discontinuance of a total disability rating based on individual unemployability.
5.314 Effective dates—discontinuance of additional disability compensation based on parental dependency.
5.315 Effective dates—additional disability compensation based on decrease in the net worth of a dependent parent.
5.316–5.319 [Reserved]

**Disability Compensation Effective Dates**

**§ 5.311 Effective dates—award of disability compensation.**

(a) *Claim received within 1 year after discharge or release from active military service.* If VA grants disability compensation based on a claim VA received within 1 year after the date the veteran was discharged or released from a continuous period of active military service during which the veteran incurred the injury or disease, the effective date of the award is the later of:

(1) The day after such discharge or release from active military service; or

(2) The date entitlement arose.

(b) *Claim received more than 1 year after discharge or release from active military service.* If VA grants disability compensation based on a claim VA received more than 1 year after the date the veteran was discharged or released from a continuous period of active military service during which the veteran incurred the injury or disease, the effective date of the award is the date established by § 5.150(a).

(Authority: 38 U.S.C. 5110(a), (b)(1))

**§ 5.312 Effective dates—increased disability compensation.**

(a) *Applicability.* This section establishes the effective date of an award of increased disability compensation based on:

(1) A higher disability rating under subpart B of the Schedule for Rating Disabilities in part 4 of this chapter.

(2) A higher disability rating under the extra-schedular provision in § 5.280(b).

(3) A higher disability rating under § 4.16 of this chapter, "Total disability ratings for compensation based on unemployability of the individual."

(4) An award or a higher rate of special monthly compensation.

**Note 1 to paragraph (a):** This section does not establish the effective date of an award of secondary service connection under § 5.246 or § 5.247, which is governed by § 5.311.

**Note 2 to paragraph (a):** For effective dates for awards and discontinuances of temporary total disability ratings based upon

hospitalization for treatment or observation of a service-connected disability and for convalescence following treatment for a service-connected disability, see §§ 4.29 and 4.30 of this chapter.

(b) *Effective date of increase*—(1) *Claim received within 1 year after increase.* An award of increased disability compensation will be effective on the date that the evidence warrants a higher disability rating, or an award or higher rate of special monthly compensation, if VA received a claim for increased disability compensation within 1 year after that date.

(2) *Claim received more than 1 year after increase.* An award of increased disability compensation will be effective on the date established by § 5.150(a) if VA received a claim for increased disability compensation more than 1 year after the date that the evidence warrants a higher disability rating, or an award or higher rate of special monthly compensation.

(Authority: 38 U.S.C. 5110(a) and (b)(2))

**§ 5.313 Effective dates—discontinuance of a total disability rating based on individual unemployability.**

(a) *Scope.* This section applies to discontinuance of a veteran's total disability rating based on individual unemployability (TDIU) after employability is regained or based on failure to return an employment questionnaire to VA.

(b) *Discontinuance on regaining employability.* If VA determines that a veteran has regained employability, VA will discontinue the TDIU rating and assign the existing schedular rating. Assignment of the existing schedular rating and the reduction in disability compensation will be effective in accordance with § 5.177(f).

(c) *Failure to return employment questionnaire.* If a veteran fails to return an employment questionnaire to VA within the time specified in VA Form 21–4140, VA will discontinue the TDIU rating and assign the existing schedular rating. Assignment of the existing schedular rating and the reduction in disability compensation will be effective beginning the first day of the month after the month VA last paid TDIU benefits.

(Authority: 38 U.S.C. 5112(a) and (b)(6))

**§ 5.314 Effective dates—discontinuance of additional disability compensation based on parental dependency**.

(a) *Scope.* This section applies to discontinuance of additional disability compensation paid to a veteran for a dependent parent if that parent is no longer dependent.

(b) *Discontinuance based on a change in a parent's economic status.* If VA determines that a veteran's parent is no longer dependent due to an improvement in economic status, the additional disability compensation paid due to parental dependency will be discontinued as follows:

(1) *Increase in income.* If dependency ends based on an increase in income, VA will discontinue paying the additional disability compensation on the first day of the month after the month in which the income increased.

(2) *Increase in net worth.* If dependency ends based on an increase in net worth, VA will discontinue paying the additional disability compensation on the first day of the calendar year after the year in which the net worth increased.

(c) *Discontinuance based on a change in a parent's marital status.* If VA determines that the marriage, remarriage, annulment of a marriage, or divorce of a dependent parent resulted in the end of dependency of that parent, VA will discontinue paying the additional disability compensation effective the first day of the month after the date the change in marital status occurred.

(d) *Discontinuance based on a parent's death.* If a dependent parent dies, VA will discontinue paying the additional disability compensation on the first day of the month after the month of death.

(Authority: 38 U.S.C. 5112(b)(2) and (4))

**§ 5.315 Effective dates—additional disability compensation based on decrease in the net worth of a dependent parent.**

(a) *Scope.* This rule applies under the following circumstances:

(1) VA previously denied a claim or discontinued payments of additional disability compensation based upon parental dependency because of a parent's net worth;

(2) The denial or discontinuation became final; and

(3) Entitlement to additional disability compensation based upon parental dependency was subsequently established, or reestablished, because of a decrease in the parent's net worth.

(b) *Payment of additional compensation.* If a parent's net worth decreases so that additional disability compensation based on parental dependency is warranted, VA will pay additional disability compensation as follows:

(1) For claims filed before the actual decrease in net worth, effective the first day of the month after the month of the decrease; or

(2) For claims filed after the actual decrease in net worth, effective the first day of the month after the receipt of a new claim for additional disability compensation.

(Authority: 38 U.S.C. 501(a), 5110)

**§§ 5.316–5.319 [Reserved]**

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# Part III

# Department of the Interior

## Fish and Wildlife Service

**50 CFR Part 20**

**Migratory Bird Hunting; Migratory Bird Hunting Regulations on Certain Federal Indian Reservations and Ceded Lands for the 2010–11 Early Season; Final Rule**

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 20**

**[Docket No. FWS–R9–MB–2010–0040; 91200–1231–9BPP–L2]**

**RIN 1018–AX06**

## Migratory Bird Hunting; Migratory Bird Hunting Regulations on Certain Federal Indian Reservations and Ceded Lands for the 2010–11 Early Season

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** This rule prescribes special early-season migratory bird hunting regulations for certain Tribes on Federal Indian reservations, off-reservation trust lands, and ceded lands. This rule responds to Tribal requests for U.S. Fish and Wildlife Service (hereinafter Service or we) recognition of Tribal authority to regulate hunting under established guidelines. This rule allows the establishment of season bag limits and, thus, harvest, at levels compatible with populations and habitat conditions.

**DATES:** This rule takes effect on September 1, 2010.

**ADDRESSES:** You may inspect comments received on the proposed special hunting regulations and Tribal proposals during normal business hours in room 4107, Arlington Square Building, 4501 N. Fairfax Drive, Arlington, VA or at *http://www.regulations.gov* at Docket No. FWS–R9–MB–2010–0040.

**FOR FURTHER INFORMATION CONTACT:** Ron W. Kokel, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, (703/358–1967).

**SUPPLEMENTARY INFORMATION:** The Migratory Bird Treaty Act (MBTA) of July 3, 1918 (40 Stat. 755; 16 U.S.C. 703 *et seq.*), authorizes and directs the Secretary of the Department of the Interior, having due regard for the zones of temperature and for the distribution, abundance, economic value, breeding habits, and times and lines of flight of migratory game birds, to determine when, to what extent, and by what means such birds or any part, nest, or egg thereof may be taken, hunted, captured, killed, possessed, sold, purchased, shipped, carried, exported, or transported.

In the August 6, 2010, **Federal Register** (75 FR 47682), we proposed special migratory bird hunting regulations for the 2010–11 hunting season for certain Indian Tribes, under the guidelines described in the June 4, 1985, **Federal Register** (50 FR 23467). The guidelines respond to Tribal requests for Service recognition of their reserved hunting rights, and for some Tribes, recognition of their authority to regulate hunting by both Tribal members and nonmembers on their reservations. The guidelines include possibilities for:

(1) On-reservation hunting by both Tribal members and nonmembers, with hunting by nontribal members on some reservations to take place within Federal frameworks but on dates different from those selected by the surrounding State(s);

(2) On-reservation hunting by Tribal members only, outside of usual Federal frameworks for season dates and length, and for daily bag and possession limits; and

(3) Off-reservation hunting by Tribal members on ceded lands, outside of usual framework dates and season length, with some added flexibility in daily bag and possession limits.

In all cases, the regulations established under the guidelines must be consistent with the March 10–September 1 closed season mandated by the 1916 Migratory Bird Treaty with Canada. We have successfully used the guidelines since the 1985–86 hunting season. We finalized the guidelines beginning with the 1988–89 hunting season (August 18, 1988, **Federal Register** [53 FR 31612]).

In the May 13, 2010, **Federal Register** (75 FR 27144), we requested that Tribes desiring special hunting regulations in the 2010–11 hunting season submit a proposal including details on:

(a) Harvest anticipated under the requested regulations;

(b) Methods that would be employed to measure or monitor harvest (such as bag checks, mail questionnaires, *etc.*);

(c) Steps that would be taken to limit level of harvest, where it could be shown that failure to limit such harvest would adversely impact the migratory bird resource; and

(d) Tribal capabilities to establish and enforce migratory bird hunting regulations.

No action is required if a Tribe wishes to observe the hunting regulations established by the State(s) in which an Indian reservation is located. On August 6, 2010, we published a proposed rule (75 FR 47682) that included special migratory bird hunting regulations for 30 Indian Tribes, based on the input we received in response to the May 13, 2010, proposed rule. All the regulations contained in this final rule were either submitted by the Tribes or approved by the Tribes and follow our proposals in the August 6 proposed rule.

Although the May 13 proposed rule included generalized regulations for both early- and late-season hunting, this rulemaking addresses only the early-season proposals. Therefore, it includes information for only 24 Tribes. The letter designations for the paragraphs pertaining to each Tribe in this rule are discontinuous because they follow the letter designations for the 30 Tribes discussed in the August 6 proposed rule, which set forth paragraphs (a) through (dd). Late-season hunting will be addressed in late September. As a general rule, early seasons begin during September each year and have a primary emphasis on such species as mourning and white-winged doves. Late seasons begin about October 1 or later each year and have a primary emphasis on waterfowl.

### Population Status and Harvest

The following paragraphs provide preliminary information on the status of waterfowl and information on the status and harvest of migratory shore and upland game birds excerpted from various reports. For more detailed information on methodologies and results, you may obtain complete copies of the various reports at the address indicated under **ADDRESSES** or from our Web site at *http://www.fws.gov/migratorybirds/NewsPublicationsReports.html.*

*Waterfowl Breeding and Habitat Survey*

Federal, provincial, and State agencies conduct surveys each spring to estimate the size of breeding populations and to evaluate the conditions of the habitats. These surveys are conducted using fixed-wing aircraft, helicopters, and ground crews and encompass principal breeding areas of North America, covering an area over 2.0 million square miles. The traditional survey area comprises Alaska, Canada, and the northcentral United States, and includes approximately 1.3 million square miles. The eastern survey area includes parts of Ontario, Quebec, Labrador, Newfoundland, Nova Scotia, Prince Edward Island, New Brunswick, New York, and Maine, an area of approximately 0.7 million square miles.

Overall, habitat conditions during the 2010 Waterfowl Breeding Population and Habitat Survey were characterized by average to below-average moisture and a mild winter and early spring across the entire traditional (including the northern locations) and eastern survey areas. The total pond estimate (Prairie Canada and U.S. combined) was

6.7 ± 0.2 million. This was similar to the 2009 estimate and 34 percent above the long-term average of 5.0 ± 0.03 million ponds.

Traditional Survey Area (U.S. and Canadian Prairies and Parklands)

Conditions across the Canadian prairies were similar to 2009. Portions of southern Alberta, Saskatchewan, and Manitoba improved, but a large area along the Alberta and Saskatchewan border remained dry, and moisture levels in portions of Manitoba declined from last year. The 2010 estimate of ponds in Prairie Canada was 3.7 ± 0.2 million. This was similar to last year's estimate (3.6 ± 0.1 million) and to the 1955–2009 average (3.4 ± 0.03 million). Residual water remains in the Parklands and these were classified as fair to good. Most of the Prairie-Parkland region of Canada received abundant to historically high levels of precipitation during and after the survey, which, while possibly flooding some nests, will produce excellent brood-rearing habitat for successful nesters and lessen the impact of the normal summer drawdown, leading to beneficial wetland conditions next spring.

Wetland numbers and conditions remained fair to good in the eastern U.S. prairies, but habitat conditions declined through the western Dakotas and Montana. The 2010 pond estimate for the north-central United States was 2.9 ± 0.1 million, essentially unchanged from last year's estimate (2.9 ± 0.1 million) and 87 percent above the long-term average (1.6 ± 0.02 million). Fall and winter precipitation in the eastern Dakotas generally improved good habitat conditions already present. However, wetlands in the western Dakotas and Montana were not recharged, resulting in a deterioration of conditions from 2009 at the time the survey was conducted.

Bush (Alaska, Northern Manitoba, Northern Saskatchewan, Northwest Territories, Yukon Territory, Western Ontario)

In the bush regions of the traditional survey area, spring breakup was early. Unlike in 2009, the majority of habitats were ice-free for arriving waterfowl. Habitat of most of the bush region, with the exception of Alaska and the Northwest Territories where conditions were normal, was classified as fair due to below-average moisture, but the early spring should benefit waterfowl across the entire area.

Eastern Survey Area

The boreal forest and Canadian Maritimes of the eastern survey area experienced an early spring as well. Much of southern Quebec and Ontario were classified as poor to fair due to dry conditions, with the exception of an area of adequate moisture in west-central Ontario. More northern boreal forest locations benefited from near-normal precipitation and early ice-free conditions. Although winter precipitation from southwestern Ontario along the St. Lawrence River Valley and into Maine was below average, waterfowl habitat was classified as good to excellent, as in 2009. The James and Hudson Bay Lowlands of Ontario (strata 57–59) were not surveyed in 2010, but reports indicated an early spring in these locations as well.

Breeding Population Status

In the traditional survey area, which includes strata 1–18, 20–50, and 75–77, the total duck population estimate was 40.9 ± 0.7 [SE] million birds. This estimate was similar to last year's estimate of 42.0 ± 0.7 million birds and was 21 percent above the long-term average (1955–2009). Estimated mallard (*Anas platyrhynchos*) abundance was 8.4 ± 0.3 million birds, which was similar to the 2009 estimate of 8.5 ± 0.2 million birds and 12 percent above the long-term average. Estimated abundance of gadwall (*A. strepera;* 3.0 ± 0.2 million) was similar to the 2009 estimate and 67 percent above the long-term average. Estimated abundance of American wigeon (*A. americana;* 2.4 ± 0.1 million) was similar to 2009 and the long-term average. The estimated abundance of green-winged teal (*A. crecca*) was 3.5 ± 0.2 million, which was similar to the 2009 estimate and 78 percent above their long-term average of 1.9 ± 0.02 million. The estimate of blue-winged teal abundance (*A. discors*) was 6.3 ± 0.4 million, which was 14 percent below the 2009 estimate and 36 percent above their long-term average of 4.7 ± 0.04 million. The estimate for northern pintails (*A. acuta;* 3.5 ± 0.2 million) was similar to the 2009 estimate, and 13 percent below the long-term average of 4.0 ± 0.04 million. Estimates of northern shovelers (*A. clypeata;* 4.1 ± 0.2 million) and redheads (*Aythya americana;* 1.1 ± 0.1 million) were similar to their 2009 estimates and were 76 percent and 63 percent above their long-term averages of 2.3 ± 0.02 million and 0.7 ± 0.01 million, respectively. The canvasback estimate (*A. valisineria;* 0.6 ± 0.05 million) was similar to the 2009 estimate and to the long-term average. The scaup estimate (*A. affinis* and *A. marila* combined; 4.2 ± 0.2 million) was similar to that of 2009 and 16 percent below the long-term average of 5.1 ± 0.05 million.

The eastern survey area was restratified in 2005 and is now composed of strata 51–72. Estimates of mallards, scaup, scoters (black [*Melanitta nigra*], white-winged [*M. fusca*], and surf [*M. perspicillata*]), green-winged teal, American wigeon, bufflehead (*Bucephala albeola*), ring-necked duck (*Aythya collaris*), and goldeneyes (common [*B. clangula*] and Barrow's [*B. islandica*]) all were similar to their 2009 estimates and long-term averages. The mergansers (red-breasted [*Mergus serrator*], common [*M. merganser*], and hooded [*Lophodytes cucullatus*]) estimate was 386.4 thousand, which was 15 percent below the 2009 estimate, and 14 percent below the long-term average of 450.8 thousand. The American black duck (*Anas rubripes*) estimate was similar to the 2009 estimate and 7 percent below the long-term average of 478.9 thousand.

Fall Flight Estimate

The mid-continent mallard population is composed of mallards from the traditional survey area (revised in 2008 to exclude Alaska mallards), Michigan, Minnesota, and Wisconsin, and was estimated to be 10.3 ± 0.9 million in 2010. This was similar to the 2009 estimate of 10.3 ± 0.9 million.

*Status of Geese and Swans*

We provide information on the population status and productivity of North American Canada geese (*Branta canadensis*), brant (*B. bernicla*), snow geese (*Chen caerulescens*), Ross' geese (*C. rossii*), emperor geese (*C. canagica*), white-fronted geese (*Anser albifrons*), and tundra swans (*Cygnus columbianus*). Temperatures in much of central and northern Canada from January through April were in excess of 5 °C warmer than average. Substantially above-average temperatures continued into May and June in important goose habitats within eastern Canada. The resulting accelerated snowmelt contributed to favorable nesting conditions for many mid-latitude and arctic nesting goose populations in 2010. Persistent snow cover significantly delayed goose nesting activities only in the Queen Maud Gulf, Victoria Island, and Wrangel Island regions. Well-above or near-average wetland abundance in the U.S. and Canadian prairie regions and mild spring temperatures in many other temperate regions will likely improve production of Canada geese that nest at southern latitudes. Primary abundance indices for both populations of tundra swans decreased in 2010 from 2009 levels. Primary abundance indices decreased for 15 goose populations and

increased for 12 goose populations in 2010 compared to 2009. The following populations displayed significant positive trends during the most recent 10-year period (P < 0:05): Mississippi Flyway Giant, Short Grass Prairie, Aleutian, and Eastern Prairie Canada geese; Western Arctic/Wrangel Island, and Western Central Flyway light geese; and Pacific white-fronted geese. No population showed a significant negative 10-year trend. The forecast for the production of geese and swans in North America for 2010 is regionally variable, but production for many populations will be much improved this year compared to the poor production widely experienced in 2009.

*Waterfowl Harvest and Hunter Activity*

National surveys of migratory bird hunters were conducted during the 2008 and 2009 hunting seasons. About 1.2 million waterfowl hunters harvested 13,635,700 (±4 percent) ducks and 3,792,600 (±5 percent) geese in 2008, and about 1.1 million waterfowl hunters harvested 13,139,800 (±4 percent) ducks and 3,327,000 (±5 percent) geese in 2009. Mallard, green-winged teal, gadwall, blue-winged/cinnamon teal, and wood duck (*Aix sponsa*) were the 5 most-harvested duck species in the United States, and Canada goose was the predominant goose species in the goose harvest. Coot hunters (about 31,100 in 2008 and 2009) harvested 275,900 (±43 percent) coots in 2008 and 219,000 (±34 percent) in 2009.

**Comments and Issues Concerning Tribal Proposals**

For the 2010–11 migratory bird hunting season, we proposed regulations for 30 Tribes and/or Indian groups that followed the 1985 guidelines and were considered appropriate for final rulemaking. Some of the Tribal proposals had both early- and late-season elements. However, as noted earlier, only those with early-season proposals are included in this final rulemaking; 24 Tribes have proposals with early seasons. The comment period for the proposed rule, published on August 6, 2010, closed on August 16, 2010. Because of the necessary brief comment period, we will respond to any comments on the proposed rule and/or these regulations postmarked by August 16, but not received prior to final action by us, in the September late-season final rule. At this time, we have not received any comments.

**NEPA Consideration**

NEPA considerations are covered by the programmatic document "Final Supplemental Environmental Impact Statement: Issuance of Annual Regulations Permitting the Sport Hunting of Migratory Birds (FSES 88–14)," filed with the Environmental Protection Agency on June 9, 1988. We published a notice of availability in the **Federal Register** on June 16, 1988 (53 FR 22582). We published our Record of Decision on August 18, 1988 (53 FR 31341). In addition, an August 1985 environmental assessment entitled "Guidelines for Migratory Bird Hunting Regulations on Federal Indian Reservations and Ceded Lands" is available from the address indicated under the caption **ADDRESSES**.

In a notice published in the September 8, 2005, **Federal Register** (70 FR 53376), we announced our intent to develop a new Supplemental Environmental Impact Statement (SEIS) for the migratory bird hunting program. Public scoping meetings were held in the spring of 2006, as detailed in a March 9, 2006, **Federal Register** (71 FR 12216). We released the draft SEIS on July 9, 2010 (75 FR 39577). The draft SEIS is available by either writing to the address indicated under **ADDRESSES** or by viewing on our Web site at *http://www.fws.gov/migratorybirds.*

**Endangered Species Act Consideration**

Section 7 of the Endangered Species Act, as amended (16 U.S.C. 1531–1543; 87 Stat. 884), provides that, "The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act" (and) shall "insure that any action authorized, funded, or carried out * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat. * * *." Consequently, we conducted formal consultations to ensure that actions resulting from these regulations would not likely jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of their critical habitat. Findings from these consultations are included in a biological opinion, which concluded that the regulations are not likely to jeopardize the continued existence of any endangered or threatened species. Additionally, these findings may have caused modification of some regulatory measures previously proposed, and the final frameworks reflect any such modifications. Our biological opinions resulting from this section 7 consultation are public documents available for public inspection at the address indicated under **ADDRESSES**.

**Executive Order 12866**

The Office of Management and Budget has determined that this rule is significant and has reviewed this rule under Executive Order 12866. OMB bases its determination of regulatory significance upon the following four criteria:

(a) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

An economic analysis was prepared for the 2008–09 season. This analysis was based on data from the 2006 National Hunting and Fishing Survey, the most recent year for which data are available (*see* discussion in Regulatory Flexibility Act section below). This analysis estimated consumer surplus for three alternatives for duck hunting (estimates for other species are not quantified due to lack of data). The alternatives are (1) Issue restrictive regulations allowing fewer days than those issued during the 2007–08 season, (2) Issue moderate regulations allowing more days than those in alternative 1, and (3) Issue liberal regulations identical to the regulations in the 2007–08 season. For the 2008–09 season, we chose alternative 3, with an estimated consumer surplus across all flyways of $205–$270 million. At this time, we are proposing no changes to the season frameworks for the 2010–11 season, and as such, we will again consider these three alternatives. However, final frameworks will depend on population status information available later this year. For these reasons, we have not conducted a new economic analysis, but the 2008–09 analysis is part of the record for this rule and is available at *http://www.fws.gov/migratorybirds/NewReportsPublications/SpecialTopics/SpecialTopics.html#HuntingRegs* or at *http://www.regulations.gov* at Docket No. FWS–R9–MB–2010–0040.

**Regulatory Flexibility Act**

The regulations have a significant economic impact on substantial numbers of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). We analyzed the economic impacts of the annual hunting

regulations on small business entities in detail as part of the 1981 cost-benefit analysis. This analysis was revised annually from 1990–95. In 1995, the Service issued a Small Entity Flexibility Analysis (Analysis), which was subsequently updated in 1996, 1998, 2004, and 2008. The primary source of information about hunter expenditures for migratory game bird hunting is the National Hunting and Fishing Survey, which is conducted at 5-year intervals. The 2008 Analysis was based on the 2006 National Hunting and Fishing Survey and the U.S. Department of Commerce's County Business Patterns, from which it was estimated that migratory bird hunters would spend approximately $1.2 billion at small businesses in 2008. Copies of the Analysis are available upon request from the Division of Migratory Bird Management (*see* **FOR FURTHER INFORMATION CONTACT**) or from our Web site at *http://www.fws.gov/migratorybirds/NewReportsPublications/SpecialTopics/SpecialTopics.html#HuntingRegs* or at *http://www.regulations.gov* at Docket No. FWS–R9–MB–2010–0040.

**Small Business Regulatory Enforcement Fairness Act**

This rule is a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. For the reasons outlined above, this rule has an annual effect on the economy of $100 million or more. However, because this rule establishes hunting seasons, we do not plan to defer the effective date under the exemption contained in 5 U.S.C. 808(1).

**Paperwork Reduction Act**

We examined these regulations under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The various recordkeeping and reporting requirements imposed under regulations established in 50 CFR part 20, subpart K, are utilized in the formulation of migratory game bird hunting regulations. Specifically, OMB has approved the information collection requirements of our Migratory Bird Surveys and assigned control number 1018–0023 (expires 2/28/2011). This information is used to provide a sampling frame for voluntary national surveys to improve our harvest estimates for all migratory game birds in order to better manage these populations.

OMB has also approved the information collection requirements of the Alaska Subsistence Household Survey, an associated voluntary annual household survey used to determine levels of subsistence take in Alaska, and assigned control number 1018–0124 (expires 4/30/2013).

A Federal 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.

**Unfunded Mandates Reform Act**

We have determined and certify, in compliance with the requirements of the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.,* that this rulemaking will not impose a cost of $100 million or more in any given year on local or State government or private entities. Therefore, this rule is not a "significant regulatory action" under the Unfunded Mandates Reform Act.

**Civil Justice Reform—Executive Order 12988**

The Department, in promulgating this rule, has determined that this rule will not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of Executive Order 12988.

**Takings Implication Assessment**

In accordance with Executive Order 12630, this rule, authorized by the Migratory Bird Treaty Act, does not have significant takings implications and does not affect any constitutionally protected property rights. This rule will not result in the physical occupancy of property, the physical invasion of property, or the regulatory taking of any property. In fact, these rules allow hunters to exercise otherwise unavailable privileges and, therefore, reduce restrictions on the use of private and public property.

**Energy Effects—Executive Order 13211**

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. While this rule is a significant regulatory action under Executive Order 12866, it is not expected to adversely affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

**Government-to-Government Relationship With Tribes**

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations With Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and 512 DM 2, we have evaluated possible effects on Federally recognized Indian Tribes and have determined that there are no effects on Indian trust resources. However, in the May 13 **Federal Register**, we solicited proposals for special migratory bird hunting regulations for certain Tribes on Federal Indian reservations, off-reservation trust lands, and ceded lands for the 2010–11 migratory bird hunting season. The resulting proposals were contained in a separate proposed rule (75 FR 47681, August 6, 2010). By virtue of these actions, we have consulted with Tribes affected by this rule.

**Federalism Effects**

Due to the migratory nature of certain species of birds, the Federal Government has been given responsibility over these species by the Migratory Bird Treaty Act. We annually prescribe frameworks from which the States make selections regarding the hunting of migratory birds, and we employ guidelines to establish special regulations on Federal Indian reservations and ceded lands. This process preserves the ability of the States and Tribes to determine which seasons meet their individual needs. Any State or Indian Tribe may be more restrictive than the Federal frameworks at any time. The frameworks are developed in a cooperative process with the States and the Flyway Councils. This process allows States to participate in the development of frameworks from which they will make selections, thereby having an influence on their own regulations. These rules do not have a substantial direct effect on fiscal capacity, change the roles or responsibilities of Federal or State governments, or intrude on State policy or administration. Therefore, in accordance with Executive Order 13132, these regulations do not have significant federalism effects and do not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

**Regulations Promulgation**

The rulemaking process for migratory game bird hunting must, by its nature, operate under severe time constraints. However, we intend that the public be given the greatest possible opportunity to comment. Thus, when the preliminary proposed rulemaking was published, we established what we believed were the longest periods possible for public comment. In doing this, we recognized that when the comment period closed, time would be of the essence. That is, if there were a delay in the effective date of these regulations after this final rulemaking, States and Tribes would have insufficient time to select season dates and limits; to communicate those

selections to us; and to establish and publicize the necessary regulations and procedures to implement their decisions. We, therefore, find that "good cause" exists, within the terms of 5 U.S.C. 553(d)(3) of the Administrative Procedure Act, and these seasons will, therefore, take effect immediately upon publication.

**List of Subjects in 50 CFR Part 20**

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

■ Accordingly, part 20, subchapter B, chapter I of title 50 of the Code of Federal Regulations is amended as follows:

## PART 20—[AMENDED]

■ 1. The authority citation for part 20 continues to read as follows:

**Authority:** Migratory Bird Treaty Act, 40 Stat. 755, 16 U.S.C. 703–712; Fish and Wildlife Act of 1956, 16 U.S.C. 742a–j; Pub. L. 106–108, 113 Stat. 1491, Note Following 16 U.S.C. 703.

**Note:** The following hunting regulations provided for by 50 CFR 20.110 will not appear in the Code of Federal Regulations because of their seasonal nature.

■ 2. Section 20.110 is amended by revising paragraphs (a) through (e), (g), (i) through (u), (w), and (y) through (bb), and adding paragraph (cc), to read as set forth below (Current § 20.110 was published at 74 FR 51707, September 2, 2009, and amended at 74 FR 49294, September 25, 2009).

**§ 20.110 Seasons, limits, and other regulations for certain Federal Indian reservations, Indian Territory, and ceded lands.**

(a) Colorado River Indian Tribes, Parker, Arizona (Tribal Members and Nontribal Hunters).

**Doves**

*Season Dates:* Open September 1, through September 15, 2010; then open November 12, through December 26, 2010.

*Daily Bag and Possession Limits:* For the early season, daily bag limit is 10 mourning or white-winged doves, singly, or in the aggregate. For the late season, the daily bag limit is 10 mourning doves. Possession limits are twice the daily bag limits after the first day of the season.

*General Conditions:* All persons 14 years and older must be in possession of a valid Colorado River Indian Reservation hunting permit before taking any wildlife on Tribal lands. Any person transporting game birds off the Colorado River Indian Reservation must have a valid transport declaration form. Other Tribal regulations apply, and may be obtained at the Fish and Game Office in Parker, Arizona.

(b) Confederated Salish and Kootenai Tribes, Flathead Indian Reservation, Pablo, Montana (Tribal Hunters).

**Tribal Members Only**

*Ducks (Including Mergansers)*

*Season Dates:* Open September 1, 2010, through March 9, 2011.

*Daily Bag and Possession Limits:* The Tribe does not have specific bag and possession restrictions for Tribal members. The season on harlequin duck is closed.

*Coots*

*Season Dates:* Same as ducks.

*Daily Bag and Possession Limits:* Same as ducks.

*Geese*

*Season Dates:* Same as ducks.

*Daily Bag and Possession Limits:* Same as ducks.

*General Conditions:* Tribal and nontribal hunters must comply with all basic Federal migratory bird hunting regulations contained in 50 CFR part 20 regarding manner of taking. In addition, shooting hours are sunrise to sunset, and each waterfowl hunter 16 years of age or older must carry on his/her person a valid Migratory Bird Hunting and Conservation Stamp (Duck Stamp) signed in ink across the stamp face. Special regulations established by the Confederated Salish and Kootenai Tribes also apply on the reservation.

(c) Fond du Lac Band of Lake Superior Chippewa Indians, Cloquet, Minnesota (Tribal Members Only).

**Ducks**

*1854 and 1837 Ceded Territories*

*Season Dates:* Begin September 18 and end November 28, 2010.

*Daily Bag Limit:* 18 ducks, including no more than 12 mallards (only 3 of which may be hens), 3 black ducks, 6 scaup, 6 wood ducks, 6 redheads, 3 pintails, and 3 canvasbacks.

Reservation

*Season Dates:* Begin September 4 and end November 28, 2010.

*Daily Bag Limit:* 12 ducks, including no more than 8 mallards (only 2 of which may be hens), 2 black ducks, 4 scaup, 4 redheads, 2 pintails, 4 wood ducks, and 2 canvasbacks.

*Mergansers*

1854 and 1837 Ceded Territories

*Season Dates:* Begin September 18 and end November 28, 2010.

*Daily Bag Limit:* 15 mergansers, including no more than 6 hooded mergansers.

Reservation

*Season Dates:* Begin September 4 and end November 28, 2010.

*Daily Bag Limit:* 10 mergansers, including no more than 4 hooded mergansers.

*Canada Geese: All Areas*

*Season Dates:* Begin September 1 and end November 28, 2010.

*Daily Bag Limit:* 20 geese.

*Coots and Common Moorhens (Common Gallinules)*

1854 and 1837 Ceded Territories

*Season Dates:* Begin September 18 and end November 28, 2010.

*Daily Bag Limit:* 20 coots and common moorhens, singly or in the aggregate.

Reservation

*Season Dates:* Begin September 4 and end November 28, 2010.

*Daily Bag Limit:* 20 coots and common moorhens, singly or in the aggregate.

*Sora and Virginia Rails: All Areas*

*Season Dates:* Begin September 1 and end November 28, 2010.

*Daily Bag Limit:* 25 sora and Virginia rails, singly or in the aggregate.

*Common Snipe: All Areas*

*Season Dates:* Begin September 1 and end November 28, 2010.

*Daily Bag Limit:* Eight common snipe.

*Woodcock: All Areas*

*Season Dates:* Begin September 1 and end November 28, 2010.

*Daily Bag Limit:* Three woodcock.

*Mourning Dove: All Areas*

*Season Dates:* Begin September 1 and end October 30, 2010.

*Daily Bag Limit:* 30 mourning dove.

*General Conditions:*

1. While hunting waterfowl, a Tribal member must carry on his/her person a valid Tribal waterfowl hunting permit.

2. Except as otherwise noted, Tribal members will be required to comply with Tribal codes that will be no less restrictive than the provisions of Chapter 10 of the Model Off-Reservation Code. These regulations parallel Federal requirements in 50 CFR part 20 as to hunting methods, transportation, sale, exportation, and other conditions generally applicable to migratory bird hunting.

3. Band members in each zone will comply with State regulations providing

for closed and restricted waterfowl hunting areas.

4. There are no possession limits on any species, unless otherwise noted above. For purposes of enforcing bag and possession limits, all migratory birds in the possession or custody of band members on ceded lands will be considered to have been taken on those lands unless tagged by a Tribal or State conservation warden as having been taken on-reservation. All migratory birds that fall on reservation lands will not count as part of any off-reservation bag or possession limit.

(d) Grand Traverse Band of Ottawa and Chippewa Indians, Suttons Bay, Michigan (Tribal Members Only).

**All Seasons in Michigan, 1836 Treaty Zone**

*Ducks*

*Season Dates:* Open September 18, 2010, through January 18, 2011.

*Daily Bag Limit:* 20 ducks, which may include no more than 5 pintail, 3 canvasback, 5 black ducks, 1 hooded merganser, 5 wood ducks, 3 redheads, and 9 mallards (only 4 of which may be hens).

*Canada and Snow Geese*

*Season Dates:* Open September 1, through November 30, 2010; and open January 1, 2010, through February 8, 2011.

*Daily Bag Limit:* 10 geese.

*Other Geese (White-Fronted Geese and Brant)*

*Season Dates:* Open September 20, through November 30, 2010.

*Daily Bag Limit:* Five geese.

*Sora Rails, Common Snipe, and Woodcock*

*Season Dates:* Open September 1, through November 14, 2010.

*Daily Bag Limit:* 10 rails, 10 snipe, and 5 woodcock.

*Mourning Doves*

*Season Dates:* Open September 1, through November 14, 2010.

*Daily Bag Limit:* 10 mourning doves.

*General Conditions:* A valid Grand Traverse Band Tribal license is required and must be in possession before taking any wildlife. All other basic regulations contained in 50 CFR part 20 are valid. Other Tribal regulations apply, and may be obtained at the Tribal office in Suttons Bay, Michigan.

(e) Great Lakes Indian Fish and Wildlife Commission, Odanah, Wisconsin (Tribal Members Only).

The 2010–11 waterfowl hunting season regulations apply to all treaty areas (accept where noted):

**Ducks**

*Season Dates:* Begin September 15 and end December 31, 2010.

*Daily Bag Limit:* 30 ducks, including no more than 5 black ducks, 5 pintails, and 5 canvasbacks.

*Mergansers*

*Season Dates:* Begin September 15 and end December 31, 2010.

*Daily Bag Limit:* 10 mergansers.

*Geese*

*Season Dates:* Begin September 1 and end December 31, 2010. In addition, any portion of the ceded territory that is open to State-licensed hunters for goose hunting after December 1 will also be open concurrently for Tribal members.

*Daily Bag Limit:* 20 geese in aggregate.

*Other Migratory Birds*

*Coots and Common Moorhens (Common Gallinules)*

*Season Dates:* Begin September 15 and end December 31, 2010.

*Daily Bag Limit:* 20 coots and common moorhens (common gallinules), singly or in the aggregate.

*Sora and Virginia Rails*

*Season Dates:* Begin September 15 and end December 31, 2010.

*Daily Bag Limits:* 20 Sora and Virginia rails, singly or in the aggregate.

*Possession Limit:* 25.

*Common Snipe*

*Season Dates:* Begin September 15 and end December 31, 2010.

*Daily Bag Limit:* 16 common snipe.

*Woodcock*

*Season Dates:* Begin September 7 and end December 1, 2010.

*Daily Bag Limit:* 10 woodcock.

*Mourning Dove: 1837 and 1842 Ceded Territories*

*Season Dates:* Begin September 1 and end November 9, 2010.

*Daily Bag Limit:* 15.

*General Conditions*

1. All Tribal members will be required to obtain a valid Tribal waterfowl hunting permit.

2. Except as otherwise noted, Tribal members will be required to comply with Tribal codes that will be no less restrictive than the model ceded territory conservation codes approved by Federal courts in the *Lac Courte Oreilles* v. *State of Wisconsin (Voigt)* and *Mille Lacs Band* v. *State of Minnesota,* and *United States* v. *Michigan* cases. Chapter 10 in each of these model codes regulates ceded territory migratory bird hunting. All versions of Chapter 10 parallel Federal requirements as to hunting methods, transportation, sale, exportation, and other conditions generally applicable to migratory bird hunting. They also automatically incorporate by reference the Federal migratory bird regulations contained in 50 CFR part 20.

3. Particular regulations of note include:

i. Nontoxic shot is required for all off-reservation waterfowl hunting by Tribal members.

ii. Tribal members in each zone shall comply with Tribal regulations providing for closed and restricted waterfowl hunting areas. These regulations generally incorporate the same restrictions contained in parallel State regulations.

iii. Possession limits for each species are double the daily bag limit, except on the opening day of the season, when the possession limit equals the daily bag limit, unless otherwise noted above. Possession limits are applicable only to transportation and do not include birds that are cleaned, dressed, and at a member's primary residence. For purposes of enforcing bag and possession limits, all migratory birds in the possession and custody of Tribal members on ceded lands will be considered to have been taken on those lands unless tagged by a Tribal or State conservation warden as taken on reservation lands. All migratory birds that fall on reservation lands will not count as part of any off-reservation bag or possession limit.

iv. The baiting restrictions included in section 10.05(2)(h) of the model ceded territory conservation code will be amended to include language which parallels that in place for non-Tribal members as published at 64 FR 29799, June 3, 1999.

v. The shell limit restrictions included in section 10.05(2)(b) of the model ceded territory conservation code will be removed.

vi. Hunting hours shall be from a half hour before sunrise to 15 minutes after sunset.

4. *Michigan—Duck Blinds and Decoys.* Tribal members hunting in Michigan will comply with Tribal codes that contain provisions parallel to Michigan law regarding duck blinds and decoys.

(g) Kalispel Tribe, Kalispel Reservation, Usk, Washington (Tribal Members and Nontribal Hunters).

**Nontribal Hunters on Reservation**

*Geese*

*Season Dates:* Open September 1, through September 13, 2010, for the

early-season, and open October 2, 2010, through January 31, 2011, for the late-season. During this period, days to be hunted are specified by the Kalispel Tribe. Nontribal hunters should contact the Tribe for more detail on hunting days.

*Daily Bag and Possession Limits:* 5 Canada geese for the early season, and 3 light geese and 4 dark geese, for the late season. The daily bag limit is 2 brant (when the State's season is open) and is in addition to dark goose limits for the late-season. The possession limit is twice the daily bag limit.

*Tribal Hunters Within Kalispel Ceded Lands*

*Ducks*

*Season Dates:* Open September 1, 2010, through January 31, 2011.

*Daily Bag and Possession Limits:* 7 ducks, including no more than 2 female mallards, 2 pintail, 1 canvasback, 3 scaup, and 2 redheads. The possession limit is twice the daily bag limit.

*Geese*

*Season Dates:* Open September 1, 2010, through January 31, 2011.

*Daily Bag Limit:* 6 light geese and 4 dark geese. The daily bag limit is 2 brant and is in addition to dark goose limits.

*General:* Tribal members must possess a validated Migratory Bird Hunting and Conservation Stamp and a Tribal ceded lands permit.

(i) Leech Lake Band of Ojibwe, Cass Lake, Minnesota (Tribal Members Only).

*Ducks*

*Season Dates:* Open September 18, through December 31, 2010.

*Daily Bag Limits:* 10 ducks.

*Geese*

*Season Dates:* Open September 1, through December 31, 2010.

*Daily Bag Limits:* 10 geese.

*General:* Possession limits are twice the daily bag limits. Shooting hours are one-half hour before sunrise to one-half hour after sunset. Nontoxic shot is required. Use of live decoys, bait, and commercial use of migratory birds are prohibited. Waterfowl may not be pursued or taken while using motorized craft.

(j) Little River Band of Ottawa Indians, Manistee, Michigan (Tribal Members Only).

*Ducks*

*Season Dates:* Open September 15, 2010, through January 20, 2011.

*Daily Bag and Possession Limits:* 12 ducks, including no more than 2 pintail, 2 canvasback, 1 hooded merganser, 3 black ducks, 3 wood ducks, 3 redheads, and 6 mallards (only 3 of which may be hens). The possession limit is twice the daily bag limit.

*Canada Geese*

*Season Dates:* Open September 1, 2010, through February 8, 2011.

*Daily Bag and Possession Limits:* Five Canada geese and possession limit is twice the daily bag limit.

*White-Fronted Geese, Snow Geese, Ross Geese, and Brant*

*Season Dates:* Open September 20, through November 30, 2010.

*Daily Bag and Possession Limits:* Five birds and the possession limit is twice the daily bag limit.

*Mourning Doves, Rails, Snipe, and Woodcock*

*Season Dates:* Open September 1, through November 14, 2010.

*Daily Bag and Possession Limits:* 10 doves, 10 rails, 10 snipe, and 5 woodcock. The possession limit is twice the daily bag limit.

*General*

1. All Tribal members are required to obtain a valid Tribal resource card and 2010–11 hunting license.

2. Except as modified by the Service rules adopted in response to this proposal, these amended regulations parallel all Federal regulations contained in 50 CFR part 20.

3. Particular regulations of note include:

i. Nontoxic shot will be required for all waterfowl hunting by Tribal members.

ii. Tribal members in each zone will comply with Tribal regulations providing for closed and restricted waterfowl hunting areas. These regulations generally incorporate the same restrictions contained in parallel State regulations.

iii. Possession limits for each species are double the daily bag limit, except on the opening day of the season, when the possession limit equals the daily bag limit, unless otherwise noted above.

4. Tribal members hunting in Michigan will comply with Tribal codes that contain provisions parallel to Michigan law regarding duck blinds and decoys.

(k) The Little Traverse Bay Bands of Odawa Indians, Petoskey, Michigan (Tribal Members Only).

**Ducks**

*Season Dates:* Open September 15, 2010, through January 31, 2011.

*Daily Bag Limits:* 20 ducks, including no more than 5 hen mallards, 5 black ducks, 5 redheads, 5 wood ducks, 5 pintail, 5 hooded merganser, 5 scaup, and 5 canvasback.

*Coots and Gallinules*

*Season Dates:* Open September 1, through December 31, 2010.

*Daily Bag Limit:* 20.

*Canada Geese*

*Season Dates:* Open September 1, 2010, through February 8, 2011.

*Daily Bag Limit:* 20.

*White-Fronted Geese, Snow Geese, and Brant*

*Season Dates:* Open September 1, 2010, through February 8, 2011.

*Daily Bag Limit:* 20 geese in aggregate.

*Sora and Virginia Rails*

*Season Dates:* Open September 1, through December 31, 2010.

*Daily Bag Limit:* 20.

*Snipe*

*Season Dates:* Open September 15, through December 31, 2010.

*Daily Bag Limit:* 16.

*Mourning Doves*

*Season Dates:* Open September 1, through November 9, 2010.

*Daily Bag Limit:* 15.

*Woodcock*

*Season Dates:* Open September 5, through December 1, 2010.

*Daily Bag Limit:* 10.

*General:* Possession limits are twice the daily bag limits.

(l) Lower Brule Sioux Tribe, Lower Brule Reservation, Lower Brule, South Dakota (Tribal Members and Nontribal Hunters).

**Tribal Members**

*Ducks, Mergansers and Coots*

*Season Dates:* Open September 11, 2010, through March 10, 2011.

*Daily Bag and Possession Limits:* Six ducks, including no more than one hen mallard, two scaup, one mottled duck, two redheads, two wood ducks, one canvasback, and one pintail. Coot daily bag limit is 15. Merganser daily bag limit is five, including no more than two hooded merganser. The possession limit is twice the daily bag limit.

(m) Lower Elwha Klallam Tribe, Port Angeles, Washington (Tribal Members Only).

*Ducks*

*Season Dates:* Open September 18, through December 31, 2010.

*Daily Bag and Possession Limits:* Seven ducks, including no more than two hen mallards, one pintail, one canvasback, and two redheads.

Possession limit is twice the daily bag limit. Bag and possession limits for harlequin ducks is one per season.

*Geese*

*Season Dates:* Open September 18, through December 31, 2010.

*Daily Bag and Possession Limits:* Four geese, and may include no more than three light geese. The seasons on Aleutian Canada geese and Brant are closed. Possession limit is twice the daily bag limit.

*Coots*

*Season Dates:* Open September 18, through December 31, 2010.

*Daily Bag and Possession Limits:* 25 and 50 coots, respectively.

*Mourning Doves*

*Season Dates:* Open September 18, through December 31, 2010.

*Daily Bag and Possession Limits:* 10 and 20 doves, respectively.

*Snipe*

*Season Dates:* Open September 18, through December 31, 2010.

*Daily Bag and Possession Limits:* 8 and 16 snipe, respectively.

*Band-Tailed Pigeon*

*Season Dates:* Open September 18, through December 31, 2010.

*Daily Bag and Possession Limits:* 2 and 4 pigeons, respectively.

*General:* Tribal members must possess a Tribal hunting permit from the Lower Elwha Klallam Tribe pursuant to Tribal law. Hunters must observe all basic Federal migratory bird hunting regulations in 50 CFR part 20.

(n) Makah Indian Tribe, Neah Bay, Washington (Tribal Members).

*Band-Tailed Pigeons*

*Season Dates:* Open September 18, through October 31, 2010.

*Daily Bag Limit:* Two band-tailed pigeons.

*Ducks and Coots*

*Season Dates:* Open September 25, 2010, through January 30, 2011.

*Daily Bag Limit:* Seven ducks including no more than five mallards (only two of which can be a hen), one redhead, one pintail, three scaup, and one canvasback. The seasons on wood duck and harlequin are closed.

*Geese*

*Season Dates:* Open September 25, 2010, through January 30, 2011.

*Daily Bag Limit:* Four including no more than one brant. The seasons on Aleutian and dusky Canada geese are closed.

*General*

All other Federal regulations contained in 50 CFR part 20 apply. The following restrictions also apply:

(1) As per Makah Ordinance 44, only shotguns may be used to hunt any species of waterfowl. Additionally, shotguns must not be discharged within 0.25 miles of an occupied area.

(2) Hunters must be eligible, enrolled Makah Tribal members and must carry their Indian Treaty Fishing and Hunting Identification Card while hunting. No tags or permits are required to hunt waterfowl;.

(3) The Cape Flattery area is open to waterfowl hunting, except in designated wilderness areas, or within 1 mile of Cape Flattery Trail, or in any area that is closed to hunting by another ordinance or regulation.

(4) The use of live decoys and/or baiting to pursue any species of waterfowl is prohibited.

(5) Steel or bismuth shot only for waterfowl is allowed; the use of lead shot is prohibited.

(6) The use of dogs is permitted to hunt waterfowl.

(7) Shooting hours for all species of waterfowl are one-half hour before sunrise to one-half hour after sunset.

(8) Open hunting areas are: GMUs 601 (Hoko), a portion of the 602 (Dickey) encompassing the area north of a line between Norwegian Memorial and east to Highway 101, and 603 (Pysht).

(o) Navajo Nation, Navajo Indian Reservation, Window Rock, Arizona (Tribal Members and Nontribal Hunters).

*Band-Tailed Pigeons*

*Season Dates:* Open September 1, through September 30, 2010.

*Daily Bag and Possession Limits:* 5 and 10 pigeons, respectively.

*Mourning Doves*

*Season Dates:* Open September 1, through September 30, 2010.

*Daily Bag and Possession Limits:* 10 and 20 doves, respectively.

*General Conditions:* Tribal and nontribal hunters will comply with all basic Federal migratory bird hunting regulations in 50 CFR part 20, regarding shooting hours and manner of taking. In addition, each waterfowl hunter 16 years of age or over must carry on his/her person a valid Migratory Bird Hunting and Conservation Stamp (Duck Stamp) signed in ink across the face. Special regulations established by the Navajo Nation also apply on the reservation.

(p) Oneida Tribe of Indians of Wisconsin, Oneida, Wisconsin (Tribal Members Only).

*Ducks (Including Mergansers)*

*Season Dates:* Open September 18, through November 19, 2010, and open November 29, through December 5, 2010.

*Daily Bag and Possession Limits:* Six, including no more than six mallards (three hen mallards), six wood ducks, one redhead, two pintail, and one hooded merganser. The possession limit is twice the daily bag limit.

*Geese*

*Season Dates:* Open September 1, through November 19, 2010; and open November 29, through December 26, 2010.

*Daily Bag and Possession Limits:* 5 and 10 Canada geese, respectively, from September 1, through September 19, 2010; and 3 and 6 Canada geese, respectively, the remainder of the season. Hunters will be issued five Tribal tags during the early season and three Tribal tags during the late season for geese in order to monitor goose harvest. An additional three tags will be issued each time birds are registered. A seasonal quota of 300 birds is adopted. If the quota is reached before the season concludes, the season will be closed at that time.

*Woodcock*

*Season Dates:* Open September 4, through November 7, 2010.

*Daily Bag and Possession Limits:* 5 and 10 woodcock, respectively.

*Dove*

*Season Dates:* Open September 1, through November 7, 2010.

*Daily Bag and Possession Limits:* 10 and 20 doves, respectively.

*General Conditions:* Tribal member shooting hours are one-half hour before sunrise to one-half hour after sunset. Nontribal members hunting on the Reservation or on lands under the jurisdiction of the Tribe must comply with all State of Wisconsin regulations, including season dates, shooting hours, and bag limits which differ from Tribal member seasons. Tribal members and nontribal members hunting on the Reservation or on lands under the jurisdiction of the Tribe will observe all basic Federal migratory bird hunting regulations found in 50 CFR part 20, with the following exceptions: Tribal members are exempt from the purchase of the Migratory Waterfowl Hunting and Conservation Stamp (Duck Stamp); and shotgun capacity is not limited to three shells.

(q) Point No Point Treaty Council, Kingston, Washington (Tribal Members Only).

**Jamestown S'Klallam Tribe**

*Ducks*

*Season Dates:* Open September 15, 2010, through February 1, 2011.

*Daily Bag and Possession Limits:* Seven ducks, including no more than two hen mallards, one pintail, one canvasback, four scoters, and two redheads. Possession limit is twice the daily bag limit. Bag and possession limits for harlequin ducks is one per season.

*Geese*

*Season Dates:* Open September 15, 2010, through March 10, 2011.

*Daily Bag and Possession Limits:* Four geese, and may include no more than three light geese. The seasons on Aleutian and cackling Canada geese are closed. Possession limit is twice the daily bag limit.

*Brant*

*Season Dates:* Open January 15 through 31, 2011.

*Daily Bag and Possession Limits:* Two and four, respectively.

*Coots*

*Season Dates:* Open September 15, 2010, through February 1, 2011.

*Daily Bag and Possession Limits:* 25 and 50 coots, respectively.

*Mourning Doves*

*Season Dates:* Open September 15, 2010, through January 14, 2011.

*Daily Bag and Possession Limits:* 10 and 20 doves, respectively.

*Snipe*

*Season Dates:* Open September 15, 2010, through March 10, 2011.

*Daily Bag and Possession Limits:* 8 and 16 snipe, respectively.

*Band-Tailed Pigeon*

*Season Dates:* Open September 15, 2010, through March 10, 2011.

*Daily Bag and Possession Limits:* 2 and 4 pigeons, respectively.

**Port Gamble S'Klallam Tribe**

*Ducks*

*Season Dates:* Open September 1, 2010, through February 1, 2011.

*Daily Bag and Possession Limits:* Seven ducks, including no more than two hen mallards, one pintail, one canvasback, four scoters, and two redheads. Possession limit is twice the daily bag limit. Bag and possession limits for harlequin ducks is one per season.

*Geese*

*Season Dates:* Open September 15, 2010, through March 10, 2011.

*Daily Bag and Possession Limits:* Four geese, and may include no more than three light geese. The seasons on Aleutian and cackling Canada geese are closed. Possession limit is twice the daily bag limit.

*Brant*

*Season Dates:* Open November 13, 2010, through January 31, 2011.

*Daily Bag and Possession Limits:* 2 and 4, respectively.

*Coots*

*Season Dates:* Open September 1, 2010, through February 1, 2011.

*Daily Bag and Possession Limits:* 25 and 50 coots, respectively.

*Mourning Doves*

*Season Dates:* Open September 1, 2010, through January 31, 2011.

*Daily Bag and Possession Limits:* 10 and 20 doves, respectively.

*Snipe*

*Season Dates:* Open September 1, 2010, through March 10, 2011.

*Daily Bag and Possession Limits:* 8 and 16 snipe, respectively.

*Band-Tailed Pigeon*

*Season Dates:* Open September 1, 2010, through March 10, 2011.

*Daily Bag and Possession Limits:* 2 and 4 pigeons, respectively.

*General:* Tribal members must possess a Tribal hunting permit from the Point No Point Tribal Council pursuant to Tribal law. Hunting hours are from one-half hour before sunrise to sunset. Hunters must observe all other basic Federal migratory bird hunting regulations in 50 CFR part 20.

(r) Sault Ste. Marie Tribe of Chippewa Indians, Sault Ste. Marie, Michigan (Tribal Members Only).

*Mourning Doves*

*Season Dates:* Open September 1, through November 14, 2010.

*Daily Bag and Possession Limits:* 10 and 20 doves, respectively.

*General:* Tribal members must possess a Tribal hunting permit from the Sault Ste. Marie Tribe pursuant to Tribal law. Shooting hours are one-half hour before sunrise until 15 minutes after sunset. Hunters must observe all other basic Federal migratory bird hunting regulations in 50 CFR part 20.

(t) Skokomish Tribe, Shelton, Washington (Tribal Members Only).

*Ducks and Mergansers*

*Season Dates:* Open September 16, 2010, through February 28, 2011.

*Daily Bag and Possession Limits:* Seven ducks, including no more than two hen mallards, one pintail, one canvasback, one harlequin per season, and two redheads. Possession limit is twice the daily bag limit (except for harlequin).

*Geese*

*Season Dates:* Open September 16, 2010, through February 28, 2011.

*Daily Bag and Possession Limits:* Four geese, and may include no more than three light geese. The season on Aleutian Canada geese is closed. Possession limit is twice the daily bag limit.

*Brant*

*Season Dates:* Open November 1, 2010, through February 15, 2011.

*Daily Bag and Possession Limits:* Two and four brant, respectively.

*Coots*

*Season Dates:* Open September 16, 2010, through February 28, 2011.

*Daily Bag and Possession Limits:* 25 and 50 coots, respectively.

*Mourning Doves*

*Season Dates:* Open September 16, 2010, through February 28, 2011.

*Daily Bag and Possession Limits:* 10 and 20 doves, respectively.

*Snipe*

*Season Dates:* Open September 16, 2010, through February 28, 2011.

*Daily Bag and Possession Limits:* 8 and 16 snipe, respectively.

*Band-Tailed Pigeon*

*Season Dates:* Open September 16, 2010, through February 28, 2011.

*Daily Bag and Possession Limits:* 2 and 4 pigeons, respectively.

*General Conditions:* All hunters authorized to hunt migratory birds on the reservation must obtain a Tribal hunting permit from the respective Tribe. Hunters are also required to adhere to a number of special regulations available at the Tribal office. Hunters must observe all other basic Federal migratory bird hunting regulations in 50 CFR part 20.

(u) Spokane Tribe of Indians, Spokane Indian Reservation, Wellpinit, Washington (Tribal Members Only).

*Ducks*

*Season Dates:* Open September 2, 2010, through January 31, 2011.

*Daily Bag and Possession Limits:* Seven ducks, including no more than two hen mallards, two pintail, one canvasback, three scaup, and two redheads. Possession limit is twice the daily bag limit.

*Geese*

*Season Dates:* Open September 2, 2010, through January 31, 2011.

*Daily Bag and Possession Limits:* Four dark geese and six light geese. Possession limit is twice the daily bag limit.

*General Conditions:* All Tribal hunters must have a valid Tribal ID card on his or her person while hunting. Shooting hours are one-half hour before sunrise to sunset, and steel shot is required for all migratory bird hunting. Hunters must observe all other basic Federal migratory bird hunting regulations in 50 CFR part 20.

(w) Stillaguamish Tribe of Indians, Arlington, Washington (Tribal Members Only).

*Band-Tailed Pigeon*

*Season Dates:* Open September 1, through December 31, 2010.

*Daily Bag and Possession Limits:* Four and eight, respectively.

*Mourning Dove*

*Season Dates:* Open September 1, through December 31, 2010.

*Daily Bag and Possession Limits:* 10 and 20, respectively.

Tribal members hunting on lands will observe all basic Federal migratory bird hunting regulations found in 50 CFR part 20, which will be enforced by the Stillaguamish Tribal Law Enforcement. Tribal members are required to use steel shot or a nontoxic shot as required by Federal regulations.

(y) Tulalip Tribes, Tulalip, Washington (Tribal Members Only).

*Ducks*

*Season Dates:* Open September 8, 2010, through February 28, 2011.

*Daily Bag and Possession Limits:* Seven ducks, including no more than two hen mallards, two pintail, one canvasback, three scaup, and two redheads. Possession limit is twice the daily bag limit.

*Geese*

*Season Dates:* Open September 8, 2010, through February 28, 2011.

*Daily Bag and Possession Limits:* Seven geese. Possession limit is twice the daily bag limit.

*Brant*

*Season Dates:* Open September 8, 2010, through February 28, 2011.

*Daily Bag and Possession Limits:* Two and four brant, respectively.

*Coots*

*Season Dates:* Open September 8, 2010, through February 28, 2011.

*Daily Bag and Possession Limits:* 25 and 50 coots, respectively.

*Snipe*

*Season Dates:* Open September 8, 2010, and through February 28, 2011.

*Daily Bag and Possession Limits:* 8 and 16 snipe, respectively.

*General Conditions:* All Tribal hunters must have a valid Tribal ID card on his or her person while hunting. Shooting hours are one-half hour before sunrise to sunset, and steel shot is required for all migratory bird hunting. Hunters must observe all other basic Federal migratory bird hunting regulations in 50 CFR part 20.

(z) Upper Skagit Indian Tribe, Sedro Woolley, Washington (Tribal Members Only).

*Mourning Dove*

*Season Dates:* Open September 1, through December 31, 2010.

*Daily Bag and Possession Limits:* 12 and 15 mourning doves, respectively.

Tribal members must have the Tribal identification and harvest report card on their person to hunt. Tribal members hunting on the Reservation will observe all basic Federal migratory bird hunting regulations found in 50 CFR part 20, except shooting hours would be one-half hour before official sunrise to one-half hour after official sunset.

(aa) Wampanoag Tribe of Gay Head, Aquinnah, Massachusetts (Tribal Members Only).

*Canada Geese*

*Season Dates:* Open September 13 through 30, 2010, and open October 30, 2010, through February 26, 2011.

*Daily Bag Limits:* Eight Canada geese during the first period and three during the second.

*Snow Geese*

*Season Dates:* Open September 8 through 22, 2010.

*Daily Bag Limits:* 15 snow geese.

*General Conditions:* Shooting hours are one-half hour before sunrise to sunset. Nontoxic shot is required. All other basic Federal migratory bird hunting regulations contained in 50 CFR part 20 will be observed.

(bb) White Earth Band of Ojibwe, White Earth, Minnesota (Tribal Members Only).

*Ducks*

*Season Dates:* Open September 18, through December 12, 2010.

*Daily Bag Limit for Ducks:* 10 ducks, including no more than 2 female mallards, 1 pintail, and 1 canvasback.

*Mergansers*

*Season Dates:* Open September 18, through December 19, 2010.

*Daily Bag Limit for Mergansers:* Five mergansers, including no more than two hooded mergansers.

*Geese*

*Season Dates:* Open September 1 through 26, 2010, and open September 27, through December 19, 2010.

*Daily Bag Limit:* Eight geese through September 26 and five thereafter.

*Coots*

*Season Dates:* Open September 1, through November 30, 2010.

*Daily Bag Limit:* 20 coots.

*Sora and Virginia Rails*

*Season Dates:* Open September 1, through November 30, 2010.

*Daily Bag Limit:* 25 sora and Virginia rails, singly or in the aggregate.

*Common Snipe and Woodcock*

*Season Dates:* Open September 1, through November 30, 2010.

*Daily Bag Limit:* 10 snipe and 10 woodcock.

*Mourning Dove*

*Season Dates:* Open September 1, through November 30, 2010.

*Daily Bag Limit:* 25 doves.

*General Conditions:* Shooting hours are one-half hour before sunrise to one-half hour after sunset. Nontoxic shot is required. All other basic Federal migratory bird hunting regulations contained in 50 CFR part 20 will be observed.

(cc) White Mountain Apache Tribe, Fort Apache Indian Reservation, Whiteriver, Arizona (Tribal Members and Nontribal Hunters).

*Band-Tailed Pigeons (Wildlife Management Unit 10 and Areas South of Y–70 and Y–10 in Wildlife Management Unit 7, Only)*

*Season Dates:* Open September 1 through 15, 2010.

*Daily Bag and Possession Limits:* Three and six pigeons, respectively.

*Mourning Doves (Wildlife Management Unit 10 and Areas South of Y–70 and Y–10 in Wildlife Management Unit 7, Only)*

*Season Dates:* Open September 1 through 15, 2010.

*Daily Bag and Possession Limits:* 10 and 20 doves, respectively.

*General Conditions:* All nontribal hunters hunting band-tailed pigeons and mourning doves on Reservation lands shall have in their possession a valid White Mountain Apache Daily or Yearly Small Game Permit. In addition to a small game permit, all nontribal hunters hunting band-tailed pigeons

must have in their possession a White Mountain Special Band-Tailed Pigeon Permit. Other special regulations established by the White Mountain Apache Tribe apply on the reservation.

Tribal and nontribal hunters will comply with all basic Federal migratory bird hunting regulations in 50 CFR Part 20 regarding shooting hours and manner of taking.

Dated: August 25, 2010.

**Will Shafroth,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 2010–21664 Filed 8–31–10; 8:45 am]

**BILLING CODE 4310–55–P**

Federal Register

Wednesday,
September 1, 2010

# Part IV

# Department of Labor

## Employment and Training Administration

**20 CFR Part 641**

**Senior Community Service Employment Program; Final Rule**

**DEPARTMENT OF LABOR**

**Employment and Training Administration**

**20 CFR Part 641**

**RIN 1205–AB48 and RIN 1205–AB47**

## Senior Community Service Employment Program; Final Rule

**AGENCY:** Employment and Training Administration, Labor.

**ACTION:** Final rule.

**SUMMARY:** The Employment and Training Administration (ETA) of the Department of Labor (Department) issues this final rule to implement changes in the Senior Community Service Employment Program (SCSEP) resulting from the 2006 Amendments to title V of the Older Americans Act, and to clarify various policies. These regulations provide administrative and programmatic guidance and requirements for the implementation of the SCSEP.

The Department issued an interim final rule (IFR) implementing changes in the SCSEP performance accountability regulations. We issued a notice of proposed rulemaking (NPRM) proposing changes to the remainder of the SCSEP regulations on August 14, 2008. This final rule takes into consideration comments received on the IFR and the NPRM.

**DATES:** *Effective date:* This final rule is effective October 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** Judith Gilbert, Team Leader, Division of Adult Services, Office of Workforce Investment, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–4209, Washington, DC 20210; telephone (202) 693–3046 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:**

The preamble to this final rule is organized as follows:

I. Background—provides a brief description of the development of the rule.
II. Summary of the Comments—provides an overview of the comments received.
III. Section-by-Section Review—discusses comments on the SCSEP regulations.
IV. Administrative Information—sets forth the applicable regulatory requirements.

### I. Background

The Older Americans Act (OAA) Amendments of 2006, Public Law 109–365 (2006 OAA) were signed into law on October 17, 2006. This law amended the statute authorizing the SCSEP and necessitates changes to the SCSEP regulations. The 2006 OAA required regulations that address performance measures by July 1, 2007. To meet this deadline, the Department promulgated an Interim Final Rule on June 29, 2007. 72 FR 35832. We issued an NPRM on August 14, 2008, to propose changes to the remainder of the SCSEP regulations in light of the 2006 OAA. 73 FR 47770. We invited comments on both the IFR and the NPRM, and thoroughly evaluated those comments in the process of developing this final rule.

The SCSEP, authorized by title V of the OAA, is the only federally-sponsored employment and training program targeted specifically to low-income older individuals who want to enter or re-enter the workforce. Participants must be unemployed, 55 years of age or older, and have incomes no more than 125 percent of the Federal poverty level. The program offers participants community service assignments and training in public and non-profit agencies. The dual goals of the program are to promote useful opportunities in community service activities and to also move SCSEP participants into unsubsidized employment, where appropriate, so that they can achieve economic self-sufficiency. In the 2006 OAA, Congress expressed its sense of the benefits of the SCSEP, stating, "placing older individuals in community service positions strengthens the ability of the individuals to become self-sufficient, provides much-needed support to organizations that benefit from increased civic engagement, and strengthens the communities that are served by such organizations." OAA § 516(2).

Although some of these regulations remain unchanged from the 2004 SCSEP final rule, this final rule does include certain significant changes to the program. Perhaps most notably, the new 48-month limitation on participation (OAA § 518(a)(3)(B); § 641.570 of this part), and the increase in available funds for training and supportive services (OAA § 502(c)(6)(C); § 641.874 of this part).

The 2006 OAA also increases the accountability of national grantees by clearly requiring a competitive process for grant awards. This final rule implements the statute's requirement that the national SCSEP grants be re-competed regularly, generally every four years. OAA § 514(a); § 641.490(a) of this part. This final rule also implements the statute's requirement that a State compete its SCSEP grant if the current State grantee fails to meet its core performance goals for three consecutive years. OAA § 513(d)(3)(B)(iii); § 641.490 of this part.

In addition, the 2006 OAA establishes new funding opportunities for pilot, demonstration, and evaluation projects (OAA § 502(e); § 641.600–640 of this part), expands the priority-for-service categories (OAA § 518(b); § 641.520 of this part), and modifies how the program determines income eligibility (OAA § 518(a)(3)(A); § 641.510 of this part).

Coordination between the SCSEP and the programs under the Workforce Investment Act of 1998 (WIA), 29 U.S.C. 2801 *et seq.,* continues to be an important objective of the 2006 OAA. With the enactment of WIA in 1998, the SCSEP became a required partner in the workforce investment system. 29 U.S.C. 2841(b)(1)(B)(vi). In 2000, Congress amended the SCSEP to require coordination with the WIA One-Stop delivery system (Pub. L. 106–501, § 505(c)(1)), including reciprocal use of assessment mechanisms and Individual Employment Plans (Pub. L. 106–501, § 502(b)(4)). In 2006, Congress continued both the requirement to coordinate at OAA § 505(c)(1) and the reciprocal use of assessments at OAA § 502(b)(3)(B). The underlying notion of the One-Stop delivery system is the coordination of programs, services, and governance structures, so that the customer has access to a seamless system of workforce investment services.

Consistent with current SCSEP practice, both WIA and the 2006 OAA require any grantee operating a SCSEP project in a local area to negotiate a Memorandum of Understanding (MOU) with the Local Workforce Investment Board. WIA § 121; OAA § 511(b); see also OAA § 502(b)(1)(O). The MOU must detail the SCSEP project's involvement in the One-Stop delivery system. In particular, SCSEP grantees and sub-recipients must make arrangements to provide their participants, eligible individuals the grantees are unable to serve, as well as SCSEP-ineligible individuals, with access to services available in the One-Stop centers. OAA §§ 510, 511; §§ 641.210, 641.220, and 641.230 of this part.

### II. Summary of the Comments

We have carefully reviewed all of the comments received in response to both the IFR and to the NPRM. We received 1,505 comments during the comment periods, of which 364 were unique, 959 were duplicates or "form" letters, and one was a petition with 182 signatures. The commenters fell into a variety of

categories that reflect the broad range of constituencies for the SCSEP program, including State and national grantees, program non-profit host agencies, area agencies on aging, WIA providers, and program participants.

A number of commenters requested additional time to review and submit comments on the changes proposed in the NPRM. Many of these commenters requested an additional 60 days to determine the impact on SCSEP stakeholders and participants. Several commenters mentioned that many who will be impacted by the proposed changes are not yet even aware of them. Others mentioned that they have had insufficient time to contact host agencies and obtain their input. One commenter pointed out that the SCSEP system is a diverse and complex network of agencies, and said that insufficient time had been allowed to seek input from this network. One commenter said additional time was required to evaluate the impact of the recent economic downturn on SCSEP participants. A few others suggested that the Department put the proposed regulations aside and work collaboratively with the grantee community and with the Administration on Aging to draft new regulations.

We reviewed these requests and concluded that they presented no novel or difficult issues justifying an extension of the comment period or a withdrawal of the proposed rule In this case, the Department provided 60 days for notice and comment. We believe the time allotted was more than sufficient to review this regulation given that most of the rule simply reflects changes required by the 2006 OAA, or is a continuation of policies that were published in the 2004 Final Rule. Accordingly, the Department did not extend the comment period.

The more substantive comments touched on almost every section of the proposed regulation. These comments are discussed in Section III below. In addition, the Department has made technical changes to the regulatory text for clarity and consistency. Provisions that were not the subject of a comment or that were not revised for technical reasons have been adopted as proposed and are not discussed in Section III.

**III. Section-by-Section Review**

In this section, we discuss the comments, our responses to them and any changes to the regulations that we made as a result of comments. In the course of reviewing the NPRM, we have made some technical or grammatical changes to the regulatory text, which are not intended to change the meaning or intent of the regulatory provisions. Generally, we do not discuss these types of changes in this section.

*Subpart A—Purpose and Definitions*

What is the SCSEP? (§ 641.110)

This section of the final rule describes the SCSEP as it is defined by the 2006 OAA. We received several comments on this provision. Those commenters expressed concern about using the term "employment" in the phrase "community service employment assignment" as referenced in §§ 641.110 and 641.120 of the rule. A few commenters found that adding the term "places undue confusion on both grantees and participants." As a result, these commenters recommended that the regulation only refer to "employment" in the context of unsubsidized employment. Other commenters stated that changing the name would reverse grantee efforts to promote SCSEP as a training program rather than an employment program.

The Department accepts this comment. The regulation has been revised to use the term "community service assignment" throughout. The term "community service employment" in the rule is consistent with the term as it is defined in the 2006 OAA at § 518(a)(2). To remedy any potential confusion, the Department notes that the terms "community service assignment" and "community service employment assignment" are the same in that they both represent part-time, temporary job training through a work experience that is paid with grant funds. Therefore, the Department recommends that grantees continue to clarify the nature of the community service assignment with participants, which should alleviate any potential confusion.

One final comment came from a program participant who stated that the program should allow for more than part-time hours so that participants are able to further develop and improve their skills. We are unable to accommodate the participant's request, because the OAA at § 518(a)(2) defines "community service employment" as "part-time, temporary employment." We are pleased to receive comments from our program participants, including this commenter, and note that developing and improving skills does not have to end with SCSEP. There are other no-cost training resources available to seniors (including, in some cases, through the One-Stop delivery system) that we hope program participants utilize.

What are the purposes of the SCSEP? (§ 641.120)

This section of the rule outlines the purpose of the SCSEP. We received a significant number of comments on this section. A majority of the commenters expressed concern that the Department is minimizing the community service aspects of the program and placing a higher priority on the unsubsidized placement goal in this regulation. Many of the commenters stated that the NPRM does not conform to the 2006 OAA because they perceived the Department as elevating the importance of unsubsidized employment at the expense of community service. Several commenters referenced the intent of Congress when it passed the legislation. Those commenters referenced section 516 of the 2006 OAA, which provides:

It is the sense of Congress that—

(1) The older American community service employment program described in this title was established with the intent of placing older individuals in community service positions and providing job training; and

(2) placing older individuals in community service positions strengthens the ability of the individuals to become self-sufficient, provides much-needed support to organizations that benefit from increased civic engagement and strengthens the communities that are served by such organizations.

Those commenters relied on the placement of the words "community service" before "job training" to make the case that Congress intended for community service to have a higher priority than job training. Further, some of these commenters asserted that "self-sufficient" in this context implies emotional and other types of self-sufficiency, and not just economic self-sufficiency. In support of this position, the commenters describe the importance of placing an older individual into a community service assignment as a means of improving the person's sense of financial as well as emotional and social well-being, while providing a useful and needed service in the community. Therefore, these commenters found that the regulations ignore the value of community service both to the participant and to the community at large. A few commenters stressed the importance of working with the non-profit sector because they rely on the program participants when they do not have enough funds to hire staff for their organizations. One commenter commended the Department for stressing the importance of the

program's goal to foster economic self-sufficiency.

In addition, some commenters focused on other language in the 2006 OAA. In addition to § 516, these commenters referenced § 502(a), "Establishment of Program" and § 518(a), which defines "community service employment." These commenters stated that these provisions "reinforce[] the primary purpose of community service employment, along with its dual purpose of placing workers into unsubsidized employment." One of the commenters noted that the Department misinterpreted the 2006 OAA when it attempted to "meld together" four disparate provisions "to support an exclusive focus on job placement" in the proposed rule.

The Department appreciates the commenters' concern about the perceived changes in the program. However, the Department finds that the dual purposes of the program—community service and appropriate employment objectives for participants—with its related performance goals, are not inconsistent. We fully embrace these dual purposes of the SCSEP as envisioned by the Congress. We recognize the importance of the community service aspect of the SCSEP. But we do not think that the regulation should overemphasize either aspect of the program. We have, therefore, written this regulation to strike an appropriate balance between community service and unsubsidized employment. Therefore, we have not changed this section.

What definitions apply to this part? (§ 641.140)

This section provides specific or contextual definitions for the terms used in this part. We received numerous comments on this section with suggestions on how to better clarify, amend, or define the following ten (10) definitions: "co-enrollment," "employment," "equitable distribution report," "host agency," "individual employment plan," "other participant costs," "state plan," "sub-recipient," "supportive services," and "unemployed." In addition, commenters asked the Department to add definitions for "community service employment" and "job ready."

As indicated in the preamble to the proposed rule, the definition of "co-enrollment" was eliminated because it related to private sector 502(e) projects which are no longer authorized. This definition was specific to the 502(e) projects and had no bearing on SCSEP participants co-enrolling into other federally funded programs. Upon further reflection, however, the Department realized that although this definition is no longer applicable to the 502(e) projects from the 2004 regulation, it is still applicable to define the status of participants who are enrolled in WIA or other employment and training programs since SCSEP is a mandatory partner in the One-Stop system. Therefore, we have reinstated this definition with some changes to reflect that the participants must be enrolled in those other programs to be considered co-enrolled.

Commenters suggested two substantial changes to the definition of "equitable distribution report." First, the commenters suggest the Department allow grantees to use other reputable and reliable population data in order to determine the optimum number of participant positions for equitable distribution purposes. The Department understands the limits of census data when determining equitable distribution of positions, given that Census data is updated only every 10 years. The Department also agrees that more timely information would help the grantees make better decisions for program efficiencies (*i.e.,* equitable distribution of SCSEP positions), which would allow more eligible individuals to participate in the program. Furthermore, by relaxing the limitations on grantees on the data they may use for equitable distribution of positions, grantees will be able to respond to major changes in their programs, such as in the case of a natural disaster or other unforeseen demographic shifts. Therefore, the Department agrees to allow the use of other data for equitable distribution purposes, as long as that information is from a reliable source, comparable in quality to the Census data, and grantees document the source of the information.

Other commenters took issue with the change of words in the definition from "counties" to "jurisdiction." We made this change to make the definition more inclusive of potentially underserved incorporated cities. One commenter specifically suggested that the Department reverse the change of wording, and edit the definition to include the term "incorporated cities." The Department accepts these commenters' suggestions and has expanded the definition of "equitable distribution report" to include these suggestions.

One commenter expressed concern with the addition of the word "training" within the definition of "host agency." The commenter felt that this term added to the confusion participants experience when they accept a community service assignment. Although the Department appreciates the sentiments of this commenter, we disagree. We believe that the added term "training" helps to underscore the fact that the community service assignment provides an opportunity to train SCSEP participants for unsubsidized employment. Congress indicates in § 502(a)(1) of the 2006 OAA, that the SCSEP is designed to "[i]ncrease the number of persons who may enjoy the benefits of unsubsidized employment in both the public and private sectors." Further in § 516 of the 2006 OAA, Congress indicates that the SCSEP program "was established with the intent of placing older individuals in community service positions and providing job training." Thus, the Department has decided to retain the term "training" in the definition of "host agency."

We received several comments on the definition of "individual employment plan or IEP." One commenter requested that the Department include the term "mandatory" in place of the term "appropriate" to describe the employment goal included in the IEP. The Department agrees that one of the end goals of an IEP should be unsubsidized employment for many participants; however, making this a mandatory function of the IEP runs counter to the statutory language in § 502(b)(1)(N)(ii) of the 2006 OAA, which provides that the grantee "will provide training and employment counseling to eligible individuals based on strategies that identify appropriate employment objectives * * * developed as a result of [an] assessment and service strategy." Thus, the use of the word "appropriate" further underscores the need to identify a strategy in the IEP that is tailored to the needs of each participant.

Additionally, commenters stated that the Department did not include community service in the definition of IEP. These commenters suggested the Department change the term IEP to "individual service employment program" or ISEP. Other suggestions included "ISS" for Individual Service Strategy and "ITP" for Individual Training Plan. There is no doubt that the community service assignment is an important aspect of the IEP, since it provides a work environment in which to obtain needed job skills. The goal of the IEP is to plot the participant's training plan that will lead to an appropriate employment objective, which includes more than just community service. Read together, paragraphs (i) and (ii) of § 502(b)(1)(N) focus on a strategy aimed at employment, and thus the IEP is appropriate. However, there is nothing

in the definition of IEP or elsewhere that prevents grantees from including a variety of other services and strategies not directly related to the employment goal as part of the IEP. For the reasons provided, the Department therefore finds this change unnecessary and did not alter this definition. However, in response to these comments we did add language to the definition to make it clear that, while the first IEP must contain an employment goal, later IEPs need not, if employment is not a feasible outcome for a participant.

Two commenters found that the term "other participant costs" contained much the same list of activities defined under "supportive services." These commenters are correct. The Department has elected to keep both definitions because the definition of "other participant costs" contains a variety of activities in addition to those listed in the definition of "supportive services." In addition, we have clarified the definition of "severely limited employment prospects" by substituting the words "substantial likelihood" for the words "substantially higher likelihood."

One commenter noted that the definition of "sub-recipient," caused general confusion by changing from the previously defined term, "subgrantee." However, the Department was clear about why it changed the various definitions and the definition of "sub-recipient" in particular in the preamble to the proposed rule. The Department explained that the previous term, "subgrantee," failed to take other recipients into account that may have grant management responsibilities. The term "sub-recipient," therefore, is inclusive of subgrants as well as other types of funding awards. For this reason, the Department did not make any changes to this definition.

One commenter noted that the cost of incidentals was not included in the proposed definition of "supportive services," even though incidentals are the most widely used supportive service. Although the Department used the definition in the OAA at § 518(a)(7), we have now modified the definition to more fully reflect the language on supportive services found in section 502(c)(6)(A)(iv).

We received a few comments on the definition of "unemployed." One commenter disagreed with the Department's interpretation and found that the definition unnecessarily complicates a grantee's ability to make eligibility decisions. This commenter further stated that use of the words the "occasional employment" works against older individuals and particularly those who reside in rural areas who take part-time jobs. This definition tracks the statutory language, and it is sufficiently clear. Therefore, we have not changed the definition.

We also received recommendations from commenters to add two definitions to this section, and we have adopted both. An overwhelming number of commenters suggested that the Department add the term "community service employment" to this regulation. The term "community service employment" is included in § 518(a)(2) of the 2006 OAA and reads as follows:

> The term "community service employment" means part-time, temporary employment paid with grant funds in projects described in section 502(b)(1)(D), through which eligible individuals are engaged in community service and receive work experience and job skills that can lead to unsubsidized employment.

The other definition we adopted in this final rule is "job ready" which pertains to the rule that prohibits the enrollment of job ready participants in §§ 641.512 and 641.535(c). The term "job ready" has been discussed in training and in conversations with grantees when the Department has provided technical assistance. The Department has generally meant the term to apply to an individual who requires no more than just job club or job search assistance to be employed. The Department discussed its policy in the 2004 regulations at 69 FR 19014 at 19031, 19032, and 19038, Apr. 9, 2004. To reiterate the Department's policy as announced in 2004, the purpose of the program is to "assure that grantees concentrate their efforts and limited funds on providing community service work assignments to those older [individuals] who are most in need" as opposed to those who are job ready. 69 FR 19014 at 19031. Therefore, a simple definition of "job ready" is now provided. It refers to "individuals who do not require further education or training to perform work that is available in his or her labor market." Thus, it may include an individual who is already employed, even if only part-time, or was recently unemployed but has a skill set to fill the jobs available in his or her area; or who has received sufficient training from SCSEP or some other employment and training program to be able to perform work that is available in the labor market.

*Subpart B—Coordination With the Workforce Investment Act*

What is the relationship between the SCSEP and the Workforce Investment Act? (§ 641.200)

This section provides that SCSEP grantees are required to follow all applicable rules under WIA and its regulations. The WIA operational requirements generally do not apply to SCSEP operations. As required partners under WIA, grantees are obligated to be familiar with the WIA requirements when they are acting as a WIA/One Stop delivery system partner. The only proposed changes made in this section are to clarify that sub-recipients (and not just grantees) are included in the requirement to follow all applicable WIA rules and regulations, and to make certain technical corrections to the citations.

A number of commenters objected to the requirement that SCSEP follow all applicable rules under WIA and its regulations. The commenters cited various problems and experiences they perceive WIA has in serving older workers, and argued that SCSEP is a different type of program than WIA and should therefore not be required to comply with its rules, which they believe are burdensome on SCSEP grantees. Several commenters said that it is unclear which WIA rules and regulations are applicable to SCSEP and which are not. Several commenters asked that the requirement to follow applicable WIA rules be removed. Since both the OAA and WIA require SCSEP to be a One-Stop partner, we cannot make the suggested change.

These commenters also mentioned that WIA performance measures create a disincentive to serving older workers, and cited as evidence findings of an April 2008 Government Accountability Office report entitled "Most One-Stop Career Centers Are Taking Multiple Actions to Link Employers and Older Workers." One commenter said the onus seems to be on SCSEP to initiate collaborative relationships with WIA. Another commenter suggested releasing a Training and Employment Guidance Letter (TEGL) to highlight the importance of coordination between WIA and SCSEP.

We appreciate the commenters' concerns about ways to improve SCSEP–WIA coordination but none of the comments received addressed the specific changes to this section proposed by the NPRM. The comments appear to reflect a concern that the coordination requirements of the 2006 OAA and WIA will have the effect of diluting or undercutting the focus and

mission of the SCSEP. As we stated in response to similar comments in the preamble to the 2004 Final Rule, we do not intend the regulations to convey this message. 69 FR 19017–19019. WIA envisions a coordinated workforce development system in which a variety of programs work more closely together to make access to workforce development services easier and more efficient. WIA includes a number of programs that serve special populations to be required partners and is very careful to assure that program boundaries are respected. None of the WIA requirements on SCSEP grantees have changed from those that applied in 2004, so we have not changed the SCSEP regulations that govern SCSEP–WIA coordination. The Department intends that the regulations will enable grantees and sub-recipients to concentrate better on the core missions of the SCSEP, providing community service assignments to hard-to-serve older individuals. The Department intends that the One-Stop delivery system be used to provide services both to older individuals who are not eligible for the SCSEP and to those who are eligible but need the intensive services that the SCSEP is unable to provide. The kinds of partnerships that the regulations envision will enable SCSEP grantees and sub-recipients to focus more of their efforts on the core population that the SCSEP is intended to serve. We did, however, add language to make it clear that the requirements of the section apply to SCSEP grantees and sub-recipients when they are acting in their capacities of required One-Stop partners.

What services, in addition to the applicable core services, must SCSEP grantees and sub-recipients provide through the One-Stop delivery system? (§ 641.210)

This section requires SCSEP grantees and sub-recipients to make arrangements to provide their participants, eligible individuals the grantees and sub-recipients are unable to serve, as well as SCSEP ineligible individuals, with access to other services available at One-Stop centers. We received comments on the second clarification made to this provision that SCSEP grantees and sub-recipients must also make arrangements through the One-Stop delivery system to provide eligible and ineligible individuals with referrals to WIA intensive and training services.

Several commenters objected to this requirement and asked that it be removed, while others noted problems with the requirement. One commenter said that it is not always feasible to make referrals to WIA intensive or training services because many participants live long distances from One-Stop centers and do not have transportation to access services. Another commenter noted the absence of One-Stop centers in rural areas. Another commenter said that even if referrals of older individuals for WIA services are made, the WIA program tends not to serve them. Still another commenter said that the One-Stop delivery system provides limited or no bi-lingual programs that target older workers and in many instances are not located in proximity to Hispanic and minority neighborhoods. Finally, a commenter said that the 2006 OAA does not require SCSEP to provide core services through the WIA One-Stop delivery system, but requires potential participants to be registered with One-Stop centers.

The Department acknowledges that access and referral to WIA services in rural areas may present particular challenges, as do addressing the special needs of older workers who are limited-English proficient. To address these challenges, the Department encourages coordination with other organizations, in addition to One-Stop centers, that may be more appropriate. This provision reminds grantees and sub-recipients that they are required to be part of the One-Stop delivery system and to participate when appropriate in providing access and referral to the other services that the One-Stop partners offer. Grantees may also decide to provide core services outside the One-Stop Career Centers.

Does title I of WIA require the SCSEP to use OAA funds for individuals who are not eligible for SCSEP services or for services that are not authorized under the OAA? (§ 641.220)

This section states that even in the One-Stop center environment, SCSEP projects are limited to serving SCSEP-eligible individuals with title V grant funds. The local Workforce Investment Board and the One-Stop partners, including SCSEP, should negotiate in the Memorandum of Understanding (MOU) arrangements for referral of individuals to WIA who are not eligible for SCSEP.

A single comment on this section suggested including language that if a Local Workforce Investment Board is a SCSEP sub-grantee, then no MOU is necessary because the contract between the grantee and sub-grantee already stipulates arrangements for administration of the SCSEP.

The Department disagrees that an MOU is not necessary when the local board is a SCSEP sub-grantee, although we acknowledge that this situation adds a degree of complexity to the relationship. As required of all partner relationships with the One-Stop delivery system, the requirement to have an MOU is statutory and therefore, still necessary. The relationship the local board would have as a sub-recipient only mandates services to participants under the grant agreement but does not ensure that there is a written policy for how services would be coordinated with the One-Stop center. Therefore, we did not make any change to this section.

Must the individual assessment conducted by the SCSEP grantee and the assessment performed by the One-Stop delivery system be accepted for use by either entity to determine the individual's need for services in the SCSEP and adult programs under title I–B of WIA? (§ 641.230)

The only proposed changes the Department made to this section were of a technical nature. We received two comments recommending the Department modify the section to include Aging Disability Resource Centers or other organizations that perform assessments in addition to WIA, to assist with the data validation requirements.

This section merely reflects the language of the 2006 OAA on the acceptance of each others' assessments by the SCSEP and One-Stop delivery system. The Department believes the SCSEP program will be better served if the regulations do not specify what other organizations perform assessments. The Department emphasizes that grantees are responsible for determining whether assessments performed by other organizations are sufficient for the grantee's and the participant's needs.

*Subpart C—The State Plan*

We received a large number of comments on this subpart, although a few were outside the scope of this rulemaking because they related to subpart G, which had a separate comment period from the proposed rule. Most of the comments were related to the 4-year strategy in the State Plan, although others discussed participation in developing the State Plan, community service needs, modifications to the State Plan, and equitable distribution. We received a few comments related to the cost and resources needed to complete the State Plan, which are addressed in the

Administrative Section of this final rule under Section D, Unfunded Mandates. We also received several comments that generally discussed the State Plan requirements or discussed the need for greater coordination with aging programs, which the Department has decided to address in this subpart on the State Plan requirements.

What is the State Plan? (§ 641.300)

This section describes the purpose and function of the State Plan. We made a number of changes to this section to reflect the new provision in the 2006 OAA, which requires State grantees to submit a four-year strategy to the Department.

A few commenters asked the Department to consider allowing the State grantees to combine the State SCSEP strategic plan with the State Unit on Aging strategic plan to further the goals and efforts of its SCSEP program. Some of those commenters specifically justified this request by stating that the Department allows the State grantees to submit the State Plan as a part of the WIA Unified Plan, but since SCSEP is an OAA program, submitting the State Plan with the other OAA programs should also be acceptable.

Although we appreciate the logic of these comments, it is not possible for the State Plans to be submitted with the other OAA strategic plans. According to 20 U.S.C. 9271, "a State may develop and submit to the appropriate Secretaries a State unified plan for 2 or more of the activities or programs" provided in a specific list, and the only part of OAA listed is Title V. Therefore, 20 U.S.C. 9271 does not authorize States to include a unified plan that includes OAA activities or programs that are authorized by a section of OAA other than Title V. Such programs are governed by their own planning requirements. Furthermore, SCSEP is unique in that it is the only program under the OAA that is administered by the Department of Labor. Section 503 of the 2006 OAA specifically requires each State to submit a State Plan to the Secretary of Labor to be eligible for grant funding under this program. The Department shares the State Plans with the Administration on Aging in an effort to coordinate with them on older American policies. However, if they so desire, we do not prevent State grantees from also submitting their SCSEP strategic plan with their OAA strategic plan.

Many commenters suggested that the Department develop regulations that require SCSEP grantees to coordinate with other programs under the 2006 OAA, such as State units and area agencies on aging, and with other Federal programs such as Foster Grandparents, Senior Companions, Vocational Rehabilitation and several others. A few even requested that the Administration on Aging and other SCSEP providers be involved in writing the regulations. These commenters did not submit their comments on any particular section of the regulation and, in fact, some commenters were "disappointed" because they found the regulations "silent" on this issue.

The regulations are not "silent" on the coordination requirement with other Federal agencies, and especially the other aging programs. There are several provisions in this regulation that require coordination with aging and other resources. The first is in § 641.315, which requires the State grantees to seek the advice and recommendation of representatives from State and area agencies on aging, social service organizations, and community-based organizations in § 641.315(a), and permits the State grantee to obtain the advice and recommendation of other interested organizations and individuals in § 641.315(b). In addition, § 641.302(i) requires the States to plan actions that coordinate activities of SCSEP grantees with other public and private entities and programs that provide services to older Americans. That the Department did not mention a specific social service or other program by name does not exclude it from being a worthy organization for collaboration. Given the large number of comments that addressed this particular concern, the Department hopes that grantees will now understand the importance of the State planning requirements that grantees will make a genuine effort to include those organizations during State planning meetings. The Department expects grantees to work with any and as many organizations as will help achieve the purpose of the program. The Department emphasizes that the grantees do not need explicit permission in the regulations to work with these organizations. Finally, at the Federal level, the Department will continue to coordinate with the Administration on Aging on State planning and other major policy concerns under the MOU that exists between the two Federal agencies.

What is the four-year strategy? (§ 641.302)

This section outlines the requirements for the four-year strategy. We received many comments on this section, largely in opposition to the various requirements. Two comments were of a more general nature.

One commenter was not in favor of the four-year strategy because he felt that "[p]lanning beyond funding periods exceed[ed] the parameters of the grantee" particularly in light of the requirements to resubmit the plans for modification. As discussed below, the State grantee is responsible for the higher-level oversight of activities in the State required by § 503 of the 2006 OAA. As a practical matter, however, a strategy is the pre-planning for what the program will accomplish over a period of time based on a forecast of events and not a mere short-term snapshot of activities or actual workload action items. The reality is that the State program operators provide continuity for the program, while other organizations may be transient. Therefore, the State grantee is in the best position to develop a thoughtful long-term plan for how activities will be provided statewide.

The other general commenter stated that, unlike their WIA program, they do not have an economist or the funds to hire an economist to provide the information that is required for a four-year strategy. Therefore, this commenter argues that the "[i]nformation submitted by the State SCSEP [grantees] are assumptions and not factual."

The Department appreciates the desire to be as precise as possible, but it does not believe that an economist is needed to develop the four-year strategy for this program. It is true that it is important to have certain data, such as information on the growth of the eligible population; however, much of this information can already be found on-line from the Bureau of Labor Statistics or other resources, such as from the State workforce agency, which manages SCSEP in a growing number of States. One of the requirements of the four-year strategy is to describe the planned actions to coordinate with other programs, including WIA. The Department suggests that State grantees that are not workforce agencies coordinate with their workforce agencies first to find out what information is already available. Other information requirements are grantee-dependent, such as equitable distribution, which requires the type of collaboration with the national grantees discussed in §§ 641.300 and 641.365.

Several commenters suggested that the State Plan requirements go beyond what Congress intended in § 503 of the 2006 OAA, and found many of the requirements duplicative of other Department requirements and policies. As an example, these commenters cited § 641.302(f) because a "performance system and sanctions system is already

in place." These commenters also noted that the regulations at § 641.302(a)(3), (c), and (d) overlapped with certain grant application requirements.

At the outset, the Department would like to point out that the State Plan is "statewide." That is to say, it is designed to cover all program activities that will occur in the State, both those operated by the State and those operated by national grantees. It is for that reason that the State grantees, which have this oversight responsibility, are required to seek the advice and consultation of other organizations in the State, including the national grantees. To that extent, there are no other vehicles in the program that would provide this higher level of thoughtful planning for the betterment of program services in the State. As previously noted, a strategy is the pre-planning for what the program will accomplish over a period of time based on a forecast of events. The main reason for a State Plan is the recognition that the State grantees are in the best position to forge relationships that cross programs, communities, and organization silos. The best way for any State to provide services to its citizens is by working with all of the relevant partners to lead the State in a direction that will produce positive outcomes overall. Such coordination requires strategic planning. Therefore, a State's individual grant application, even if duplicative to some extent, represents the more immediate actions the State plans to take, which is only one small part of the overall strategy for providing services in the State.

We received a few comments on § 641.302(a) on equitable distribution and the requirement to address priority individuals, comments on § 641.302(f) on continuous increase in performance, and one comment on § 641.302(g) on coordination with WIA. With regard to § 641.302(a)(1), one commenter argued that, given the limited ability of the State to alter positions between the national grantees and the State, creating "a long range strategy beyond the scope of the Older Americans Act * * * reauthorization increases paper work without measurable benefits to program participants." Another commenter mentioned that this paragraph "exclude[d] any mention of national grantees and the key role they play in the distribution process." This commenter requested that the Department rewrite the section to say: "Moves positions from over-served to under-served locations within the State by working collaboratively with national grantees through a participatory process."

In response to the first commenter, we disagree that a long range strategy increases paperwork without measurable benefit to program participants because of the limited ability of the State to alter positions. The four-year State Plan guides the annual adjustments that occur with the annual Equitable Distribution report, which itself insures positions are moved from over-served to under-served locations. This process helps ensure that positions are distributed in the most appropriate and least disruptive manner to participants and also to grantees. The 4-year plan outlines the principles for determining the need for moving positions and when "swaps" will occur. As to the point about the State's limited ability to alter positions, the language in § 641.365(f) gives the State the ability to influence the movement of positions. ("All grantees are required to coordinate any proposed changes in position distribution with the other grantees in the State, including the State project director, before submitting the proposed changes to the Department for approval. The request for the Department's approval must include the comments of the State project director, which the Department will consider in making its decision.") The Department intends to give significant weight to the State project director's comments in deciding whether to approve any proposed changes in position distribution.

As to the second commenter, their concern about the exclusion of any mention of national grantees is addressed in §§ 641.360 and 641.365 on equitable distribution. As provided in those sections, the State grantees are responsible for submitting an equitable distribution report at the beginning of each fiscal year and that the report is the result of consultations with all the grantees (including the national grantees) in the State to discuss the location of their authorized positions. In addition to showing where the positions are currently located, the equitable distribution report reflects an agreement among the grantees for how positions will gradually shift over time to either align with changes in the population either through movement of the positions to underserved areas by the grantees, or through "swaps." Those consultations by their nature already require grantees to do some forecasting about where positions should be located. Therefore, the four-year strategy is consistent with the goals and current practices for equitable distribution. When these provisions are read together, it is clear that the Department expects the national grantees to have a significant role in the equitable distribution process. Therefore, particularly since § 641.302(a)(1) specifically refers to § 641.365, the Department does not believe the regulation provision needs to be revised as suggested.

We received comments about § 641.302(f) of the proposed rule. One commenter stated that because the Department sets the minimum levels of performance each year, the States have minimal input in determining the performance levels and are not consulted when they are established. Another commenter found that the regulation provision, as written, implied that State grantees were responsible for performance of the national grantees. This commenter suggested that the Department amend the provision to read: "The State strategy, including input from national grantees regarding their own performance strategies, for continuous increase in the level of performance for entry into unsubsidized employment, and to achieve at a minimum, the levels * * *."

In the Department's opinion, these commenters misunderstood the purpose of that provision and the role of the State grantee in shepherding the State Plan process. As noted in the preamble to the proposed rule, the four-year strategy is a long-term strategy for increasing the level of performance in the State. We further stated in the NPRM preamble that "[a]ll grantees should strive to continuously improve their performance levels to assist enrollees in becoming self-sufficient, make available opportunities for other individuals to enroll in SCSEP, and better fulfill the objectives of the program." Therefore, the regulation does not make the State grantees responsible for ensuring that every national grantee that operates in the State meet its performance goal; rather, the State grantees are responsible for planning a strategy in collaboration with the national grantees to provide better services to participants overall, which will lead to higher performance for the State as a whole. We believe the rule, which requires in this section and § 641.315 that the State Plan must be developed in consultation with, among others, the national grantees in the State, is clear on these purposes and does not need to be amended.

Some commenters took issue with § 641.302(g) of the proposed rule. A few commenters stated that the programs under WIA "seem to focus on the younger generation" and full-time employment opportunities, which makes it difficult to set employment expectations for the older workers in

collaboration with WIA projects. Other commenters did not have an issue with the language but echoed these sentiments. These commenters wanted to know what the Department was doing to encourage similar collaborative efforts with the WIA programs, however, rather than leaving the onus on SCSEP to initiate partnering efforts.

We believe these commenters are reading the provision too narrowly. The point of the coordination requirement is no different from the expectations and requirements established in subpart B of this final rule. The type and degree of coordination will vary depending on the geographic location. This provision requires the State grantees to develop a long-term strategic plan for how those activities will be coordinated over a period of time for the benefit of the program. The Department further notes that WIA grantees have a responsibility to coordinate with the SCSEP program as well, but these regulations are not intended to apply to WIA-funded recipients. For example, State Workforce Investment Boards are required to develop linkages among One-Stop Partner programs such as SCSEP in order to assure coordination and avoid duplication of activities. 20 CFR 661.205(b)(1). For a more in depth discussion on the coordination requirements, see the discussion of subpart B of this final rule.

Finally, one commenter argued that § 641.302(k) is "overly prescriptive" in requiring the State to provide a long-term strategy because it "presumes the necessity for every state to make long-term program design changes in order to improve services to participants and communities." The commenter argued that instead, the State "should have the latitude to plan strategically, within the framework of the OAA, for what works best * * *." There is nothing in § 641.302(k) that prevents a State from planning strategically for what works best. Indeed, that is precisely what this provision assumes that the States will do. This provision does not require change for change's sake, rather, it requires that a State take a hard look at the SCSEP in the State, determine whether changes in the program will improve it and develop a plan to move toward those changes. Therefore, we disagree that § 641.302(k) is overly prescriptive, because as explained above, we believe that long-term, 4-year planning will improve services overall in the State.

May the Governor, or the highest government official, delegate responsibility for developing and submitting the State Plan? (§ 641.310)

Although we did not receive any comments on this section, we made technical amendments to this section by breaking it into paragraphs to make it easier to read.

Who participates in developing the State Plan? (§ 641.315)

This section describes the required participants to the State planning process. We received a few comments on this section.

One commenter stated that the requirement to seek the advice and recommendation of representatives of the various organizations involved too many people, and that it "would take an entire year just to coordinate those efforts." This commenter requested that the Department limit the number of organizations required to provide input to the development of the State Plan.

This part of the proposed rule did not change from the 2004 regulations. In addition, the list of organizations and individuals is consistent with the § 503(a)(2) of the 2006 OAA. The Department commented on this issue in the 2004 regulations. At that time the Department stated: "[Although] obtaining information on coordination may be a bit more complicated whe[n] there are several national grantees in a State, we believe that if the Governor has set up a good consultation process, obtaining the information should not be difficult." 69 FR 19014, 19022, Apr. 9, 2004.

Other commenters found this section to be inadequate as written because it does not address coordination requirements with aging programs. Specifically, one commenter noted that the SCSEP regulation should "enforce and reflect section 503(b) of the 2006 OAA, requiring coordination of SCSEP with other programs under the Older Americans Act, such as state units and area agencies on aging, and with other Federal programs such as Foster Grandparents, Senior Companions, and Vocational Rehabilitation." We did not make any changes to these sections because the regulation lists aging organizations in paragraphs (1), (4), (5) and (7) and thus clearly requires coordination with aging organizations.

Must all national grantees operating within a State participate in a State planning process? (§ 641.320)

This provision explains that all national grantees are required to participate in the State planning process with the exception of grantees serving older American Indians or Pacific Island and Asian Americans. One commenter disagreed with this provision and stated that these entities should not be exempt from participation. As noted in the regulation text at paragraph (b), however, that exclusion is mandated by Congress at § 503(a)(8) of the 2006 OAA. That being said, the Department agrees that it would be helpful for these organizations to participate in the development of the State Plan, which is designed to improve services, and we believe they have done so in the past. Therefore, as noted in the regulation provision, the Department will continue to encourage these national grantees to participate in the State Plan process.

How should the State Plan reflect community service needs? (§ 641.330)

We received one comment on this section; however, because the substance of the comment was related to a lack of resources, it will be addressed in the Administrative section of the preamble under Section D, Unfunded Mandates.

How should the Governor, or the highest government official, address the coordination of SCSEP services with activities funded under title I of WIA? (§ 641.335)

We received several comments on this section. These commenters found this section inadequate as drafted to address coordination requirements with aging programs but failed to provide any specific regulatory suggestions other than to draft more regulations. The Department did not make any changes to these sections because, as mentioned in the discussion of § 641.315, the requirements to coordinate with aging groups are clear.

How often must the Governor, or the highest government official, update the State Plan? (§ 641.340)

This section discusses the situations when the State is required or encouraged to update the State Plan. We received one comment on this section. This commenter stated that requiring updates more frequently than every two years as specified by the 2006 OAA, would convert a long range strategy into an annual plan, which is the current requirement. Although updates are not required more frequently than every two years, they are encouraged and should be done when circumstances warrant, as noted in § 641.345. The State Plan process is not an exercise that should be done as an item on a "to do" list. Rather, it is a thoughtful instrument that is designed to lead the State forward to achieve positive outcomes. In order for

any plan to be effective, it must align with current circumstances. Over the course of two or four years, it is reasonable to think that there could be some major shifts in policy, local or national economy, employers, performance, or community social service organizations that may alter the State's direction described in the State Plan. Therefore, without monitoring and adjusting the State Plan, it would be easy for the State Plan to become obsolete. Therefore, the Department did not make any changes based on this comment. However, as a technical amendment, we did divide the section into two paragraphs to make it easier to read.

What are the requirements for modifying the State Plan? (§ 641.345)

We received several comments on this section. One commenter stated that modifying the State Plan according to § 641.345(b)(3) would require grantees to modify the State Plan every year, which is contrary to the four-year strategic planning document. This commenter stated that almost every State and national grantee failed to meet at least one goal, and because the Department requires grantees to submit a performance improvement plan each year when one or more goal is not met, that effectively results in annual modifications.

We appreciate this comment and upon further reflection have decided to delete this provision from the final rule. Although the assertions that most grantees fail to meet at least one goal each year and that they are required to submit a performance improvement plan each year is inaccurate, the Department does agree that the requirement is unnecessary for continuous improvement. As a consequence, proposed § 641.345(b)(3) has been deleted and § 641.345(b)(4) will be renumbered as § 641.345(b)(3).

Two other commenters reported contradictions: One found that paragraphs (c) and (d) contradicted each other and the other found that paragraph (d) contradicted OAA § 503(a)(3). We do not find a contradiction in either case.

Paragraph (c) requires the modified State Plan to be published for public comment, while paragraph (d) allows the grantees to make modifications to the plan without seeking the advice and recommendation of those entities and individuals listed in § 641.315. Paragraph (d) addresses the development of the modification while paragraph (c) addresses the post-development, pre-submission phase of the planning process. However, it appears that some State grantees have used the public comment period as the main mechanism for seeking the advice and recommendation of those organizations and individuals, which is not the intent of the statute. Section 503(a)(2) of the 2006 OAA requires State grantees to seek the advice and recommendations of those organizations and individuals while developing the plan. The public comment period occurs after the State Plan is developed. Although it is a time consuming process, as we have stated elsewhere in this preamble, the State Plan process is not an item on a "to do" list. The State Plan process requires the grantee to identify and assess the resources available in the State, to engage the key members of organizations providing those resources in the planning process, and to provide a roadmap for how the State will reach overall projected outcomes. Therefore, it is a critical document for helping the State provide continuously improving services to as many eligible individuals possible in that State. Thus, if the plan development or modification processes are being run correctly, there is no contradiction in the provisions on consultation and public comment.

The second commenter further stated that paragraph (d) negates the role of the national grantees in the modification process. This commenter recommended that the Department strike this provision and replace it with a provision that reads: "the Governor, or the highest [S]tate official, must seek advice and recommendations from each grantee operating a SCSEP within the State."

The Department agrees with this comment and has modified the language to require the Governor or the highest State official to consult with the national grantees. In addition, given the commenter's rationale, the Department also considered whether this provision should be revised to require the full consultation of those entities listed at § 641.315 as well. The purpose of the State Plan is to draft a plan that will improve services across the State and this provision relates to major changes that will impact services to participants statewide, which suggests the importance of full consultation even when modifying the plan. On the other hand, we recognize that the State may need some flexibility about which organizations it seeks advice from during the modification planning process because the need for advice from particular organizations may vary, depending on the event that gave rise to the need for a modification. Therefore, while the Department strongly encourages State grantees to seek the advice and recommendation of each entity listed in § 641.315 when or if modifying the State Plan becomes necessary, we have decided not to require it except for the national grantees in the state.

How does the State Plan relate to the equitable distribution report? (§ 641.360)

This section describes the connection between the State Plan and the equitable distribution report. The Department made one substantive change to this section. The Department changed "Census data" to "Census or other reliable data" to be consistent with the changes made to the definition of "Equitable Distribution Report" in § 641.140.

A commenter stated that the State Plan should address competition and the authorized positions that could change. That commenter further argued that the Department should require a plan to involve State grantees in the finalization of the authorized positions to avoid disruptions, or the ability to make recommendations to better serve areas proportionately.

We agree with these concerns and it is for that reason that the 4-year strategy and the meetings on equitable distribution are so vitally important to the program, as discussed in other sections of this final rule. Further, § 641.480 addresses the commenter's other concern that States should have a role in determining where positions are located during a competitive process. Since the commenter's concerns are addressed in that provision, we did make any changes to this section.

How must the equitable distribution provisions be reconciled with the provision that disruptions to current participants should be avoided? (§ 641.365)

This section describes the Department's policy on the movement of positions for equitable distribution in the context of minimizing disruptions to participants. One commenter supported the proposed regulation because it included language that emphasized the coordination of all grantees within the State. Another commenter requested that the Department require national grantees to report to the State when they move positions within the State, and wanted us to allow the States to authorize these changes. This commenter felt that this change would ensure that "the maximum number of eligible individuals will have an opportunity to participate in the program and will allow States to demonstrate that they are making good

faith efforts to correct slot inequities and are on track to meet their state plan goals."

We appreciate the comment in support of this proposed section as well as the sentiments of the commenter, who would like to see more State authority over any position movement within the State. Section 641.365(d) requires that national grantees notify the State of any position transfers before the transfers may be made. Not only are national grantees required to participate in the equitable distribution and State Plan processes, but they are also required to notify the State before any positions are transferred within the State. § 641.365(f). However, to ensure that national grantees coordinate with the State grantee before submitting a request to the Department to move positions, we are revising this section to require that the national grantee's request to DOL include a recommendation from the State grantee in which the affected positions are located and to indicate that the Department will consider those comments in reviewing the application. As a matter of practice, since the 2004 regulations, the Department has looked for the State's comments on any position relocation request from a national grantee and will continue to do so. This revision conforms the regulation to our established practice and ensures that the State's comment on the proposed transfer will be considered by the Department in the decision making process. Approval authority, however, will continue to remain with the Department consistent with the 2006 OAA.

The Department recognizes that it may have been difficult to follow this provision and, therefore, has divided the section into subparagraphs to make it easier to read. The requirements discussed above are now reflected in new §§ 641.365(a)–(f). The Department also made a few technical changes, which included changing "Federal Project Officer" to "the Department" to be more consistent with the statutory language; and editing "Census data" to read "Census or other reliable data" to be consistent with the changes to the definition of "Equitable Distribution Report" in § 641.140.

*Subpart D—Grant Application and Responsibility Review Requirements for State and National SCSEP Grants*

We received several comments on this subpart. Those comments were related to State competition, the use of past performance for selecting grantees, State involvement in the national competition, and the timing of a national competition.

What entities are eligible to apply to the Department for funds to administer SCSEP projects? (§ 641.400)

This section describes the entities that are eligible to apply for SCSEP grants. We received one comment on this proposed section on the funding to the State for conducting a competition. The commenter stated that the regulations do not address the funding provided to the State to conduct a competition. This commenter also stated that the Department "appear[ed] to define the State in two distinctly different definitions."

The Department does not provide additional funding for the States to compete their grant program. States that compete their programs will have plenty of advance notice that they will have to compete because it takes a failure to meet performance standards for three consecutive years to trigger the competition requirement. States therefore will have time to plan for the possibility of competition and to set money aside to fund it. The Department suggests that grantees work with their Federal Project Officer to determine a sufficient amount for administrative management of a competitive process for State grantees that are required or desire to compete their programs.

In addition, we have amended § 641.420(d) to cross reference § 641.460, which provides that relevant past participation will be used as scoring criteria, as well as a factor for determining an applicant's eligibility.

How will the Department examine the responsibility of eligible entities? (§ 641.450)

We have amended this section to state that in reviewing records, the Department may consider "all relevant" information including the organization's history in "managing" other grants. These changes merely reflect the Department's standard practice in reviewing competitive grants.

What factors will the Department consider in selecting national grantees? (§ 641.460)

This section describes the factors the Department will consider when it competes the national grant funds. We received several comments on this proposed section. One commenter stated that § 641.460 appeared to be at odds with § 514(c)(4) of the 2006 OAA because the statutory language was intended "to prevent selection bias where past performance was meritorious." The commenter compared the OAA to the NPRM language, in which the Department "propose[d] to drop the reference to past performance among the rating criteria [it] will consider." That same commenter went on to request that the Department propose more comprehensive regulations to address the interrelated issues of past performance and the manner and timing of the competition for SCSEP grants. The commenter based this argument on his organization's experience with prior competitions and the 2006 Solicitation for Grant Applications. See 71 FR 10798, Mar. 2, 2006. This commenter stated that his organization believed the statute only provided the Department the authority to re-allocate positions from grantees that failed to meet national performance goals. Another commenter stated that written comments should be sought on this provision from the Governor or designee of the State.

We do not agree that the statute only provides the Department the authority to reallocate positions from grantees that failed to meet national performance goals. While OAA § 513(d)(2)(B)(iii) bars grantees which have failed to meet their performance goals for four consecutive years from participating in the next competition, we interpret OAA § 514(a)(1) to require an open competition; a competition in which all funds and slots available to national grantees are competed. As discussed in the preamble to the proposed rule, at 73 FR 47770, 47780, Aug. 14, 2008, the proposed change merely took past performance out of the rating criteria in the Solicitation for Grant Applications requirements because it is included already as an eligibility criterion under § 514(c)(4), as the commenters point out. However, upon further consideration, we believe that using past performance merely as an eligibility criterion is inadequate to give effect to the Congressional requirement. Grantees that fail to meet their aggregate level of performance for four consecutive years are precluded by statute from participating in the competition. This would still allow a grantee with totally unacceptable performance in the last three years to compete. Therefore, we have concluded that consideration of all relevant past performance should be part of the scoring mechanism and of the awarding criteria. Considering all relevant experience, and not just SCSEP experience, will protect against selection bias. What constitutes relevant experience and the specific weight given to past performance will be addressed in the Solicitation for Grant Applications published in the **Federal**

**Register** or other appropriate instrument.

Finally, written comments from the Governor or highest elected official are provided for under § 641.480, which outlines the process by which the Governor or highest elected official may participate in the national competition process.

When will the Department compete SCSEP grant awards? (§ 641.490)

This section outlines the circumstances that govern the Department's decision to compete the national grant funds. We received one comment on this section.

The commenter expressed concern that having an additional grant year for some grantees but not for all would create a complicated competitive grant cycle. The commenter also thought that such a process would remove the opportunity for new and incumbent organizations to compete with all the national organizations and "would only serve to exacerbate the difficulties of SCSEP participant transition [from] one provider to another." The commenter recommended that the Department make a decision to hold a national SCSEP competition "using the national baseline for all organizations."

The Department takes this comment to mean that a competition should be for all available national grant positions and that the extension of the grants for an additional year as permitted by § 514(a)(2) of the 2006 OAA, should be determined by how well all grantees are performing at the end of the four-year period referenced in § 514(a)(1).

Although we appreciate the commenter's concerns, we decline to address this issue in a regulation, but will take it under advisement. The 2006 OAA requires us to compete the program every four years but permits us to grant a one-year extension to any national grantee that has met its performance goals for each year of the four-year grant period. Although we cannot extend the grants of grantees that have failed to meet their expected levels of performance, the extension is otherwise discretionary. It is discretionary in the sense that we could decide to compete all of the grants after the fourth year, extend all of the grants if all the national grantees have met their expected levels of performance, or compete the funds of only those grantees that have failed to meet their expected levels of performance. We will decide how to structure the future competition after reviewing program performance toward the end of the four-year period, and will make the decision based on the best interests of the participants and our policy of avoiding disruptions to the extent possible.

*Subpart E—Services to Participants*

Who is eligible to participate in the SCSEP? (§ 641.500)

This section describes the eligible population for participation in the program. We received one comment on this section. That commenter recommended the Department lower the age limit of participants to 50 with continued priority to those who meet the most-in-need characteristics. We did not make this change because the requirement to serve individuals age who are at least 55 years of age is statutory. OAA § 502(a)(1). For clarity, the Department has added the phrase "at the option of the applicant" to the sentence about treating a person with a disability as a family of one at the end of this section. This change is consistent with the intent of the statutory provision, and conforms to the Department's long-standing interpretation of the provision.

How is applicant income computed? (§ 641.507)

This section describes the procedures grantees must follow when making income determinations for enrolling participants. Most of these requirements were previously in administrative guidance and were adopted with the 2006 OAA.

We received one comment on this section related to using either a 12-month period of income or a 6-month period of annualized income to determine participant eligibility. This commenter stated that the regulation appeared to require the grantee to use one or the other and requested that the Department allow grantees the flexibility to use whichever method was most favorable to the participant on a case-by-case basis.

The Department previously stated that grantees should use which method of calculating income is most favorable to the participant and for that reason, the preamble to the proposed rule acknowledged that we were adopting the procedures that were published in TEGL No. 12–06 (Dec. 28, 2006), which went into effect on January 1, 2007. See 73 FR 47770, 47781, Aug. 14, 2008. That section of the preamble specifically allowed grantees to calculate income based on either 12 months or 6 months annualized. Further, in that section, the Department encouraged grantees to "choose the computation method that is most favorable to each participant, on a case-by-case basis, for the broadest possible inclusion of the eligible applicants." 73 FR at 47781. To reinforce this interpretation, the Department is changing the language of the regulation to remove the word "encourages" and to track the language of TEGL 12–06, which requires the grantee to use whichever period is more favorable to the participant.

What types of income are included and excluded for participant eligibility determinations? (§ 641.510)

This section generally describes what does and does not constitute income for purposes of determining participant eligibility. We received a few comments on this section expressing agreement with the provision. One of the commenters further stated that the regulation should specifically reference other income exclusions, such as income from training programs, SSI, Veterans benefits, and any other publicly subsidized program where the goal is self-sufficiency.

The Department declines to make the suggested change to this provision for the reasons stated in the preamble to the proposed rule at 73 FR 47781–47782, Aug. 14, 2008. The Department encourages grantees to read TEGL No. 12–06 (Dec. 28, 2007) for the most recent information on excludable income. The Department also notes that that TEGL includes the exclusions referenced by this commenter and is located on the SCSEP Web site at *http://www.doleta.gov/seniors* under Grantee Information, Technical Assistance. The income exclusions included in the regulation were only those exclusions required in the 2006 OAA. The issue of includable and excludable income is one that requires some measure of flexibility for good program management. It is for that reason that the details of the income requirements have always been in an administrative guidance, as authorized by § 641.510(c).

May grantees and sub-recipients enroll otherwise eligible job ready individuals and place them directly into unsubsidized employment? (§ 641.512)

This section prohibits grantees from enrolling job ready individuals, who can be directly placed into unsubsidized employment, as SCSEP participants. One commenter suggested the Department add a definition or criteria for "job ready," which would help the providers determine the type of individual that is not eligible for SCSEP services. The Department agrees and has included a definition of "job ready" in § 641.140. As noted in that section of the preamble, in general terms, it is an individual who requires no more than

just job club or job search assistance to be employed. Therefore, the definition of "job ready," as now defined at § 641.140, refers to an individual who does not require further education or training to perform work that is available in his or her labor market. For further clarity, we have added the word "job-ready" to the text of § 641.512 to describe those individuals "who can be directly placed into unsubsidized employment" and thus cannot be enrolled in SCSEP but should be directly referred to the One-Stop system.

How must grantees and sub-recipients recruit and select eligible individuals for participation in the SCSEP? (§ 641.515)

This section describes the criteria grantees must use when determining the eligibility of an individual to receive program services. We received a few comments on this section specifically related to proposed paragraph (b), on using the One-Stop delivery system for recruiting participants.

One commenter acknowledged the essential relationship that must exist between the One-Stop delivery system and the SCSEP. However, that commenter further stated that transferring the responsibility of recruitment and selection of all eligible participants to the One-Stop appears duplicative and eliminates the role of SCSEP in participant selection. Several other commenters stated that the provision is inconsistent with § 502(b)(1)(H). Those commenters reasoned that the statutory language did not require grantees to use the One-Stop delivery system to recruit or select eligible individuals because of the use of "will" rather than "must." They wanted the regulation to reflect that there are other means to recruit and select participants.

We believe these commenters misinterpreted that section of the statute and the proposed rule. In the context of OAA § 502(b), the Department interprets the use of the word "will," to be synonymous with the words "shall," or "must." Section 502(b)(1) requires the Secretary not to fund programs unless she determines that the programs "will" do all of the things listed in paragraphs (A)–(R). In that context, "will" means that the 18 activities listed in § 502(b)(1) must be done for a program to be funded. That being said, however, we do not believe the statute or the regulation implies a requirement for an exclusive use of the One-Stop delivery system as the means to recruit eligible participants, as required by § 641.515(b). Rather, it is one method that grantees must use to recruit eligible participants. Moreover, this requirement in the regulation is not new to SCSEP; it appeared in the 2004 regulations at 20 CFR 641.515(b). Therefore, the Department's interpretation is consistent with the 2006 OAA and the 2004 regulations and accompanying preamble discussion at 69 FR 19014, at 19029.

What services must grantees and sub-recipients provide to participants? (§ 641.535)

This section describes the types of services that are required, permitted, and prohibited in the program. We received a few comments on this section. One commenter requested language in proposed paragraph (a)(1)(ii), to ensure grantees have the flexibility to determine when a participant needed to be reassessed. The Department does not agree that additional language is necessary. The regulation text, as written, as well as the preamble discussion in the proposed rule, already allows for such flexibility so long as participants are assessed upon entry, and for a total of at least two times in a 12-month period.

In addition, two commenters stated that proposed § 641.535(a)(9), as well as §§ 641.540(f) and 641.565(a), appeared to require projects to pay participants for time spent in such training and orientation. In particular, one commenter stated that orientation activities can occur as part of the initial assessment process which may be before a community service assignment. The commenter notes that under the proposed rule, such a participant would not be required to receive wages, which appeared inconsistent with the proposed § 641.540(h), and therefore, disagreed with the proposed change.

We do not read this provision as narrowly as this commenter. Paragraph (a) of § 641.535 specifically states: "When individuals are selected for participation in the SCSEP" the grantee is responsible for the activities listed at paragraphs (1) through (11) of that section. Included on that list is paragraph (9) "Providing participants with wages and benefits for time spent in the community service employment assignment, orientation, and training." The Department believes that the operative words in this paragraph are "selected for participation." The point of the regulation is that when a person is formally enrolled in the program the enrollee must receive paid services. Therefore, it is possible, as the commenter described, that an individual may attend a general overview of the program or participate in a general assessment for eligibility before the individual is enrolled in the program. In that case, the individual, who is not yet a SCSEP participant, is not required to be paid SCSEP wages for attending that overview or assessment. However, once a participant is enrolled in the program, which means the individual has been found eligible, has been given a community service assignment, and is receiving a service, paragraph (a)(9) requires that the grantee must pay wages for time spent in orientation, training, assessment, or in receiving any other service. This requirement applies even if the participant has yet to start his or her assigned community service assignment at the host agency.

Further, as one commenter noted, participants may continue to receive self-development training outside of their participation in the SCSEP as provided in § 641.540(h). However, the regulation does not require grantees to pay wages when the participants are participating in training that they have selected and that is not identified in their IEP.

Another commenter stated that proposed paragraph (b) allows the Department to increase programmatic costs without funding and that, "utilizing the administrative guidelines appears to circumvent the rule making process." The Department disagrees with this commenter for a number of reasons. Proposed paragraph (b) states that "[t]he Department may issue administrative guidance that clarifies the requirements of paragraph (a)." The Department is fully compliant with the notice and comment procedures for rulemaking under the Administrative Procedure Act (5 U.S.C. 551 *et seq.*). The administrative guidance discussed in paragraph (b) will merely clarify the requirements of paragraph (a) and is not intended to create new rules or regulations. Such guidance would provide further explanation, as necessary, of the meaning and parameters of the various activities required by the regulation and functions as a type of technical assistance to grantees that sometime struggle to understand how they are expected to satisfy a regulation. The portion of the comment that is related to increasing programmatic costs without funding is addressed in the Administrative section of this preamble under Section D, Unfunded Mandates. However we also note that rather than increase programmatic costs, we anticipate that such guidance will actually decrease programmatic costs.

We have also changed the language in paragraph (a)(3) by adding a new subparagraph (iii) to clarify that the

requirement that an appropriate unsubsidized employment goal be part of the IEP for all participants applies only for the first IEP. Thereafter, if it becomes apparent that unsubsidized employment is not feasible for the participant, the IEP should be adjusted to reflect other appropriate goals for increased self-sufficiency, including the transition to other services, as required by § 641.570(a)(2). Since it is possible that some SCSEP participants will not achieve unsubsidized employment during or immediately following their enrollment in SCSEP, grantees must have the flexibility to design an IEP that will lead to maximum self-sufficiency for the participant and an enhanced quality of life after participation in SCSEP has ended.

Finally, we have removed the citation in paragraph (a)(1) to the 2006 OAA, since OAA § 502 does not specifically require a grantee or sub-recipient to provide orientation to the SCSEP. However, it is the Department's position that requiring the provision of orientation is consistent with the purpose of title V. Orientation adds great value to the participants' experience. Orientation is the ideal forum in which to provide participants with important information on the program; to address expectations and desired outcomes; and explain participant's rights and obligations, grievance procedures, safety issues, and any other information deemed necessary to ensure a positive experience.

What types of training may grantees and sub-recipients provide to SCSEP participants in addition to the training received at the community service assignment? (§ 641.540)

The purpose of this section is to describe the types and the timing of training services grantees may provide to participants. We received several comments on this section about on-line training and the Department's interpretation of training.

One commenter requested that the Department revise paragraph (b) to be more consistent with the 2006 OAA. That commenter interpreted § 502(c)(6)(A)(ii) of the 2006 OAA to allow training before or after an unsubsidized placement.

We understand how a reader could interpret the provision to allow training after a participant is placed in unsubsidized employment because that provision may not be clear; however, we do not agree with that interpretation. The relevant provision states: "participant training * * * which may be provided prior to or subsequent to placement and which may be provided on the job, in a classroom setting, or pursuant to other appropriate arrangements." We interpret the term "placement" here to mean a placement in a community service assignment. We base our interpretation on the latter part of that provision, which indicates that the training may be provided on the job, in a classroom, or through other appropriate arrangements. In the Department's opinion, the examples listed go hand-in-hand with the types of training a grantee would provide while a participant is in a community service assignment, given that the community service assignment is an on-the-job type of training. The commenter's reading is not only inconsistent with the SCSEP's policy on services to exited participants, but is also inconsistent with the intent of the program to help most-in-need, older individuals find employment.

Given the program's limited resources, it is important that grantees use grant funds to help current participants achieve self-sufficiency. Grantees have a responsibility to provide training for the participants that will make them job ready. In appropriate cases, the grantees have an obligation to provide or assist participants to obtain supportive services to make sure the participant keeps that job, as the commenter notes. We do not, however, define supportive services to include training for a participant once he or she has exited the program. Although there is government support for incumbent worker training in WIA and TAA, SCSEP's funds cannot be used to provide training after unsubsidized employment has been attained. SCSEP's goal is to help participants become job-ready through community service and approved training; therefore, training may occur during enrollment but not after completion of the program. We have revised this provision to clarify that training may be provided "before or during" a community service assignment.

Other comments were about on-line training. One commenter expressed support for the approval to use on-line instruction for training as discussed in the preamble to the proposed rule at 73 FR 47770, 47784, Aug. 14, 2008. Another commenter questioned how the Department expected grantees to calculate the participant's time toward on-line training for wage purposes and who would validate the time spent in this activity.

The Department does not expect on-line training to be handled any differently than any other training. On-line training is not new to SCSEP; it is not required, but is one of several options for how training may be provided. It has long been recognized as an approved training activity, although not expressly mentioned in the regulations. Grantees that have questions about how to implement on-line training should contact their Federal Project Officer for technical assistance.

Another commenter requested that the Department add the language "and any other costs deemed necessary" to the end of § 641.540(e). We decline to make this suggested change. The language follows the statutory language at 502(c)(6)(A)(ii) of the 2006 OAA and is sufficiently inclusive of all costs the Department considers part of training. Any allowable cost associated with training that is not included in § 641.540(e) will fall within the wages and other benefits listed in § 502(c)(6)(A)(i) of the 2006 OAA and participant supportive services costs which are addressed in § 641.540(g). Making the suggested change would likely lead to unnecessary confusion over whether the "other costs" associated with training fall within § 641.540(e) or § 641.540(g). Such confusion would be especially problematic because the statute excludes the cost of activities listed in § 641.540(e) from its general rule that 75% of costs go to wages, while the statute *includes* costs listed in § 641.540(g) within the "75% of grant funds go to wages" rule. OAA § 502(c)(6)(B)(i).

We make one technical change in paragraph (a) to clarify that the grantee "may" pay for appropriate skill training, in addition to that provided through the community service assignment, "that is realistic and consistent with the participant's IEP, that makes the most effective use of the participant's skills and talents, and that prepares them for unsubsidized employment." The prior mandatory language, "must," was meant to apply to the criteria that have to be met before the grantee may pay for such skill training. It was not meant to require the grantee to pay for such training for all participants. Grantees are encouraged to arrange or provide for such training when appropriate, but given the limited funds available for this purpose, they are not required to provide or pay for training when it is not appropriate.

What supportive services may grantees and sub-recipients provide to participants? (§ 641.545)

This section describes the types of supportive services grantees may provide to participants. We received a few comments on this section about the

proposed rule language that limits supportive services to those services that support an employment goal. Those commenters asserted that there are times when a participant may need services in order to be able to participate in the SCSEP, and therefore, providing those services should not be tied specifically to an employment goal. One other commenter requested that the Department add "temporary shelter" to the list of supportive services.

The regulation as drafted is consistent with the historical practice of providing supportive services in the program and specifically refers to supportive services "that are necessary to enable an individual to successfully participate in a SCSEP project." The regulation's language is consistent with the comments about using supportive services to assist participants during their enrollment in the program. In the preamble discussion of 20 CFR 641.545 of the 2003 Notice of Proposed Rulemaking, the Department stated: "Grantees/subgrantees should seek to ensure that participants receive those supportive services necessary for them to participate in the program and to realize the goals set forth in their SCSEP IEPs." 68 FR 22520, 22529, Apr. 28, 2003. The Department's position was later restated in the 2004 Final Rule preamble for 20 CFR 641.545:

> To meet the needs of the seniors the SCSEP serves, grantees must make every effort to provide them the supportive services they need to be able to participate in their community service assignments. The Department recognizes that SCSEP grantees will not be able to provide all needed or desirable supportive services with grant funds * * *. But the Department expects grantees and subgrantees to make every reasonable effort to provide participants with the supportive services provided for in their IEPs. 69 FR 19014, 19032, Apr. 9, 2004.

We believe the commenters' concerns arise from the requirement in § 641.535(a)(6) for the supportive services to be consistent with the participant's IEP. Commenters seem to interpret that requirement to mean that grantees may not provide supportive services during a participant's community service assignment. The fact that the IEP, and particularly the initial IEP, is tied to an employment goal does not mean that the IEP is limited to only those services that advance the employment goal. The IEP may and should assess and consider all of the services the participant needs to successfully participate in SCSEP, and should address supportive services that may be required before assignment to community service, during assignment, and during the first 12 months of unsubsidized employment.

For all these reasons, we find no inconsistency between the rule and the way the commenters want to provide supportive services and thus have not changed the final rule.

On the issue of temporary shelter, we agree with the commenter. Accordingly, we are revising the regulatory text to be more inclusive by saying "housing, including temporary shelter."

We have also changed the language of paragraph (a) to reinforce the idea that grantees must assess participants' need for supportive services and must assist participants in meeting those needs and grantees may directly pay for or arrange for supportive services as necessary. This change reconciles § 641.545(a) with § 641.535(a)(2) and (a)(6), and clarifies that, while paying for supportive services directly is optional, grantees must assess participants' supportive services needs and must make every effort to help participants to meet the needs so identified.

What responsibilities do grantees and sub-recipients have to place participants in unsubsidized employment? (§ 641.550)

This provision identifies the steps that grantees must take to assist participants to obtain unsubsidized employment. We received two comments about the emphasis on unsubsidized placements. The first commenter found the proposed rule's increased emphasis on placement in unsubsidized employment in conflict with self-directed job searches which, when appropriate, should "be an acceptable alternative for promoting placement in unsubsidized employment."

The Department does not construe this change in emphasis to restrict the grantees from providing this type of assistance when it is appropriate. The grantees are still required to assess participants and to ensure they are following their IEP. If a grantee or sub-recipient determines that self-directed job searches are a reasonable method for seeking unsubsidized employment for certain participants, the grantee or sub-recipient may encourage or assist in such efforts in place of more intensive placement assistance, but they must still document it in the IEP and follow-up with the participant. In some cases, grantees may need to use a combination of methods to help participants locate and apply for unsubsidized employment. The regulation was not meant to prescribe how grantees may help participants find employment but rather to make it clear that they are expected to work with participants to help them find unsubsidized employment.

Another commenter disliked the changes from "reasonable" effort to "every reasonable effort" as it relates to a grantee's responsibility to place participants in unsubsidized employment. The commenter argued that a participant could claim that every effort was not provided to help him or her achieve unsubsidized placement. Thus, the commenter, argued, the participant could wait for the perfect unsubsidized placement and refuse the other opportunities. Therefore, the commenter concluded that "[r]easonable should be the standard."

We agree that the language of § 641.550 could be read as imposing an obligation on grantees to provide unsubsidized employment for all participants, even those for whom unsubsidized employment is not a goal in their IEP, and could be interpreted as overstating the extent of reasonable effort required. Moreover, helping participants find unsubsidized employment is not required or possible until participants become job-ready. Therefore, consistent with the change in the language to § 641.535(a)(3), we agree with the recommendation. We have eliminated the requirement to "make every reasonable effort" and section 641.550 now provides that the obligation to help participants achieve unsubsidized employment only applies to those participants who have unsubsidized employment as a goal.

What policies govern the provision of wages and benefits to participants? (§ 641.565)

This section provides the requirements for wages and benefits that participants may receive. This section was updated from the 2004 regulations to reflect new statutory provisions. The Department received several comments on this section, largely related to compensation for Federal holidays. One commenter, however, noted that the acronym "WIA" was missing before the word intensive services in proposed paragraph (a)(1)(ii). The Department appreciates this comment and made the change to the regulation so it is now consistent with the rule as we described it in the preamble to the proposed rule.

One commenter noted that the limitation in proposed paragraph (b)(ii)(A) that the results of a physical examination be provided only to the participant hindered the grantee's ability to meet the Department's data validation requirements for determining disability if they were unable to require the physical examination results. The

commenter misunderstands the data validation requirement. Grantees merely need to document that a physical was offered. That can easily be accomplished without having the results of the physical. (If the offer is declined, grantees must obtain a written waiver from the participant.)

Furthermore, grantees should not use the physical examination results to document disability for the most-in-need performance requirement. The certification of the attending physician or official documentation of a disability is sufficient. To the extent that a participant declines to provide that information, the grantee will not be able to take credit for it. However, participants have an incentive to provide that information because documentation is required if a participant claims family of one status for eligibility purposes. To avoid any confusion about the use of the results of the physical and to clarify that the physical itself is a fringe benefit meant solely for the benefit of the participant, we have deleted the last sentence of subparagraph (b)(1)(ii)(A), which stated that the participant could provide the grantee a copy of the physical examination results. There are circumstances under which a grantee may request documentation of a disability or may even require all participants assigned to a particular community service position to take a physical examination. For example, documentation is required for family of one status, as well as where a participant claims an accommodation. A physical also can be required of all participants who are assigned to community service positions that require certain physical capability. However, those circumstances are entirely unrelated to the physical examination that must be offered to the participant as a fringe benefit under the statute.

The remainder of the comments related to the requirement that grantees provide compensation for participants when the scheduled workday in the program falls on a Federal holiday for the host agency. Almost all of these commenters requested that the Department allow flexibility in the regulation text to allow participants to make up the time. One commenter specifically requested that the language in the regulation more closely track the language of the 2006 OAA, which provides for "employer" closure for Federal holidays. Another commenter stated that having the flexibility to allow participants to make up the hours posed concerns when program policies could vary from grantee to grantee. This commenter was concerned that in one instance, a program may pay the participant for the Federal holiday and in another, the program may require the participant to make up the hours. This commenter also raised a concern about adjusting the timesheets and the difficulties it would cause for validating community service hours. The commenter did not address how the adjustment of timesheets would be a problem. Other commenters approved of the flexibility described in the preamble of the NPRM that allows the participants to make up the time rather than pay them for a day off. They believe it helps to distinguish the participants from being considered employees of the host agency.

The Department appreciates these commenters' concerns, which reflect a desire to maintain the participants' status as "trainees" rather than "employees" at the host agency. Upon further reflection, we find that the NPRM's regulation text provision of only two categories of participant benefits (required and prohibited) failed to reflect the flexibility the Department intended to provide for Federal holiday leave and sick leave. For both of these benefits, as indicated in the preamble to the NPRM, "(t)he Department broadly interprets the word 'compensation' * * * to allow for a variety of practices * * * The intent of the Department here is to allow flexibility in administering the SCSEP * * *" Unlike the other benefits listed in the NPRM regulation text as "required," the NPRM preamble noted that Federal holiday and sick leave benefits need not be paid in cash but must be provided in some fashion. Accordingly we have amended the regulation to clearly indicate that Federal holiday leave and sick leave "may be paid or in the form of rescheduled work time."

These modifications and clarifications address the concern of perceived inequity mentioned by one commenter. It is not uncommon for programs to offer different services and benefits. We have written these regulations to permit each grantee to have the maximum available flexibility in the design of its benefit programs, as long as each grantee consistently applies the rules to all of its program participants as required in § 641.565(b)(1). We also do not see any issues with validating timesheets for program accuracy or data validation purposes. The timesheets are always based on the actual hours the participant spends in a community service assignment at the host agency. To the extent a participant makes up hours at the host agency, it will be reflected in the total number of hours the participant worked at the host agency in his or her assignment.

Finally, we interpret the word "employer" as meaning a "host agency" since that is the only context in which this provision would apply. Therefore, the Department has not made the change the commenter requested.

Is there a time limit for participation in the program? (§ 641.570)

The Department received a large number of comments about this section. The NPRM implemented the 48-month limitation on individual participation in the program as required by § 518(a)(3)(B) of the 2006 OAA. Paragraph (c) of this section addressed the average participation cap created by § 502(b)(1)(C) of the 2006 OAA. Paragraphs (d), (e), and (f) further implemented these limits on program participation.

The majority of comments on this section pertain to paragraph (b). The statute provides for increased periods of participation for individuals who meet one of the criteria listed in the statute. As explained in the NPRM, the Department proposed to implement the extension as a one-time, one-year extension to ensure that SCSEP participation is not indefinitely extended, thus preventing other eligible individuals from benefiting from the SCSEP, and to be generally consistent with the possible extension of the average participation cap which extends up to a maximum of only nine additional months.

Most commenters asserted that the limit on the extension of the individual participation limit to one-time and one-year "is both contrary to Congressional intent and counterproductive to assisting the most vulnerable older adults." The commenters noted that Congress did not place an absolute time limit on individual participation. The commenters also argued that limiting the potential extension in this way is unnecessary to reduce the number of long-term SCSEP participants because there are several other program features, such as the performance measurement system, that effectively achieve that goal. The commenters also contended that restricting the extension to one-year, one-time would result in involuntary terminations from the program for older adults who are benefiting from the SCSEP and may be unable to find any other meaningful employment and training assistance from other programs. One commenter requested that the Department delay the implementation of this provision in order to consult with other Federal and State agencies on alternative programs

and resources for terminated participants. A few comments, including those from participants, noted that the time limit could be more costly to the government in the long-run and would create a financial hardship on participants who are on the verge of obtaining employment. A few commenters agreed generally with time limits in the program but disagreed with applying it to all participants.

After considering these comments, the Department has decided not to impose the proposed one-time, one-year restriction on the increased period of individual participation. We agree that Congress could have included an absolute limit on SCSEP participation in the 2006 OAA, but did not do so. We also are sympathetic to the assertion that grantees are in the best position to manage their programs to satisfy the various aspects of the 2006 OAA and this final rule, some of which impose other limitations on participation. Therefore, we agree that grantees require the flexibility to determine the needs of individuals, which necessarily means that some individuals may be in the program longer provided they meet one of the waiver factors listed in § 641.570(b), and will continue to receive services consistent with their IEP. As noted in paragraph (e), the Department will issue administrative guidance that describes the process for grantees to request increased periods of individual participation. We expect that grantees will make their determinations for requesting extensions for individual participants who meet the eligibility factors in a fair and equitable manner and in accordance with applicable civil rights laws. This process developed in the administrative guidance will reflect this expectation.

Given that the average participation in the program is approximately two years and that there are other requirements designed to limit participation in the program, we agree that it is not necessary to retain this requirement. However, as some commenters pointed out, grantees are cautioned that they are nevertheless responsible for satisfying the average participation cap described in paragraph (c) of this section as well as the expected levels of performance for the core performance measures.

In addition, we received a number of comments on the 27 month cap in paragraph (c). One commenter requested that the Department edit this regulation provision to more accurately reflect the law as written. Thus, this commenter requested that we revise the rule to read: "each grantee must comply with an average participation cap for eligible individuals (in the aggregate) of 27 months." Other commenters requested that the grantees be consulted on the method used to determine the 27 month average participation cap. One commenter asked for clarification on whether the 27 month cap, like the 48 month time limit, was intended to be consecutive or not.

The Department does not agree that the language in the proposed rule paragraph (c) requires additional clarification. The Department opted to draft the language in this way to make it more reader-friendly. We do not believe there are any inconsistencies between the regulatory provision and the 2006 OAA, and therefore, did not make any changes to this section. Finally, the Department will work with grantees to implement the participation limits.

May a grantee or sub-recipient establish a limit on the amount of time its participants may spend at each host agency? (§ 641.575)

This section authorizes grantees to adopt a policy under which participants are rotated among community service assignments. We received several comments on this section. One commenter stated that moving participants around from host agency to host agency every 12 months has a negative impact on the program and considered it to be an arbitrary rule. This commenter further claimed that this provision did not consider the needs of the workers (participants). Other commenters echoed this concern in one way or another, mostly opposing the provision because they find it disruptive to the host agency when a participant leaves and then they are understaffed.

The Department appreciates these commenters' concerns; however, the rule does not require a grantee to adopt a rotation policy. Rather, it allows grantees to implement a rotation policy when the grantee believes it will make the program more effective and help program participants achieve economic self-sufficiency consistent with their IEP. This provision has been helpful to an increasing number of grantee organizations over the years, who find it difficult to persuade host agencies that they should not expect the SCSEP to augment their workforce. More importantly, grantee rotation policies have allowed participants to acquire more job skills, which increase their opportunities to find unsubsidized employment. However, we do agree that rotation of participants among host agencies may be disruptive and counter-productive if the participant is still effectively acquiring needed skills at his or her assignment. Therefore, we are revising the regulation to provide that no rotation policy will be approved that does not require an individualized determination that rotation is in the best interest of the participant and will further the acquisition of skills listed in the IEP.

Is there a limit on community service assignment hours? (§ 641.577)

We received a significant number of comments on this section. In the NPRM, the Department proposed a limit of 1,300 hours per year on participants' community service hours. The proposed limit is similar to a previous 1,300 hours per year limit on all participant paid hours.

Several commenters criticized the proposed 1,300 hour limit as "another example of an unnecessary restriction on a SCSEP grantee's capacity to meet the needs of individual participants and to respond to local conditions." Although commenters acknowledged that participation in SCSEP is part-time, they asserted that the proposed 1,300 hour limit "sets an arbitrary cap on participation" and "disregards the * * * particular needs of a community (such as responding to a natural disaster)." The commenters further asserted that although the 1,300 hours is still a good benchmark, the restriction limits their ability to address the backgrounds, life challenges and other circumstances that make providing services to each participant a unique experience. Still other commenters found that a majority of participants work less than 1,100 hours because their higher State minimum wage prevents them from overspending their budget. One commenter stated that if participant staff are not allowed to exceed the 20–25 hours per week, the grantees' performance measures will suffer.

The Department has considered these comments and has decided to eliminate the 1,300 hour limit, as suggested by the commenters. We agree that the grantees need the flexibility to respond to downturns in the economy or natural disasters, for example. Therefore, we have changed this provision to read that the 1,300-hour requirement is not required but is still a benchmark and good practice that the Department strongly encourages grantees to follow. This language is consistent with the Department's position on this issue published in the preamble to the 2004 Final Rule, at 69 FR 19014, 19036, Apr. 9, 2004. The statute defines "community service employment" as "part-time" work and grantees must ensure that community service assignments are part-time positions. In addition, the

Department cautions grantees about allowing participant staff to exceed the part-time requirements, which is not permitted.

Under what circumstances may a grantee or sub-recipient terminate a participant? (§ 641.580)

This section describes a variety of circumstances in which a participant may or must be terminated from the program and the procedures by which terminations must be accomplished. We received several comments on this section. One commenter asked for an explanation of what "knowingly" means in paragraph (a). The common legal definition of "knowingly" is "[w]ith knowledge; consciously; intelligently; willfully; intelligently." Black's Law Dictionary 4th Ed. (1957) West Publishing. The Department recommends a common-sense application of this definition. For example, if a participant provided false information in order to meet the eligibility requirements for the program and either knew or should have known that the information was false, then such provision was done "knowingly."

We received two comments on paragraph (e) of this proposed section which deals with terminations when a participant has refused a reasonable number of job offers or referrals. One commenter requested that the Department add language to paragraph (e) allowing the grantee to terminate the participant for refusal to accept a reasonable number of job searches or job offers. The other commenter reminded the Department that in some cases, local, State, or Federal law and/or agency policy requires immediate termination for cause as described in the proposed rule at paragraph (e).

As to the first comment, the Department does not believe the commenter's proposed language is necessary. Paragraph (e) already states that if a participant refuses to accept a reasonable number of job offers or referrals to unsubsidized employment, the grantee may terminate the participant. The only word that appears to be different between the comment and the regulation is the word "searches." It is the Department's opinion that "job searches" are included as part of the "job referral" process. Therefore, the Department did not make this change in the regulation.

The commenter that disagreed with "for cause terminations 30 days after written notice" may have confused this provision with another paragraph in this section. Paragraphs (a) and (d) did not contain the 30-day termination requirement that is found in paragraphs (b), (c), and (e) of this final rule. However, upon reconsideration, we believe that paragraphs (a) and (d) should also require 30 days notice before a termination for cause may be effective. Notice allows a participant time to contest the grantee's determination and to offer factors in mitigation. Notice is inherent in fundamental notions of fairness and is arguably more necessary in cases of alleged misconduct than in cases where a participant was mistakenly determined eligible. We already require notice in the case of terminations under paragraph (e), which is a type of termination for cause. We see no reason not to expand the notice to all cause terminations.

We note that the requirement for 30 days notice before termination does not require the grantee to permit a participant to remain assigned to the host agency where the offense is alleged to have occurred. In those cases where a statute or regulation requires the immediate removal of a participant for certain specified offenses, the grantee may remove the participant from the host agency and may assign the participant to another host agency (including the local project office) or to no host agency, depending on the circumstance, during the notice period.

We have made an additional change in the notice language in paragraphs (a), (d) and (e) to provide that the termination after notice is not required if additional facts or evidence shows that the basis for the termination is incorrect. The original intent of this provision was that termination could not be effected until 30 days had elapsed, not that termination was always required once 30 days had elapsed. Indeed, the notice requirement would be rendered largely meaningless if the grantee were required to terminate the participant at the end of the notice period regardless of what information the participant might have produced in the interval. We thus have added language to paragraphs (a)–(e) to make it clear that a grantee is not required to terminate a participant if the evidence shows that the grounds for termination were incorrect. We remind grantees, however, that if a participant has finally been determined to be ineligible (after being given 30 days to provide evidence of eligibility), the grantee must terminate the participant.

Another commenter questioned how the organization would know when a participant receives a written notice of termination as suggested by paragraphs (b), (c), and (e). This commenter requested that the language in the proposed rule only require grantees to provide written notice explaining the reasons for termination when the termination is the result of an adverse action.

Again, we believe the commenter is misreading the intention of these regulatory provisions. Each of these situations represents circumstances where a termination is necessary. However, the Department has made a change to the regulation to clarify the notice requirement. The purpose of the notice requirement is that the participant would be terminated in 30 days after either the day notice was provided to the participant in person, or the day the grantee mailed the termination notice. Given the propensity for confusion with the current language, the Department has revised paragraphs (b), (c), and (e) to read "and may terminate the participant 30 days after it has provided the participant with written notice."

Another commenter criticized the termination process as "indicative of micromanagement." This commenter further expressed disagreement with the single national approach to termination because it limited the discretion of grantees and sub-recipients.

In response, the Department notes that there are certain requirements to which grantees must adhere to in order to receive Federal funds. Uniform policies are necessary in some cases for a program of national scope to ensure all participants are treated in a fair and consistent manner. The issue of termination is one of those necessary policies. Grantees may not continue to spend grant funds on ineligible participants. The rule does allow for some flexibility, such as determining what constitutes cause for termination, which we recognize may vary among grantee organizations. Grantees also have flexibility to determine whether they want to terminate participants for failure to accept a reasonable number of job offers or referrals and, if they do, what constitutes a reasonable number.

One final commenter raised the issue of termination in the context of the performance measures and how terminations impact a grantee's ability to meet the performance measures. This comment is outside the scope of this rulemaking as it does not relate to the proposed rule.

What is the employment status of SCSEP participants? (§ 641.585)

This section discusses the employment status of program participants given that they receive work experience training. The Department received one comment on this section. This commenter requested

a ruling on the responsibility of the grantees and sub-recipients to conduct background checks on SCSEP applicants as part of the application process if they are not employees of the grantee or sub-recipient.

Although this comment is outside the scope of this rulemaking, the Department will reiterate its policy here. Grantees may take the responsibility of providing background checks before placing participants in community service assignments, provided that the background check is conducted because of the requirements of a specific community service assignment, rather than based on a particular participant, and is consistently applied to all applicants considered for that position. We stress that background checks are relevant to the assignment of participants to particular host agency positions only and cannot be used as a basis for denying eligibility. In addition, grantees should be careful to comply with EEOC and any state or local rules regarding the use of background checks.

*Subpart F—Pilot, Demonstration, and Evaluation Projects*

What is the purpose of the pilot, demonstration, and evaluation projects authorized under § 502(e) of the OAA? (§ 641.600)

This section describes the purpose of the new provisions implementing § 502(e) of the 2006 OAA. The Department received one comment that asked the Department to clarify whether On-the-Job Experience (OJE) projects would continue under the new section and whether the Department plans to introduce new pilot projects or expand and improve existing projects.

The Department is pleased that grantees have found the OJE program useful and will take that under advisement as we explore how best to exercise this new flexible authority, as we noted in the preamble to the NPRM. See 73 FR 47770, 47789, Aug. 14, 2008.

Should pilot, demonstration, and evaluation project entities coordinate with SCSEP grantees and sub-recipients, including area agencies on aging? (§ 641.640)

This section provides that the Department will collaborate with appropriate aging organizations when developing projects under this section and grantees of these projects must also consult with appropriate organizations. We received several comments related to this section. The comments mostly suggested that § 641.640, in concert with §§ 641.315 and 641.335, were inadequate to address the type of coordination that should occur between SCSEP and other aging programs. One commenter stated that the regulation should be written to "requir[e] coordination of SCSEP with other programs under the Older Americans Act, such as state units and area agencies on aging, and with other Federal programs." Another commenter "suggest[ed] that the regulations reflect additional coordination requirements with disability networks, in order to better incorporate person-centered planning, Americans with Disability Act compliance, and independent living philosophy concepts into the provision of services." Yet another commenter expressed a concern about where the funding for these projects would come from given that the revised funding allocations appear to decrease services to participants. That commenter cited recent Department actions to reserve $5,000,000 for program support activities under the Secretary's discretionary authority.

Section 641.640 has been written to follow the statutory language, with the addition of a clarification that SCSEP grantees and sub-grantees are among the entities that must be consulted with. To be more prescriptive in this section would limit the Department's and the grantees' ability to use the flexibility granted by the statute. Finally, comments about the possible effect of funding for the pilot, demonstration and evaluation projects on the funding of the "regular" program are outside the scope of this rulemaking.

*Subpart G—Performance Accountability*

On June 29, 2007, the Department published an IFR that implemented changes in the SCSEP performance measurement system in light of the OAA. This section discusses comments on the performance measurement system.

The OAA requires the SCSEP to track six [1] core indicators of performance [2] (also called "core performance indicators," or just "core indicators"): (1) Hours (in the aggregate) of community service employment; (2) entry into unsubsidized employment; (3) retention in unsubsidized employment for six months; (4) earnings; (5) the number of eligible individuals served; and (6) most-in-need (the number of barriers per participant as listed in subsection (a)(3)(B)(ii) or (b)(2) of § 518 of the OAA. Core indicators are subject to goal-setting and corrective action. The statute also requires two additional indicators of performance (also called "additional performance indicators," or just "additional indicators"): Retention in unsubsidized employment for one year; and satisfaction of participants, employers, and host agencies with their experiences and the services provided. Additional indicators are not subject to goal-setting and corrective action. The OAA gives the Department the authority to add other additional indicators that it determines to be appropriate to evaluate services and performance, but we are not adding any other additional indicators at this time.

Under authority of the IFR, grantees have been using the common measures definitions for the three core indicators addressing unsubsidized employment. We received a number of comments raising concerns about whether the common measures are an appropriate way to measure participation in SCSEP. Changes in the core indicator definitions at this point will muddle the data we have collected for three program years using the existing definitions. The Department wants to have a consistent body of data over a multiyear period through which to be able to evaluate both the overall performance of the SCSEP, and the utility of the performance indicators. In addition, any changes would not be fully implemented until PY 2011.

As a result, the Department has concluded that to change the definitions of the core indicators at this time would create a significant administrative burden for grantees, which would outweigh any benefit of changing those definitions. With reauthorization of the SCSEP also on the horizon for 2011, it would be difficult to conduct evaluations of the program and collect data for doing so if the definitions were changed at this late stage. Moreover, a change in the measures at this late date would deprive the grantees of valuable baseline data that they are using for program management and improvement. The Department intends to maintain the existing definitions for the three core indicators on unsubsidized employment, under which grantees have been working for three years already.

Overview of Comments Received on Subpart G

The Department received eleven comments in response to the

[1] Section 513(b)(1) of the 2006 OAA lists, "[t]he number of eligible individuals served, including the number of participating individuals described in subsection (a)(3)(B)(ii) or (b)(2) of section 518," on performance, as a single core indicator. However, as discussed in the IFR, 72 FR 35836, June 29, 2007, the Department chose to divide it into two separate indicators—number of eligible individuals served, and number of most-in-need participants.

[2] We use the terms "indicator" and "measure" interchangeably throughout this rule.

performance accountability IFR. Some commenters urged changes to particular performance measures and/or asked specific questions about one or more of the measures. Such comments commonly expressed the view that the SCSEP is unique among workforce programs primarily because of its community service element, and therefore use of the common measures is neither appropriate nor desirable.

A second theme common to several of the comments is that an emphasis on performance accountability may lead to unintended consequences. In this view, SCSEP grantees and sub-recipients may feel pressure to serve individuals who are relatively easy to place in unsubsidized employment to meet performance goals. Such a focus, it was argued, would thwart a consistent tenet of the SCSEP, reflected in the 2006 OAA, that the program should prioritize individuals with multiple barriers to employment. Further, several commenters expressed concern that this pressure to attain good performance outcomes could result in fewer minorities being served by the SCSEP.

Because the definition of the most-in-need indicator changed significantly from the 2004 SCSEP final rule, the Department treated the 2007 Program Year as a baseline year for that indicator and did not set sanctionable goals for the most-in-need measure. Some commenters thought that the 2007 Program Year should be treated as a baseline year for all indicators; that is, they thought no goals should be set for any of the core indicators for the Program Year 2007.

Other commenters expressed concern with one or more of the indicators. One commenter requested that the Department decrease the number of core indicators and increase the number of additional indicators. A few commenters urged the Department to develop the remainder of the regulations before finalizing the performance accountability requirements. Finally, some commenters supported the creation of an interagency group to provide input on the SCSEP regulations.

We will discuss all of the comments below, beginning with the comments that broadly address the performance measurement system overall.

Broad Comments on the Performance Measurement System Overall

A few commenters urged the Department to develop the remainder of the regulations before finalizing the performance accountability requirements. Some commenters requested that we convene meetings on the performance measurement regulations before finalizing them. Several commenters supported the creation of an interagency group to provide input on the SCSEP regulations.

We agree with the commenters who urged the Department to develop the remainder of the regulations before finalizing the performance accountability requirements. To that end, we published an NPRM on August 14, 2008, that addressed all aspects of the SCSEP regulations other than performance measures. We were able to carefully consider the comments from both the IFR and the NPRM before proceeding with this final rule.

We also received some comments requesting that we convene meetings with grantees and other interested parties as we developed final regulations on the performance measurement system. We considered this suggestion but chose not to adopt it. All interested persons were invited to participate in the regulatory process by submitting comments on the IFR and the NPRM, and we considered those comments very seriously as we developed this rule.

In the IFR, we stated that we had "implemented an interagency group to oversee the strategy for implement[ing]" the performance measurement system required by the 2006 OAA. 72 FR 35845, June 29, 2007. Some commenters interpreted this to mean that the Department had convened a group that included the Administration on Aging, and those commenters applauded such efforts. In fact, the group to which we were referring was comprised of representatives from different agencies within the Department. Nevertheless, we acknowledge that several commenters urged greater coordination between the Department and the Administration on Aging. The 2006 OAA already requires the SCSEP to coordinate with area agencies on aging at the local level, and the Department endeavors to mirror that coordination at the national level. However, it is clear from these comments that some in the SCSEP network think that we have not done enough coordinating at the Federal level. We appreciate that even closer coordination may aid the SCSEP overall and its participants in particular. To that end, we will pursue strengthening our relationship with the Administration on Aging as we move forward.

We now respond to the comments on the IFR that pertain to particular regulatory sections within subpart G.

What performance measures/indicators apply to SCSEP grantees? (§ 641.700)

Several commenters criticized the performance measurement system implemented in the IFR generally, and the common measures in particular. Some of the commenters asserted that the SCSEP is unique among workforce programs primarily because of its community service element, and that use of the common measures is therefore neither appropriate nor desirable for the SCSEP. Other commenters maintained that an emphasis on performance accountability may lead to unintended, adverse consequences. These commenters argued that, in an effort to achieve the expected levels of performance for the core indicators, SCSEP grantees and sub-recipients may feel pressure to serve individuals who are relatively easy to place in unsubsidized employment. This incentive to "cream" from applicants contravenes a consistent and central theme of the SCSEP, reflected in the 2006 OAA, that the program serves individuals with barriers to employment. Of particular concern to some commenters was that a focus on performance outcomes would result in a reduction of services to disadvantaged and minority older adults.

In the IFR, as well as the NPRM, the Department specifically requested that the public submit comments addressing concerns that the performance measurement system implemented by the IFR compromises the ability of grantees to serve minority individuals. We particularly appreciate the comments we received on that topic.

The Department does not, however, view the performance measurement system required by the 2006 OAA and implemented in the IFR as inappropriate or undesirable for the SCSEP, or as adverse to the SCSEP's traditional focus on serving persons with barriers to employment or minority individuals. We hold a different view from the commenters who argued that this performance measurement system will lead to a reduction in services to persons with barriers to employment, including minority individuals. We will address these points in turn.

The Department fully acknowledges that community service is integral to the SCSEP. Congress gave voice to the importance of this aspect of the SCSEP in its "[s]ense of the Congress" provision in the 2006 OAA: "placing older individuals in community service positions strengthens the ability of the individuals to become self-sufficient, provides much-needed support to organizations that benefit from

increased civic engagement, and strengthens the communities that are served by such organizations." OAA § 516(2). We also acknowledge that the 2006 OAA's requirement that grantees spend a minimum of 65–75 percent of their funds on participant wages and benefits is a unique program feature, and one that clearly assists persons with otherwise low incomes. Providing an opportunity for low-income older adults in need of job training to work at community service organizations that need operational support is a "win-win" situation.

Some commenters asserted that the SCSEP should not align with other workforce programs in its use of common measures because the SCSEP retains this unique community service element, and that the common measures are limited in providing full evidence of the SCSEP's performance. We also received comments noting that initially there were plans for common performance measures to be applied across a wide array of Federal agencies and programs. These commenters suggest that the scope of the common measures has been reduced to "[F]ederal job training and employment programs that share similar goals" (emphasis omitted), and that the SCSEP does not share sufficiently similar goals with other Federal job training and employment programs to make the common measures appropriate.

Other commenters claimed that Congress "overwhelmingly rejected" a focus by the SCSEP on unsubsidized employment outcomes. These commenters argued that the Department is contravening Congressional intent by requiring performance measures that focus on unsubsidized employment outcomes.

Congress made both community service and its potential to lead to unsubsidized employment important goals. Congress required the use of specified core indicators in the 2006 OAA, including the entry into employment, retention in employment for six months, and earnings indicators. Along with providing valuable community service, then, the SCSEP is a training program for low-income persons who have not been able to obtain employment on their own. Congress was well aware of the unique nature of the SCSEP, and could have chosen separate outcome measures unique to the SCSEP as it did in the 2000 Amendments to the OAA. Instead, it specifically mandated that the program report on certain core indicators, three of which measure employment outcomes; therefore, the Department must implement those indicators as stated in the 2006 OAA to achieve the dual purpose of ensuring community service opportunities, but also making unsubsidized employment possible where appropriate for exiting SCSEP participants. Furthermore, the language Congress used in the 2006 OAA to mandate the implementation of the three core indicators on employment outcomes mirrored the common measures. It therefore seemed sensible to define these three core indicators using common measures definitions.

The 2006 OAA requires the Department to implement the three core indicators on employment outcomes. This requires us to gather consistent data on program performance to inform reauthorization. Without a body of consistent performance data over a reasonable number of years, we will not be able to determine whether those indicators as defined are or are not effective performance measures. In addition, grantees would be deprived of meaningful baseline data for making improvements in services, which is the primary purpose behind measurement. As discussed above, therefore, the administrative burden of changing these definitions would outweigh the policy value of changing them before a good body of consistent data has been gathered to inform the program reauthorization anticipated in 2011. This is particularly so since the Department anticipates proposing another SCSEP additional indicator for volunteer work performed after exit from the program, which would further reinforce the Department's support for community service and volunteer work.

In addition, several commenters asserted that the common measures are limited in providing full evidence of the SCSEP's performance, and we agree. The common measures do not accurately portray the entirety of the SCSEP program or its successes. These three core measures, which currently use common measures definitions (entry, six-month retention, and earnings), relate most closely to the SCSEP's goal of unsubsidized employment. However, Congress also required three other core measures (number of persons served, most-in-need, and community service), and they relate most closely to the community service goal of the SCSEP. Accordingly, we acknowledge that the common measures do not "tell the whole SCSEP story." However, we remain convinced that in light of the need to gather data for reauthorization and our consideration of another additional indicator, for now these definitions are most sensibly kept as a method to capture important data on the success of participants in meeting the goals deemed appropriate for their personal circumstances, as laid out in their IEPs.

We turn now to the commenters' argument that implementing the performance measurement system described in the IFR will lead to a reduction in services to persons with barriers to employment, including minority individuals. Some of these commenters asserted that the introduction of common measures in other workforce programs has led to a decrease in the number of low-income participants and participants with barriers to employment in those programs. These commenters claim that such programs have selected participants based on the participants' potential to achieve positive indicator outcomes. They contend that, faced with the same common measures, SCSEP program operators will "cream" by selecting those participants who are easiest to serve. In this view, persons with barriers to employment, including minority individuals, will be disfavored by SCSEP program operators. Some commenters asserted that "creaming" is contrary to Congressional intent, because in the 2006 OAA Congress intended the SCSEP to serve low-income persons and persons with other barriers to employment. Several commenters cited a study of WIA indicating that, following the introduction of common measures in WIA, there was a decline in the number of WIA participants with low incomes or who had barriers to employment, and suggested that implementing the common measures in the SCSEP would lead to similar results.

For reasons discussed already, the Department will continue to implement the core indicators of performance. We take the commenters' argument to be effectively limited to the core indicators, as additional indicators of performance are not subject to sanctionable goal-setting. The Department is required to implement the indicators mandated in the 2006 OAA; we disagree that such indicators will lead to "creaming," or a reduction in SCSEP services to low-income individuals or individuals with barriers to employment. We agree with the commenters' assertion that Congress clearly intended for the SCSEP to serve low-income individuals and to prioritize persons most-in-need. Moreover, Congress designed the SCSEP to have two goals—community service and an appropriate employment objective for participants whose experience in the SCSEP may lead to unsubsidized employment. But it is not possible for SCSEP program operators to reduce the numbers of low-income

participants in the SCSEP because, unlike WIA, only low-income persons are eligible for the SCSEP. Regardless of the population characteristics of other workforce programs, the SCSEP is specifically designed to serve lower income older persons with barriers to employment. The 2006 OAA requires program operators to prioritize persons who have barriers to employment such as those who have a disability, low employment prospects, or limited English proficiency. Moreover, SCSEP has a counter-balance to any creaming that the employment indicators might engender because another of the core indicators measures, the average number of most-in-need characteristics per participant. The Department's view is that the SCSEP performance measurement system will not disfavor people with barriers to employment when one of the measures is designed to give effect to the statute's requirement that program operators prioritize those most in need of SCSEP services. In fact, studies for PY 2006 and PY 2007 show that minorities are served by SCSEP in greater proportions than their incidence in the population and have employment outcomes no different from those of non-minority participants.

Finally, one commenter requested that the Department switch several of the core indicators to become additional indicators. We are bound by the 2006 OAA to implement the core and additional indicators of performance required in the statute; we do not have the discretion to reclassify core indicators as additional indicators.

How are the performance indicators defined? (§ 641.710)

In this section the Department defines each of the indicators. A few commenters suggested that the Department use data available from unemployment insurance wage records to capture data for such indicators as entry, retention, and earnings. Some commenters stated that it can be difficult to obtain this data from employers and exited participants.

The Department agrees that unemployment insurance wage records are a potentially advantageous method of collecting performance data, and we are actively pursuing the use of such records by the SCSEP. For the reasons already stated, however, we have decided to retain the performance indicator definitions in their current form.

Entry Into Unsubsidized Employment

One commenter disagreed with the existing definition of entry into unsubsidized employment as each participant who is employed during the first quarter after the exit quarter. The traditional SCSEP entry indicator treated as entered employment any participant who worked 30 days within the 90 days following their program exit. This commenter argued that the current definition will make it harder to count an exited participant as having entered employment because of the later qualifying period (the first 90 days after exit versus the quarter following the exit quarter).

It is clear that using this definition over the past six years has not resulted in fewer exited participants being counted as having entered unsubsidized employment. While the qualifying period under the current definition occurs later in time than the qualifying period under the traditional SCSEP entry measure, the former SCSEP entry indicator required 30 days of employment, but this definition does not specify an employment period. A participant could be employed for significantly fewer than 30 days during the relevant quarter, and that person would be counted as having entered unsubsidized employment under the existing definition of entry. In this way, the existing definition actually makes it more likely that an exited participant will be counted as a positive entry outcome. Indeed, during each of the three years when outcomes for both the SCSEP placement measure and the existing entry indicator were reported, the average entry outcome under the existing definition was higher than the average SCSEP placement outcome.

Retention in Unsubsidized Employment for Six Months

We received one comment proposing that we revert to the former, SCSEP-specific retention indicator, which measured retention for six months at 180 days after program exit. The current definition measures retention for six months based on employment in the second and third quarters after the exit quarter. This commenter asserted that the longer qualifying period for this indicator increases the difficulty of obtaining the information.

We do not question the commenter's assertion that it can sometimes be difficult to obtain this retention information. Nevertheless, grantees and sub-recipients have been submitting data using the current definition since the first quarter of Program Year 2005, although as an additional rather than a core indicator in the early years. We are confident that grantees and sub-recipients will be able to continue obtaining those data in the future. Also, as noted previously, we are actively pursuing the use of unemployment insurance wage records; these records would provide significant retention data.

Earnings

We received one comment on the definition of the earnings indicator. This commenter urged the use of a simpler indicator that captured wages at the time of program exit rather than the current indicator definition which averages the earnings received during the second and third quarters after the exit quarter. However, this always has been a core indicator and the current definition is that used by all of ETA. The commenter also asked a few questions about the description of the earnings indicator in TEGL 17–05. This commenter asked whether the term "exited participants" refers to all exited participants, or only those who achieved unsubsidized employment. If the term "exited participants" refers to all exited participants, the commenter wondered whether that would dilute the average earnings figure.

The term, "exited participants," refers to the pool of individuals who satisfy the six months retention indicator, not the entire pool of persons who left the SCSEP for a variety of reasons during the relevant quarter. As implemented, the three core indicators may be viewed as building upon each other. To arrive at the entry outcome, one considers how many persons, of the total number who exited the SCSEP during the relevant exit quarter, were employed during the first quarter after the exit quarter. To arrive at the retention in six months outcome, one considers how many persons, of those who satisfied the entry indicator, were employed during the second and third quarters after the exit quarter. To arrive at the earnings outcome, one considers what was earned by those persons who were included the six months retention indicator.

The previous earnings measures counted the earnings of exiters who achieved entered employment, whether or not they were employed in the reporting period, and that did have the effect of distorting the outcomes of the measure. By including those who were not employed in the earnings measure, it was difficult to determine how much those who were employed were actually earning. Under this final rule, however, only the wages of exiters who entered employment *and* who were employed during both quarters of the reporting period are included in the earnings measure.

Most-in-Need

We received several comments about the definition of most-in-need. The "most-in-need" population is based on the fifth core indicator in 2006 OAA § 513(b): "the number of eligible individuals served, including the number of participating individuals described in subsection (a)(3)(B)(ii) or (b)(2) of section 518." One commenter advocated reducing and simplifying the list of most-in-need characteristics. The regulatory definition cannot be reduced or simplified any more than it already is, because it is taken directly from the statute.

Several commenters were distressed that the revised definition of most-in-need "no longer includes any reference to racial minority status." Another commenter took issue with the characteristic, "has failed to find employment after utilizing services provided under title I of [WIA]." This commenter asserted that most SCSEP participants are not even considered for services under title I of WIA, and proposed that instead the characteristic should be, "[w]ere not considered for services under [t]itle I of WIA and/or failed to find employment after utilizing services under [t]itle I of WIA."

The 2006 OAA omitted the characteristic of "greatest social need" from the list of characteristics that comprise the "most-in-need" indicator. OAA §§ 513(b)(1)(E), 518(a)(3)(B)(ii), and 518(b)(2). Whatever the relative merits of considering other groups to be most in need, Congress defined most in need with great specificity, and we have no authority to change the statutory definition.

The 2006 OAA does require the Department to annually report to Congress on the levels of participation and performance outcomes of minority individuals by grantees, by service area and in the aggregate. OAA § 515. The analyses conducted for both PY 2006 and PY 2007 indicate that minorities are served in greater numbers than their incidence in the population and that minorities achieve employment outcomes equal to those of non-minorities. Therefore, we have not changed the definition of the most-in-need indicator.

Retention for One Year

We received one comment on the definition of retention for one year. In the IFR, we defined this indicator to align with the WIA one-year retention indicator, which measures retention at the end of the fourth quarter after the exit quarter. This commenter recommended that we instead capture retention data at 360 days following program exit.

The Department has considered this comment but has decided to retain the definition of retention for one-year as published in the IFR for the reasons already stated.

Satisfaction of the Participants, Employers, and Host Agencies With Their Experiences and the Services Provided

We received one comment on this indicator. The commenter asserted that sub-recipients should not have to be involved in gathering data for this indicator, including mailing cover letters to encourage survey participation.

The Department already provides very substantial assistance in obtaining the data for this indicator. We request that program operators—whether a grantee or a sub-recipient—deliver the employer survey, which we supply, and which ideally is done in person. For the participant and host agency surveys, we create the survey instrument as well as a cover letter explaining the survey and requesting its completion; draw the samples of those who will be asked to complete the survey; and mail it to those persons. We ask program operators to mail pre-survey letters to those participants selected to complete the survey to request cooperation with the survey, and we provide the pre-survey letter text and the mailing list. We have considered the commenter's request and have decided not to make any changes to the customer satisfaction survey process at this time. Given the substantial amount of the burden that we already shoulder, we ask very little of grantees, sub-recipients and host agencies. The work we ask them to perform is work that we cannot do and that we need grantees, sub-recipients, and host agencies to manage.

How will the Department and grantees initially determine and then adjust expected levels of performance for the core performance measures? (§ 641.720)

We received several comments about the expected levels of performance that were set for Program Year 2007. In general, such concerns must be raised during the process of setting the expected levels of performance and are not appropriate for the regulatory comment process as they relate to the specifics of each grantee's situation. We will, however, respond to those aspects of these comments that have general applicability.

One commenter asserted that the statutorily-mandated minimum expected level of performance for the entry indicator would be difficult for sub-grantees to achieve using the current definition of entry. The Department does not have the discretion to set the expected levels of performance below those required by statute. Further, we hold grantees accountable for achieving the expected levels of performance, but we do not set goals at the sub-recipient level. Having said that, we do conduct training sessions that are open to all program operators and offer technical assistance to both grantees and sub-recipients that are experiencing difficulty in any aspect of program administration. Finally, we note that the nationally-averaged outcome for the entry indicator at the end of Program Year 2007 was 52.4 percent, greatly in excess of the statutorily-mandated goal. Only three individual grantees with adequate data to permit accurate measurement failed to meet at least 80% of their negotiated goal, and 62 grantees exceeded 100% of their negotiated goal.

Other commenters suggested that the expected levels of performance for the entry and earnings indicators for Program Year 2007 were too high. These commenters noted that the median expected level of performance for the entry indicator was higher than the statutory minimum. They also asserted that the earnings and entry indicator levels were set so high that program operators would be encouraged to "cream," which would lead to fewer minority participants.

Although the § 513(a)(2)(E)(ii) of the statute sets a minimum percentage for the entry indicator, it is in fact merely a minimum, and the Department has the authority to set expected levels of performance above that minimum. The Department bases a grantee's expected levels of performance in part on the prior performance of the grantee. The statute requires that the expected levels of performance for the core indicators be designed to promote continuous improvement in performance. OAA § 513(a)(2)(B). And, as we explained in the IFR, the Department has consistently established a performance level higher than the minimum required by statute for many grantees, and expects to continue to do so.

In response to the assertion that the expected levels of performance are set so high that the Department is encouraging "creaming," we disagree. As noted, a grantee's expected levels of performance for a new program year are based in part on the prior performance of the grantee, so sudden large increases in performance goals generally do not occur. The expected levels of performance are designed to promote

continuous improvement; however, the Department also takes into account such factors as unemployment rates, relative poverty levels, and whether the grantee is serving a disproportionate share of most-in-need individuals. Negotiating expected levels of performance is a data-driven process; when a grantee presents the Department with relevant data, we take that into consideration when setting the performance goals. Also, expected levels of performance may be adjusted during the Program Year if circumstances warrant. See § 641.720(b).

The Department is making three technical corrections to this section of the regulations none of which are intended to change the meaning of the section. First, we are removing the word "baseline" from the first sentence of paragraph (a)(1). The word was mistakenly included in this paragraph in the IFR; the expected level of performance initially proposed by the Department is more commonly called a goal or target, not a baseline. Second, we are adding the word "a" at the beginning of the third sentence in paragraph (a)(3); it was inadvertently omitted from the IFR. Finally, we updated the citation format in paragraph (a)(2).

How will the Department assist grantees in the transition to the new core performance indicators? (§ 641.730)

In paragraph (a) of this section, the Department explained that we would be providing technical assistance to help certain grantees meet the expected levels of performance for the core indicators in Program Year 2007. Technical assistance was provided to those grantees whose performance outcomes during Program Year 2006 did not achieve the levels expected during Program Year 2007. In paragraph (b) of this section we created an exception from sanctionable goal-setting for Program Year 2007 for the most-in-need measure because the 2006 OAA so changed the list of most-in-need characteristics that we determined that a year was needed to gather baseline data before meaningful goals could be established. Some commenters thought that Program Year 2007 should have been treated as a baseline year for all of the indicators; they suggested that no sanctionable goals should have been set for Program Year 2007.

Five of the indicators now classified as "core" are indicators that the SCSEP was already using before the IFR (*i.e.,* hours of community service, number of individuals served, entry into employment, six-month retention in employment, and earnings), although some of these had been classified as additional measures previously. The most-in-need indicator was the only indicator that changed so significantly that we determined that we did not have sufficient data to set meaningful goals. Therefore, goals were set for the other core indicators for Program Year 2007.

*Subpart H—Administrative Requirements*

We received several comments on this section about non-Federal share, participant wages and fringe benefits, and performance reporting requirements.

How must SCSEP program income be used? (§ 641.806)

We have inserted clarifying language in paragraph (b) of this section to provide for a distinction in the expenditure of program income for grantees with continuing relationships with the Department of Labor and allow program income to be expended for 1 additional program year.

What non-Federal share (matching) requirements apply to the use of SCSEP funds? (§ 641.809)

This section describes the requirements grantees have to contribute a 10 percent match to the program. We received one comment on this section of the proposed rule that disagreed with the provision that prohibits grantees from requiring sub-recipients to contribute financially to the program to meet their match requirement. This commenter stated that he believed that a financial investment from a sub-recipient encourages ownership and responsibility for the program. This commenter suggested that a State's inability to require a sub-recipient to provide a 10 percent match shifts all the responsibility to the State grantee and reduces the commitment of the sub-recipient to meet performance goals.

Although the Department appreciates this concern, this requirement was added in the 2004 regulations to prevent abuses in the program where some grantees permitted only those organizations with cash contributions to be sub-recipients. The fact remains that the grantees are the organizations responsible for program operations and services as evidenced by the grant agreement with the Department. Further, the Department does not believe this limitation is onerous to meet. As provided in § 641.809(d), the match may be cash, in-kind, or a combination of the two. Program data indicates that with this flexibility, most grantees tend to exceed the match requirement for the program. Also, paragraph (e) of this section allows sub-recipients to voluntarily provide a contribution to the program.

What minimum expenditure levels are required for participant wages and benefits? (§ 641.873)

This section outlines the financial requirements for wages and fringe benefits and expressly adds the new statutory provisions that permit grantees to reduce the 75 percent requirement to 65 percent for the wages and fringe benefits cost category. We received one comment on this section. This commenter expressed concern with the change that in the past required 75 percent of grant funds to be spent on participant wages and fringe benefits (PWFB) based on final expenditures to now being 75 percent of the grant funds. This commenter noted that there was no change from the 2000 OAA to the 2006 OAA and the Department did not provide a rationale in the proposed rule to justify this change. The commenter noted that "[t]rying to reach the goal based on the award amount changes the emphasis from using resources to effectively benefit the program to just incurring PWFB cost to meet the goal."

The commenter is correct that the OAA did not change the language at § 502(c)(6)(B)(i) from the 2000 Amendments to the 2006 Amendments. The Department made the change in the proposed rule to more closely follow the statutory language, which requires "75 percent of the grant funds [be used] to pay for wages, benefits, and other costs." However, the Department has reconsidered its position and has decided not to depart from its established practice of measuring compliance with this requirement for the grantee as a whole, at the conclusion of the grant, based upon the total amount expended. Accordingly, we are withdrawing the proposed revision to the regulation, and are retaining the existing text of § 641.873(b).

How will compliance with cost limitations and minimum expenditure levels be determined? (§ 641.876)

For clarity, we changed the first word in the title for this section. It originally asked "When will compliance with cost limitations and minimum expenditure levels be determined?" Because the content of the section does not actually discuss a time period but instead the method of determining compliance, we replaced "When" with "How."

What are the financial and performance reporting requirements for recipients? (§ 641.879)

This section describes the financial and reporting requirements that grantees

must submit to the Department. We received one comment on this section that argued that the financial and performance reporting requirements conflict with § 514(f) of the 2006 OAA. This commenter cited this section of the statute, which states the Secretary of Labor may not promulgate rules or regulations that would significantly compromise the ability of the grantees to serve their target population of minority older individuals. The commenter suggested the Department add the following language in a new § 641.879(i): "Collection and validation of data should in no way compromise the ability of grantees to serve the targeted population of most-in-need individuals, and significant attention should be paid to the unintended consequences that documentation may cause for minority older individuals, particularly those with specific language and culture limitations."

The Department agrees that the collection and validation of data should not compromise the ability of grantees to serve the target population. Although it may take more time to obtain the required information due to language barriers, the statute requires that we collect a variety of information on program performance, including information on the populations and subpopulations served. This is information that grantees must collect and have on file for program management and auditing purposes anyway. Although collecting information may be a burden, it is a required part of program management and is necessary to show that the program meets its statutory goals effectively.

Furthermore, the Department monitors services to minorities closely, as required by the 2006 OAA. According to PY 2006 and PY 2007 data, minorities are served by SCSEP in substantially greater numbers than their incidence in the population and show no differences in employment outcomes from non-minority participants. Therefore, there is no evidence that minorities are underserved in the program. Given that this commenter did not provide more specific information on how she believed minorities would be affected, we are not persuaded that any such injury would occur from these regulations to diminish services to this population.

We are, however, making technical changes in paragraphs (b), (d) and (e) to clarify that SPARQ is the vehicle by which all grantees must report information on participants, host agencies, and employers, including demographic and performance information. All grantees are required to report the required information in a format specified by the Department. We have also clarified that grantees may be required to report additional demographic and performance information through means other than SPARQ if required by the Department.

*Subpart I—Grievance Procedures and Appeals Process*

What grievance procedures must grantees make available to applicants, employees, and participants? (§ 641.910)

This section describes the grievance procedures that must be in place for grantees and that those grantees must have in place for program participants. We received one comment on this section. That commenter stated that he found the Department's requirement to submit a copy of the grantee's appeal process with the grant application micromanaging.

As a recipient of Federal funds, however, there are certain requirements that grantees must adhere to in order to receive those funds. See §§ 641.420 and 430. Prior program experience has indicated that the grantees do not always have the most up-to-date policies, and sometimes, do not have policies on file at all. This requirement ensures that grantees are meeting their obligation without the Department having to go to each program office to check for these documents.

## IV. Administrative Information

*A. Regulatory Flexibility Analysis, Executive Order 13272, Small Business Regulatory Enforcement Fairness Act*

The Regulatory Flexibility Act (RFA) at 5 U.S.C. 603 requires agencies to prepare a regulatory flexibility analysis to determine whether a regulation will have a significant economic impact on a substantial number of small entities. Section 605(b) of the RFA allows an agency to certify a rule in lieu of preparing an analysis if the regulation is not expected to have a significant economic impact on a substantial number of small entities. Section 601 of the RFA defines small entities to include small businesses, small organizations, including not-for-profit organizations, and small governmental jurisdictions.

There are approximately 970 SCSEP grantees and sub-recipients. Of these, more than 50 are States, State agencies, or territories and are not small entities as defined by the RFA. The vast majority of the rest are non-profit organizations, many of which may be categorized as small entities for RFA purposes. The Department does not have a precise number of small entities that may be impacted by this rulemaking, but it requested comments on the possible impact of the rule in the NPRM. The Department did not receive any comments on this section.

Although there may be a substantial number of small entities impacted by this rulemaking, the Department has determined that the economic impact of this final rule is not significant because these regulations will not result in any additional costs to grantees and sub-recipients. The SCSEP is designed so that SCSEP funds cover the vast majority of the costs of implementing this program. Subpart H of this final rule provides detailed information to grantees on what costs are proper program expenditures, how to properly categorize those costs, etc. The SCSEP statute does require a 10 percent non-Federal match (*see* § 641.809); however, the 10 percent match requirement has been in effect in previous SCSEP regulations and, therefore, does not constitute a new economic burden on grantees. Furthermore, the Department's allowance of in-kind contributions in lieu of monetary payments significantly moderates the economic impact of the match requirement. Accordingly, the Department certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

The Department has also determined that this rule is not a "major rule" for purposes of the Small Business Regulatory Enforcement Fairness Act (SBREFA), Public Law 104–121 (1996) (codified in scattered sections at 5 U.S.C.). SBREFA requires agencies to take certain actions when a "major rule" is promulgated. 5 U.S.C. 801. SBREFA defines a "major rule" as one that will have an annual effect on the economy of $100,000,000 or more; that will result in a major increase in costs or prices for, among other things, State or local government agencies; or that will significantly and adversely affect the business climate, including competition, employment, investment, and innovation. 5 U.S.C. 804(2).

This final rule will not significantly or adversely affect the business climate. First, the rule will not create a significant impact on the business climate at all because, as discussed above, SCSEP grantees are governmental jurisdictions and not-for-profit enterprises. Moreover, any secondary impact of the program on the business community would not be adverse. To the contrary, the SCSEP functions to assist the business community by training older Americans to participate in the workforce.

This final rule will also not result in a major increase in costs or prices for States or local government agencies. The SCSEP has no impact on prices, and as discussed above, the only costs that could potentially be borne by governmental jurisdictions are limited to the 10 percent matching share. Finally, this final rule will not have an annual effect on the economy of $100,000,000 or more.

Therefore, because none of the definitions of "major rule" apply in this instance, we determine that this final rule is not a "major rule" for SBREFA purposes.

*B. Executive Order 12866*

Executive Order 12866 requires that for each "significant regulatory action" taken by the Department, the Department conduct an assessment of the regulatory action and provide OMB with the regulation and the requisite assessment prior to publishing the regulation. A significant regulatory action is defined to include an action that will have an annual effect on the economy of $100 million or more, as well as an action that raises a novel legal or policy issue.

As discussed in the SBREFA analysis above, this final rule will not have an annual effect on the economy of $100,000,000 or more. However, the rule does raise novel policy issues concerning implementing the 2006 OAA in the SCSEP. The key policy changes being implemented include the introduction of a 48-month limit on participation, institution of a regular competition for national grants, and an increase in the proportion of grant funds that can be used for participant training and supportive services. Therefore, the Department has submitted this final rule to the OMB.

*C. Paperwork Reduction Act*

The purposes of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* include minimizing the paperwork burden on affected entities. The PRA requires certain actions before an agency can adopt or revise the collection of information, including publishing a summary of the collection of information and a brief description of the need for and proposed use of the information. 44 U.S.C. 3507.

Because the 2006 OAA necessitated changes in many of the SCSEP forms used by grantees before the effective date of the Act, in July 2007 the Department submitted to OMB for review and approval in accordance with § 3507(d) of the PRA a modification to the SCSEP information collection requirements. The four-year strategy newly required by the 2006 OAA (see § 641.302) was accounted for in that PRA submission. The SCSEP PRA submission was assigned OMB control number 1205–0040 and was approved by OMB in October 2007. The approval expires October 31, 2010. This final rule neither introduces new nor revises any existing information collection requirements.

*D. Unfunded Mandates Reform Act*

The Unfunded Mandates Reform Act (UMRA) of 1995 (Pub. L. 104–4, 2 U.S.C. 1501 *et seq.*) requires an agency to "prepare a written statement" providing specific information before "promulgating any final rule for which a general notice of proposed rulemaking was published." The Department has done this and, as required by 2 U.S.C. 1523(b), it includes a summary of the statement. For purposes of the UMRA, this final rule does not include any Federal mandate that may result in increased expenditure by State, local, and tribal governments in the aggregate of more than $100 million, or increased expenditures by the private sector of more than $100 million. We did, however, receive some comments on the costs of the rule, to which we respond here.

We received several comments on this section from State agencies related to the responsibilities in the State Plan requirements at subpart C of this rule, State competition requirements, and administrative guidance related to required services to participants. The programmatic aspects of these comments are discussed in the related sections of the preamble. This section is limited to a discussion that addresses the impact of this rule as an unfunded mandate.

One commenter generally noted that its jurisdiction was neither financially nor functionally prepared to take on this added workload. Several States specifically stated that the Department was imposing additional requirements on State grantees without providing additional funding. A few commenters stated that they did not have funds to hire an economist to provide the data required for the State four-year strategy as provided in the State WIA program; and one commenter said that it did not have the funds to obtain the data to meet the requirement that State grantees identify the types of community services that are needed and their location statewide. Some commenters requested that the Department provide additional resources to help States develop a comprehensive four-year State Plan. Another commenter protested that the Department did not provide funding for States to conduct a competition if, under § 641.400, the State fails to meet its expected levels of performance for the core indicators for three consecutive years. That same commenter also stated that the requirement in § 641.535(b) (additional guidance) has the potential to increase program costs without providing funding to cover such requirements.

The Department disagrees that any of these requirements impose an unfunded mandate. The requirements in this final rule are funded by SCSEP grant funds and fall under the category of either administrative costs or programmatic costs. Section 502(c)(3) allows grantees to request an increase in administrative costs from 13.5 percent to 15 percent, if the grantee demonstrates that such increase is necessary to carry out the program. There are several States that take advantage of this provision by submitting applications meeting the criteria listed in § 641.870. We have no evidence that the additional administrative funds they receive are insufficient to oversee sub-recipient operations and perform the requirements of subpart B for State Planning. Further, to the extent that the Department has always expected grantees to take the State planning process seriously and formulate a projection for how services would be provided, the requirements in this final rule are not new. They are merely more descriptive and now in regulations where before the requirements were listed in a Training and Employment Guidance Letter (TEGL No. 16–07): *http://www.doleta.gov/Seniors/pdf/TEGL16-07.pdf.*

Finally, the catch-all provision in § 641.535 that informs grantees that they may be expected to provide services to participants according to administrative guidelines does not impose more responsibilities that require additional grant funds. The administrative guidance discussed in that section relates to further explanation or clarification for how the services listed in that section or in the 2006 OAA can be carried out. For example, past guidance has provided the Federal poverty levels which are adjusted each year. This guidance is important because it provides the framework for determining participant eligibility in the program. Other past guidance has allowed grantees the option of providing On-the-Job Experience or OJE training and established the parameters for using that training option.

Department-issued guidance is designed to inform the grantees about ways to serve participants within program parameters and do not rise to

the level of creating an unfunded mandate for the program. To avoid ambiguity, we changed the regulatory text in § 641.535(b) to reflect that further guidance may be issued to clarify existing requirements. The Department may also from time-to-time request that grantees provide certain information to program participants, such as information about Earned Income Tax Credit program services. We have found that as a general matter, grantees are eager to provide information to the participants when it is in the participants' best interest, and do so willingly. Furthermore, although carrying out the obligations of the statute and regulations may require careful management, the duties imposed by the regulations flow from the specific requirements of the statute as well as the Congressional purposes expressed in the statute. Although the regulations may provide more specifics on how those duties and purposes are to be carried out, the regulations do not do anything more than flesh out the requirements on how to properly implement and manage the SCSEP. Therefore, for the reasons described above, the Department believes that the requirements of this final rule do not impose any unfunded mandates.

*E. Executive Order 13132*

The Department has reviewed this final rule in accordance with Executive Order 13132 on federalism and has determined that the Final Rule does not have "policies that have federalism implications." As explained at § 1(a) of the Order, "'Policies that have federalism implications' refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." This rule does not "have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government" because the requirements in this final rule flow directly from the 2006 OAA. Whatever federalism implications these regulations have on the States is merely indirect. Moreover, these grants are, by definition, voluntary. States are not required to take the grant funds if they do not approve of the conditions attached to the funds. Therefore, the rule does not have a "substantial direct effect" on the States, nor will it alter the relationship, power, or responsibilities between the Federal and State governments. The relationship, power, or responsibilities were already established in the authorizing legislation.

Finally, the Department received no comments on this provision. Accordingly, we conclude that this rule does not have federalism implications for the purposes of Executive Order 13132.

*F. Executive Order 13045*

Executive Order 13045 concerns the protection of children from environmental health risks and safety risks. This final rule addresses the SCSEP, a program for older Americans, and has no impact on safety or health risks to children.

*G. Executive Order 13175*

Executive Order 13175 addresses the unique relationship between the Federal Government and Indian tribal governments. The order requires Federal agencies to take certain actions when regulations have "tribal implications." Required actions include consulting with tribal governments prior to promulgating a regulation with tribal implications and preparing a tribal impact statement. The Order defines regulations as having "tribal implications" when they have substantial direct effects 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.

The Department has reviewed this final rule and concludes that it does not have tribal implications. Although tribes are sub-recipients of national SCSEP grant funds, this final rule will not have a substantial direct effect on those tribes, because, as outlined in the Regulatory Flexibility section of the preamble, there are no new costs associated with implementing this final rule. This regulation does not affect the relationship between the Federal Government and the tribes, nor does it affect the distribution of power and responsibilities between the Federal Government and tribal governments. These grants are, by definition, voluntary and tribes are not required to take the grant funds if they do not approve of the conditions attached to the funds.

Finally, the Department received no comments on this issue. Accordingly, we conclude that this rule does not have tribal implications for the purposes of Executive Order 13175.

*H. Environmental Impact Assessment*

The Department has reviewed this final rule in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 CFR part 1500), and the Department's NEPA procedures (29 CFR part 11). The rule will not have a significant impact on the quality of the human environment, and, thus, the Department has not prepared an environmental assessment or an environmental impact statement.

*I. Assessment of Federal Regulations and Policies on Families*

Section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681), requires the Department to assess the impact of this rule on family well-being. A rule that is determined to have a negative effect on families must be supported with an adequate rationale.

The Department has assessed this final rule and determines that it will not have a negative effect on families. Indeed, we believe the SCSEP strengthens families by providing job training and support services to low-income older Americans.

*J. Executive Order 12630*

Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, is not relevant to this Final Rule because the rule does not involve implementation of a policy with takings implications.

*K. Executive Order 12988*

This final rule has been drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The Department has written the regulation so as to minimize litigation and provide a clear legal standard for affected conduct, and has carefully reviewed it to eliminate drafting errors and ambiguities.

*L. Executive Order 13211*

This final rule is not subject to Executive Order 13211 because the rule will not have a significant adverse effect on the supply, distribution, or use of energy.

*M. Plain Language*

The Department drafted this rule in plain language.

**List of Subjects in 20 CFR Part 641**

Aged, Employment, Government contracts, Grant programs—Labor, Reporting and recordkeeping requirements.

■ For the reasons discussed in the preamble, the Department of Labor amends 20 CFR part 641 as follows:

## PART 641—PROVISIONS GOVERNING THE SENIOR COMMUNITY SERVICE EMPLOYMENT PROGRAM

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Sec.

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**Subpart I—Grievance Procedures and Appeals Process**

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641.920 What actions of the Department may a grantee appeal and what procedures apply to those appeals?
641.930 Is there an alternative dispute resolution process that may be used in place of an OALJ hearing?

**Authority:** 42 U.S.C. 3056 *et seq.*; Pub. L. 109–365.

## Subpart A—Purpose and Definitions

### § 641.100 What does this part cover?

Part 641 contains the Department of Labor's regulations for the Senior Community Service Employment Program (SCSEP), authorized under title V of the Older Americans Act (OAA), 42 U.S.C. 3056 *et seq.*, as amended by the Older Americans Act Amendments of 2006, Public Law 109–365. This part and other pertinent regulations set forth the regulations applicable to the SCSEP.

(a) Subpart A of this part contains introductory provisions and definitions that apply to this part.

(b) Subpart B of this part describes the required relationship between the OAA and the Workforce Investment Act of 1998 (WIA), 29 U.S.C. 2801 *et seq.* These provisions discuss the coordinated efforts to provide services through the integration of the SCSEP within the One-Stop delivery system.

(c) Subpart C of this part sets forth the requirements for the State Plan, such as the four-year strategy, required coordination efforts, public comments, and equitable distribution.

(d) Subpart D of this part establishes grant planning and application requirements, including grantee eligibility and responsibility review provisions that apply to the Department's award of SCSEP funds for State and national grants.

(e) Subpart E of this part details SCSEP participant services.

(f) Subpart F of this part provides the rules for pilot, demonstration, and evaluation projects.

(g) Subpart G of this part outlines the performance accountability requirements. This subpart establishes requirements for performance measures, defines such measures, and establishes corrective actions for failure to meet core performance measures.

(h) Subpart H of this part sets forth the administrative requirements for SCSEP funds.

(i) Subpart I of this part describes the grievance and appeals processes and requirements.

### § 641.110 What is the SCSEP?

The Senior Community Service Employment Program (SCSEP) is a program administered by the Department of Labor that serves unemployed low-income persons who are 55 years of age and older and who have poor employment prospects by training them in part-time community service assignments and by assisting them in developing skills and experience to facilitate their transition to unsubsidized employment.

### § 641.120 What are the purposes of the SCSEP?

The purposes of the SCSEP are to foster individual economic self-sufficiency and promote useful part-time opportunities in community service assignments for unemployed low-income persons who are 55 years of age or older, particularly persons who have poor employment prospects, and to increase the number of older persons who may enjoy the benefits of unsubsidized employment in both the public and private sectors. (OAA § 502(a)(1)).

### § 641.130 What is the scope of this part?

The regulations in this part address the requirements that apply to the SCSEP. More detailed policies and procedures are contained in administrative guidelines issued by the Department. Throughout this part, phrases such as, "according to instructions (procedures) issued by the Department" or "additional guidance will be provided through administrative issuance" refer to the documents issued under the Secretary's authority to administer the SCSEP, such as Training and Employment Guidance Letters (TEGLs), Training and Employment Notices (TENs), previously issued SCSEP Older Worker Bulletins that are still in effect, technical assistance guides, and other SCSEP guidance.

### § 641.140 What definitions apply to this part?

The following definitions apply to this part:

*Additional indicators* mean retention in unsubsidized employment for one year; satisfaction of participants, employers and their host agencies with their experiences and the services provided; and any other indicators of performance that the Secretary determines to be appropriate to evaluate services and performance. (OAA § 513(b)(2)).

*At risk for homelessness* means an individual is likely to become homeless and the individual lacks the resources and support networks needed to obtain housing.

*Authorized position level* means the number of SCSEP enrollment opportunities that can be supported for a 12-month period based on the average national unit cost. The authorized position level is derived by dividing the total amount of funds appropriated for a Program Year by the national average unit cost per participant for that Program Year as determined by the Department. The national average unit cost includes all costs of administration, other participant costs, and participant wage and benefit costs as defined in § 506(g) of the OAA.

*Co-enrollment* applies to any individual who meets the qualifications for SCSEP participation and is also

enrolled as a participant in WIA or another employment and training program, as provided in the Individual Employment Plan.

*Community service* means:

(1) Social, health, welfare, and educational services (including literacy tutoring), legal and other counseling services and assistance, including tax counseling and assistance and financial counseling, and library, recreational, and other similar services;

(2) Conservation, maintenance, or restoration of natural resources;

(3) Community betterment or beautification;

(4) Antipollution and environmental quality efforts;

(5) Weatherization activities;

(6) Economic development; and

(7) Other such services essential and necessary to the community as the Secretary determines by rule to be appropriate. (OAA § 518(a)(1)).

*Community service assignment* means part-time, temporary employment paid with grant funds in projects at host agencies through which eligible individuals are engaged in community service and receive work experience and job skills that can lead to unsubsidized employment. (OAA § 518(a)(2)).

*Core indicators* means hours (in the aggregate) of community service employment; entry into unsubsidized employment; retention in unsubsidized employment for six months; earnings; the number of eligible individuals served; and most-in-need (the number of individuals described in § 518 (a)(3)(B)(ii) or (b)(2) of the OAA). (OAA § 513(b)(1)).

*Core Services* means those services described in § 134(d)(2) of WIA.

*Department or DOL* means the United States Department of Labor, including its agencies and organizational units.

*Disability* means a disability attributable to a mental or physical impairment, or a combination of mental and physical impairments, that results in substantial functional limitations in one or more of the following areas of major life activity:

(1) Self-care;

(2) Receptive and expressive language;

(3) Learning;

(4) Mobility;

(5) Self-direction;

(6) Capacity for independent living;

(7) Economic self-sufficiency;

(8) Cognitive functioning; and

(9) Emotional adjustment.

(42 U.S.C. 3002(13)).

*Equitable distribution report* means a report based on the latest available Census or other reliable data, which lists the optimum number of participant positions in each designated area in the State, and the number of authorized participant positions each grantee serves in that area, taking into account the needs of underserved counties and incorporated cities as necessary. This report provides a basis for improving the distribution of SCSEP positions.

*Frail* means an individual 55 years of age or older who is determined to be functionally impaired because the individual—

(1)(i) Is unable to perform at least two activities of daily living without substantial human assistance, including verbal reminding, physical cueing, or supervision; or

(ii) At the option of the State, is unable to perform at least three such activities without such assistance; or

(2) Due to a cognitive or other mental impairment, requires substantial supervision because the individual behaves in a manner that poses a serious health or safety hazard to the individual or to another individual. (42 U.S.C. 3002(22)).

*Grant period* means the time period between the effective date of the grant award and the ending date of the award, which includes any modifications extending the period of performance, whether by the Department's exercise of options contained in the grant agreement or otherwise. This is also referred to as "project period" or "award period."

*Grantee* means an entity receiving financial assistance directly from the Department to carry out SCSEP activities. The grantee is the legal entity that receives the award and is legally responsible for carrying out the SCSEP, even if only a particular component of the entity is designated in the grant award document. Grantees include public and nonprofit private agencies and organizations, agencies of a State, tribal organizations, and Territories, that receive SCSEP grants from the Department. (OAA §§ 502(b)(1), 506(a)(2)). As used here, "grantee" includes "grantee" as defined in 29 CFR 97.3 and "recipient" as defined in 29 CFR 95.2(gg).

*Greatest economic need* means the need resulting from an income level at or below the poverty guidelines established by the Department of Health and Human Services and approved by the Office of Management and Budget (OMB). (42 U.S.C. 3002(23)).

*Greatest social need* means the need caused by non-economic factors, which include: Physical and mental disabilities; language barriers; and cultural, social, or geographical isolation, including isolation caused by racial or ethnic status, which restricts the ability of an individual to perform normal daily tasks or threatens the capacity of the individual to live independently. (42 U.S.C. 3002(24)).

*Homeless* includes:

(1) An individual who lacks a fixed, regular, and adequate nighttime residence; and

(2) An individual who has a primary nighttime residence that is:

(i) A supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);

(ii) An institution that provides a temporary residence for individuals intended to be institutionalized; or

(iii) A public or private place not designed for, or ordinarily used as, regular sleeping accommodations for human beings. (42 U.S.C. 11302(a)).

*Host agency* means a public agency or a private nonprofit organization exempt from taxation under § 501(c)(3) of the Internal Revenue Code of 1986 which provides a training work site and supervision for one or more participants. Political parties cannot be host agencies. A host agency may be a religious organization as long as the projects in which participants are being trained do not involve the construction, operation, or maintenance of any facility used or to be used as a place for sectarian religious instruction or worship. (OAA § 502(b)(1)(D)).

*Indian* means a person who is a member of an Indian tribe. (42 U.S.C. 3002(26)).

*Indian tribe* means any tribe, band, nation, or other organized group or community of Indians (including Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.*) which: (1) Is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; or (2) is located on, or in proximity to, a Federal or State reservation or Rancheria. (42 U.S.C. 3002(27)).

*Individual employment plan (IEP)* means a plan for a participant that is based on an assessment of that participant conducted by the grantee or sub-recipient, or a recent assessment or plan developed by another employment and training program, and a related service strategy. The IEP must include an appropriate employment goal (except that after the first IEP, subsequent IEPs need not contain an employment goal if such a goal is not feasible), objectives that lead to the goal, a timeline for the achievement of the objectives; and be

jointly agreed upon with the participant. (OAA § 502(b)(1)(N)).

*Intensive services* means those services authorized by § 134(d)(3) of the Workforce Investment Act.

*Jobs for Veterans Act* means Public Law 107–288 (2002). Section 2(a) of the Jobs for Veterans Act, codified at 38 U.S.C. 4215(a), provides a priority of service for Department of Labor employment and training programs for veterans, and certain spouses of veterans, who otherwise meet the eligibility requirements for participation. Priority is extended to veterans. Priority is also extended to the spouse of a veteran who died of a service-connected disability; the spouse of a member of the Armed Forces on active duty who has been listed for a total of more than 90 days as missing in action, captured in the line of duty by a hostile force, or forcibly detained by a foreign government or power; the spouse of any veteran who has a total disability resulting from a service-connected disability; and the spouse of any veteran who died while a disability so evaluated was in existence. (See § 641.520(b)).

*Job ready* refers to individuals who do not require further education or training to perform work that is available in their labor market.

*Limited English proficiency* means individuals who do not speak English as their primary language and who have a limited ability to read, speak, write, or understand English.

*Local Workforce Investment Area or local area* means an area designated by the Governor of a State under § 116 of the Workforce Investment Act.

*Local Board* means a Local Workforce Investment Board established under § 117 of the Workforce Investment Act.

*Low employment prospects* means the likelihood that an individual will not obtain employment without the assistance of the SCSEP or another workforce development program. Persons with low employment prospects have a significant barrier to employment. Significant barriers to employment may include but are not limited to: Lacking a substantial employment history, basic skills, and/or English-language proficiency; lacking a high school diploma or the equivalent; having a disability; being homeless; or residing in socially and economically isolated rural or urban areas where employment opportunities are limited.

*Low literacy skills* means the individual computes or solves problems, reads, writes, or speaks at or below the 8th grade level or is unable to compute or solve problems, read, write, or speak at a level necessary to function on the job, in the individual's family, or in society.

*Most-in-need* means participants with one or more of the following characteristics: Have a severe disability; are frail; are age 75 or older; are age-eligible but not receiving benefits under title II of the Social Security Act; reside in an area with persistent unemployment and have severely limited employment prospects; have limited English proficiency; have low literacy skills; have a disability; reside in a rural area; are veterans; have low employment prospects; have failed to find employment after using services provided under title I of the Workforce Investment Act of 1998 (29 U.S.C. 2801 *et seq.*); or are homeless or at risk for homelessness. (OAA § 513(b)(1)(E)).

*National grantee* means a public or non-profit private agency or organization, or Tribal organization, that receives a grant under title V of the OAA (42 U.S.C. 3056 *et seq.*) to administer a SCSEP project. (*See* OAA § 506(g)(5)).

*OAA* means the Older Americans Act, 42 U.S.C. 3001 *et seq.,* as amended.

*One-Stop Center* means the One-Stop Center system in a WIA local area which must include a comprehensive One-Stop Center through which One-Stop partners provide applicable core services and which provides access to other programs and services carried out by the One-Stop partners. (*See* WIA § 134(c)(2)).

*One-Stop delivery system* means a system under which employment and training programs, services, and activities are available through a network of eligible One-Stop partners, which assures that information about and access to core services is available regardless of where the individuals initially enter the workforce investment system. (*See* WIA § 134(c)(2)).

*One-Stop partner* means an entity described in § 121(b)(1) of the Workforce Investment Act, *i.e.,* required partners, or an entity described in § 121(b)(2) of the Workforce Investment Act, *i.e.,* additional partners.

*Other participant (enrollee) costs* means the costs of participant training, including the payment of reasonable costs to instructors, classroom rental, training supplies, materials, equipment, and tuition, and which may be provided before or during a community service assignment, in a classroom setting, or under other appropriate arrangements; job placement assistance, including job development and job search assistance; participant supportive services to enable a participant to successfully participate in a project, including the payment of reasonable costs of transportation, health care and medical services, special job-related or personal counseling, incidentals (such as work shoes, badges, uniforms, eyeglasses, and tools), child and adult care, temporary shelter, and follow-up services; and outreach, recruitment and selection, intake orientation, and assessments. (OAA § 502(c)(6)(A)(ii)–(v)).

*Pacific Island and Asian Americans* means Americans having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands. (OAA § 518(a)(5)).

*Participant* means an individual who is determined to be eligible for the SCSEP, is given a community service assignment, and is receiving any service funded by the program as described in subpart E.

*Persistent unemployment* means that the annual average unemployment rate for a county or city is more than 20 percent higher than the national average for two out of the last three years.

*Poor employment prospects* means the significant likelihood that an individual will not obtain employment without the assistance of the SCSEP or another workforce development program. Persons with poor employment prospects have a significant barrier to employment; significant barriers to employment include but are not limited to: lacking a substantial employment history, basic skills, and/or English-language proficiency; lacking a high school diploma or the equivalent; having a disability; being homeless; or residing in socially and economically isolated rural or urban areas where employment opportunities are limited.

*Program operator* means a grantee or sub-recipient that receives SCSEP funds from a SCSEP grantee or a higher-tier SCSEP sub-recipient and performs the following activities for all its participants: Eligibility determination, participant assessment, and development of and placement into community service assignments.

*Program Year* means the one-year period beginning on July 1 and ending on June 30.

*Project* means an undertaking by a grantee or sub-recipient in accordance with a grant or contract agreement that provides service to communities and training and employment opportunities to eligible individuals.

*Recipient* means grantee. As used here, "recipient" includes "recipient" as defined in 29 CFR 95.2(gg) and "grantee" as defined in 29 CFR 97.3.

*Residence* means an individual's declared dwelling place or address as

demonstrated by appropriate documentation.

*Rural* means an area not designated as a metropolitan statistical area by the Census Bureau; segments within metropolitan counties identified by codes 4 through 10 in the Rural Urban Commuting Area (RUCA) system; and RUCA codes 2 and 3 for census tracts that are larger than 400 square miles and have population density of less than 30 people per square mile.

*SCSEP* means the Senior Community Service Employment Program authorized under title V of the OAA.

*Secretary* means the Secretary of the U.S. Department of Labor.

*Service area* means the geographic area served by a local SCSEP project in accordance with a grant agreement.

*Severe disability* means a severe, chronic disability attributable to mental or physical impairment, or a combination of mental and physical impairments, that—

(1) Is likely to continue indefinitely; and

(2) Results in substantial functional limitation in 3 or more of the following areas of major life activity:

(i) Self-care;

(ii) Receptive and expressive language;

(iii) Learning;

(iv) Mobility;

(v) Self-direction;

(vi) Capacity for independent living;

(vii) Economic self-sufficiency.

(42 U.S.C. 3002(48)).

*Severely limited employment prospects* means the substantial likelihood that an individual will not obtain employment without the assistance of the SCSEP or another workforce development program. Persons with severely limited employment prospects have more than one significant barrier to employment; significant barriers to employment may include but are not limited to: Lacking a substantial employment history, basic skills, and/or English-language proficiency; lacking a high school diploma or the equivalent; having a disability; being homeless; or residing in socially and economically isolated rural or urban areas where employment opportunities are limited.

*State Board* means a State Workforce Investment Board established under WIA § 111.

*State grantee* means the entity designated by the Governor, or the highest government official, to enter into a grant with the Department to administer a State or Territory SCSEP project under the OAA. Except as applied to funding distributions under § 506 of the OAA, this definition applies to the 50 States, Puerto Rico, the District of Columbia and the following Territories: Guam, American Samoa, U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

*State Plan* means a plan that the Governor, or the highest government official, of a State must submit to the Secretary that outlines a four-year strategy, and describes the planning and implementation process, for the statewide provision of community service employment and other authorized activities for eligible individuals under SCSEP. (*See* § 641.300).

*Sub-recipient* means the legal entity to which a sub-award of financial assistance is made by the grantee (or by a higher-tier sub-recipient), and that is accountable to the grantee for the use of the funds provided. As used here, "sub-recipient" includes "sub-grantee" as defined in 29 CFR 97.3 and "sub-recipient" as defined in 29 CFR 95.2(kk).

*Supportive services* means services, such as transportation, health and medical services, special job-related or personal counseling, incidentals (such as work shoes, badges, uniforms, eyeglasses, and tools), child and adult care, housing, including temporary shelter, follow up services, and needs-related payments, which are necessary to enable an individual to participate in activities authorized under the SCSEP. (OAA § 502(c)(6)(A)(iv) and 518(a)(7)).

*Title V of the OAA* means 42 U.S.C. 3056 *et seq.,* as amended.

*Training services* means those services authorized by WIA § 134(d)(4).

*Tribal organization* means the recognized governing body of any Indian tribe, or any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body. (42 U.S.C. 3002(54)).

*Unemployed* means an individual who is without a job and who wants and is available for work, including an individual who may have occasional employment that does not result in a constant source of income. (OAA 518(a)(8)).

*Veteran* means an individual who is a "covered person" for purposes of the Jobs for Veterans Act, 38 U.S.C. 4215(a)(1).

*Workforce Investment Act (WIA)* means the Workforce Investment Act of 1998 (Pub. L. 105–220 (Aug. 7, 1998)), 29 U.S.C. 2801 *et seq.,* as amended.

*Workforce Investment Act (WIA) regulations* means regulations at 20 CFR part 652, subpart D and parts 660–671.

## Subpart B—Coordination With the Workforce Investment Act

### § 641.200 What is the relationship between the SCSEP and the Workforce Investment Act?

The SCSEP is a required partner under the Workforce Investment Act. As such, it is a part of the One-Stop delivery system. When acting in their capacity as WIA partners, SCSEP grantees and sub-recipients are required to follow all applicable rules under WIA and its regulations. (29 U.S.C. 2841(b)(1)(B)(vi) and 20 CFR 662.200 through 662.280).

### § 641.210 What services, in addition to the applicable core services, must SCSEP grantees and sub-recipients provide through the One-Stop delivery system?

In addition to providing core services, as defined at 20 CFR 662.240 of the WIA regulations, SCSEP grantees and sub-recipients must make arrangements through the One-Stop delivery system to provide eligible and ineligible individuals with referrals to WIA intensive and training services and access to other activities and programs carried out by other One-Stop partners.

### § 641.220 Does title I of WIA require the SCSEP to use OAA funds for individuals who are not eligible for SCSEP services or for services that are not authorized under the OAA?

No, SCSEP requirements continue to apply. Title V resources may not be used to serve individuals who are not SCSEP-eligible. The Workforce Investment Act creates a seamless service delivery system for individuals seeking workforce development services by linking the One-Stop partners in the One-Stop delivery system. Although the overall effect is to provide universal access to core services, SCSEP resources may only be used to provide services that are authorized and provided under the SCSEP to eligible individuals. Note, however, that one allowable SCSEP cost is a SCSEP project's proportionate share of One-Stop costs. See § 641.850(d). Title V funds can be used to pay wages to SCSEP participants receiving intensive and training services under title I of WIA provided that the SCSEP participants have each received a community service assignment. All other individuals who are in need of the services provided under the SCSEP, but who do not meet the eligibility criteria to enroll in the SCSEP, should be referred to or enrolled in WIA or other appropriate partner programs. WIA § 121(b)(1). These arrangements should be negotiated in the Memorandum of Understanding (MOU), which is an agreement developed and executed

between the Local Workforce Investment Board, with the agreement of the chief local elected official, and the One-Stop partners relating to the operation of the One-Stop delivery system in the local area. The MOU is further described in the WIA regulations at 20 CFR §§ 662.300 and 662.310.

**§ 641.230 Must the individual assessment conducted by the SCSEP grantee or sub-recipient and the assessment performed by the One-Stop delivery system be accepted for use by either entity to determine the individual's need for services in the SCSEP and adult programs under title I–B of WIA?**

Yes, § 502(b)(3) of the OAA provides that an assessment or IEP completed by the SCSEP satisfies any condition for an assessment, service strategy, or IEP completed at the One-Stop and vice-versa. (OAA § 502(b)(3)). These reciprocal arrangements and the contents of the SCSEP IEP and WIA IEP should be negotiated in the MOU.

**§ 641.240 Are SCSEP participants eligible for intensive and training services under title I of WIA?**

(a) Although SCSEP participants are not automatically eligible for intensive and training services under title I of WIA, local boards may deem SCSEP participants, either individually or as a group, as satisfying the requirements for receiving adult intensive and training services under title I of WIA.

(b) SCSEP participants who have been assessed and for whom an IEP has been developed have received an intensive service under 20 CFR 663.240(a) of the WIA regulations. In order to enhance skill development related to the IEP, it may be necessary to provide training beyond the community service assignment to enable participants to meet their unsubsidized employment objectives. The SCSEP grantee or sub-recipient, the host agency, the WIA program, or another One-Stop partner may provide training as appropriate and as negotiated in the MOU. (See § 641.540 for a further discussion of training for SCSEP participants.)

## Subpart C—The State Plan

**§ 641.300 What is the State Plan?**

The State Plan is a plan, submitted by the Governor, or the highest government official, in each State, as an independent document or as part of the WIA Unified Plan, that outlines a four-year strategy for the statewide provision of community service employment and other authorized activities for eligible individuals under the SCSEP as described in § 641.302. The State Plan also describes the planning and implementation process for SCSEP services in the State, taking into account the relative distribution of eligible individuals and employment opportunities within the State. The State Plan is intended to foster coordination among the various SCSEP grantees and sub-recipients operating within the State and to facilitate the efforts of stakeholders, including State and local boards under WIA, to work collaboratively through a participatory process to accomplish the SCSEP's goals. (OAA § 503(a)(1)). The State Plan provisions are listed in § 641.325.

**§ 641.302 What is a four-year strategy?**

The State Plan must outline a four-year strategy for the statewide provision of community service employment and other authorized activities for eligible individuals under the SCSEP program. (OAA § 503(a)(1)). The four-year strategy must specifically address the following:

(a) The State's long-term strategy for achieving an equitable distribution of SCSEP positions within the State that:

(1) Moves positions from over-served to underserved locations within the State, under § 641.365;

(2) Equitably serves rural and urban areas; and

(3) Serves individuals afforded priority for service, pursuant to § 641.520;

(b) The State's long-term strategy for avoiding disruptions to the program when new Census or other reliable data become available, or when there is over-enrollment for any other reason;

(c) The State's long-term strategy for serving minority older individuals under SCSEP;

(d) Long-term projections for job growth in industries and occupations in the State that may provide employment opportunities for older workers, and how those relate to the types of unsubsidized jobs for which SCSEP participants will be trained, and the types of skill training to be provided;

(e) The State's long-term strategy for engaging employers to develop and promote opportunities for the placement of SCSEP participants in unsubsidized employment;

(f) The State's strategy for continuous improvement in the level of performance for entry into unsubsidized employment, and to achieve, at a minimum, the levels specified in § 513(a)(2)(E)(ii) of the OAA;

(g) Planned actions to coordinate activities of SCSEP grantees with the activities being carried out in the State under title I of WIA, including plans for using the WIA One-Stop delivery system and its partners to serve individuals aged 55 and older;

(h) Planned actions to coordinate activities of SCSEP grantees with the activities being carried out in the State under other titles of the OAA;

(i) Planned actions to coordinate the SCSEP with other public and private entities and programs that provide services to older Americans, such as community and faith-based organizations, transportation programs, and programs for those with special needs or disabilities;

(j) Planned actions to coordinate the SCSEP with other labor market and job training initiatives; and

(k) The State's long-term strategy to improve SCSEP services, including planned longer-term changes to the design of the program within the State, and planned changes in the use of SCSEP grantees and program operators to better achieve the goals of the program; this may include recommendations to the Department, as appropriate.

**§ 641.305 Who is responsible for developing and submitting the State Plan?**

The Governor, or the highest governmental official, of each State is responsible for developing and submitting the State Plan to the Department.

**§ 641.310 May the Governor, or the highest government official, delegate responsibility for developing and submitting the State Plan?**

(a) Yes, the Governor, or the highest governmental official of each State, may delegate responsibility for developing and submitting the State Plan, provided that any such delegation is consistent with State law and regulations.

(b) To delegate responsibility, the Governor, or the highest government official, must submit to the Department a signed statement indicating the individual and/or organization that will be submitting the State Plan on his or her behalf.

**§ 641.315 Who participates in developing the State Plan?**

(a) In developing the State Plan the Governor, or the highest government official, must seek the advice and recommendations of representatives from:

(1) The State and area agencies on aging;

(2) State and local boards under the Workforce Investment Act (WIA);

(3) Public and private nonprofit agencies and organizations providing employment services, including each grantee operating a SCSEP project within the State, except as provided in § 641.320(b);

(4) Social service organizations providing services to older individuals;
(5) Grantees under title III of the OAA;
(6) Affected communities;
(7) Unemployed older individuals;
(8) Community-based organizations serving older individuals;
(9) Business organizations; and
(10) Labor organizations.
(b) The Governor, or the highest government official, may also obtain the advice and recommendations of other interested organizations and individuals, including SCSEP program participants, in developing the State Plan. (OAA § 503(a)(2)).

**§ 641.320 Must all national grantees operating within a State participate in the State planning process?**

(a) The eligibility provision at OAA § 514(c)(6) requires national grantees to coordinate activities with other organizations at the State and local levels. Therefore, except as provided in paragraph (b) of this section, any national grantee that does not participate in the State planning process may be deemed ineligible to receive SCSEP funds in the following Program Year.

(b) National grantees serving older American Indians, or Pacific Island and Asian Americans, with funds reserved under OAA § 506(a)(3), are exempted from the requirement to participate in the State planning processes under § 503(a)(8) of the OAA. Although these national grantees may choose not to participate in the State planning process, the Department encourages their participation. Only those grantees using reserved funds are exempt; if a grantee is awarded one grant with reserved funds and another grant with non-reserved funds, the grantee is required under paragraph (a) of this section to participate in the State planning process for purposes of the non-reserved funds grant.

**§ 641.325 What information must be provided in the State Plan?**

The Department issues instructions detailing the information that must be provided in the State Plan. At a minimum, the State Plan must include the State's four-year strategy, as described in § 641.302, and information on the following:

(a) The ratio of eligible individuals in each service area to the total eligible population in the State;

(b) The relative distribution of:

(1) Eligible individuals residing in urban and rural areas within the State;

(2) Eligible individuals who have the greatest economic need;

(3) Eligible individuals who are minorities;

(4) Eligible individuals who are limited English proficient; and

(5) Eligible individuals who have the greatest social need;

(c) The current and projected employment opportunities in the State (such as by providing information available under § 15 of the Wagner-Peyser Act (29 U.S.C. 491–2) by occupation), and the types of skills possessed by eligible individuals;

(d) The localities and populations for which projects of the type authorized by title V are most needed;

(e) Actions taken and/or planned to coordinate activities of SCSEP grantees in the State with activities carried out in the State under title I of WIA;

(f) A description of the process used to obtain advice and recommendations on the State Plan from representatives of organizations and individuals listed in § 641.315, and advice and recommendations on steps to coordinate SCSEP services with activities funded under title I of WIA from representatives of organizations listed in § 641.335;

(g) A description of the State's procedures and time line for ensuring an open and inclusive planning process that provides meaningful opportunity for public comment as required by § 641.350;

(h) Public comments received, and a summary of the comments;

(i) A description of the steps taken to avoid disruptions to the greatest extent possible as provided in § 641.365; and

(j) Such other information as the Department may require in the State Plan instructions. (OAA § 503(a)).

**§ 641.330 How should the State Plan reflect community service needs?**

The Governor, or the highest government official, must ensure that the State Plan identifies the types of community services that are needed and the places where these services are most needed. The State Plan should specifically identify the needs and locations of those individuals most in need of community services and the groups working to meet their needs. (OAA § 503(a)(4)(E)).

**§ 641.335 How should the Governor, or the highest government official, address the coordination of SCSEP services with activities funded under title I of WIA?**

The Governor, or the highest government official, must seek the advice and recommendations from representatives of the State and area agencies on aging in the State and the State and local boards established under title I of WIA. (OAA § 503(a)(2)). The State Plan must describe the steps that are being taken to coordinate SCSEP activities within the State with activities being carried out under title I of WIA. (OAA § 503(a)(4)(F)). The State Plan must describe the steps being taken to ensure that the SCSEP is an active partner in each One-Stop delivery system and the steps that will be taken to encourage and improve coordination with the One-Stop delivery system.

**§ 641.340 How often must the Governor, or the highest government official, update the State Plan?**

(a) Under instructions issued by the Department, the Governor, or the highest government official, must review the State Plan and submit an update to the State Plan to the Secretary for consideration and approval not less often than every two years. OAA § 503(a)(1). States are encouraged to review their State Plan more frequently than every two years, however, and make modifications as circumstances warrant, under § 641.345.

(b) Before development of the update to the State Plan, the Governor, or the highest government official, must seek the advice and recommendations of the individuals and organizations identified in § 641.315 about what, if any, changes are needed, and must publish the State Plan, showing the changes, for public comment. OAA § section 503(a)(2), 503(a)(3).

**§ 641.345 What are the requirements for modifying the State Plan?**

(a) Modifications may be submitted anytime circumstances warrant.

(b) Modifications to the State Plan are required when:

(1) There are changes in Federal or State law or policy that substantially change the assumptions upon which the State Plan is based;

(2) There are significant changes in the State's vision, four-year strategy, policies, performance indicators, or organizational responsibilities; or

(3) There is a change in a grantee or grantees.

(c) Modifications to the State Plan are subject to the same public comment requirements that apply to the development of the State Plan under § 641.350.

(d) States are not required to seek the advice and recommendations of the individuals and organizations identified in § 641.315 when modifying the State Plan, except that States must seek the advice and recommendations of any national grantees operating in the State. While not required, states are strongly encouraged to seek the advice and recommendation of the relevant entities listed in § 641.315 when or if modifying the State Plan becomes necessary.

(e) The Department will issue additional instructions for the procedures that must be followed when requesting modifications to the State Plan.

**§ 641.350 How should public comments be solicited and collected?**

The Governor, or the highest government official, should follow established State procedures to solicit and collect public comments. The State Plan must include a description of the State's procedures and schedule for ensuring an open and inclusive planning process that provides meaningful opportunity for public comment.

**§ 641.355 Who may comment on the State Plan?**

Any individual or organization may comment on the Plan.

**§ 641.360 How does the State Plan relate to the equitable distribution report?**

The two documents address some of the same areas, but are prepared at different points in time. The equitable distribution report is prepared by State grantees at the beginning of each fiscal year and provides a "snapshot" of the actual distribution of all of the authorized positions within the State, grantee-by-grantee, and the optimum number of participant positions in each designated area based on the latest available Census or other reliable data. The State Plan is prepared by the Governor, or the highest government official, and covers many areas in addition to equitable distribution, as discussed in § 641.325, and sets forth a proposed plan for distribution of authorized positions in the State. Any distribution or redistribution of positions made as a result of a State Plan proposal will be reflected in the next equitable distribution report, which then forms the basis for the proposed distribution in the next State Plan update. This process is iterative in that it moves the authorized positions from overserved areas to underserved areas over a period of time.

**§ 641.365 How must the equitable distribution provisions be reconciled with the provision that disruptions to current participants should be avoided?**

(a) Governors, or highest government officials, must describe in the State Plan the steps that are being taken to comply with the statutory requirement to avoid disruptions in the provision of services for participants. (OAA § 503(a)(6)).

(b) When there is new Census or other reliable data indicating that there has been a shift in the location of the eligible population or when there is over-enrollment for any other reason, the Department recommends a gradual shift in positions as they become vacant to areas where there has been an increase in the eligible population.

(c) The Department does not define disruptions to mean that participants are entitled to remain in a subsidized community service assignment indefinitely. As discussed in § 641.570, there is a time limit on SCSEP participation, thus permitting positions to be transferred over time.

(d) Grantees and sub-recipients must not transfer positions from one geographic area to another without first notifying the State agency responsible for preparing the State Plan and equitable distribution report.

(e) Grantees must submit, in writing, any proposed changes in distribution that occur after submission of the equitable distribution report to the Department for approval.

(f) All grantees are required to coordinate any proposed changes in position distribution with the other grantees in the State, including the State project director, before submitting the proposed changes to the Department for approval. The request for the Department's approval must include the comments of the State project director, which the Department will consider in making its decision.

## Subpart D—Grant Application and Responsibility Review Requirements for State and National SCSEP Grants

**§ 641.400 What entities are eligible to apply to the Department for funds to administer SCSEP projects?**

(a) *National Grants.* Entities eligible to apply for national grants include nonprofit organizations, Federal public agencies, and tribal organizations. These entities must provide information to establish that they are capable of administering a multi-State program, as required by the Secretary. State and local agencies may not apply for these funds.

(b) *State Grants.*

(1) Section 506(e) of the OAA requires the Department to award each State a grant to provide SCSEP services. Governors, or highest government officials, designate an individual State agency as the organization to administer SCSEP funds.

(2) If the State fails to meet its expected levels of performance for the core indicators for three consecutive years, it is not eligible to designate an agency to administer SCSEP funds in the following year. Instead, the State must conduct a competition to select an organization as the grantee of the funds allotted to the State under § 506(e). Public and nonprofit private agencies and organizations, State agencies other than the previously designated, failed agency, and tribal organizations, are eligible to be selected as a grantee for the funds. Other States may not be selected as a grantee for this funding.

**§ 641.410 How does an eligible entity apply?**

(a) *General.* An eligible entity must follow the application guidelines issued by the Department. The Department will issue application guidelines announcing the availability of national funds and State funds, whether they are awarded on a competitive or noncompetitive basis. The guidelines will contain application due dates, application instructions, evaluation criteria, and other necessary information.

(b) *National Grant Applicants.* All applicants for SCSEP national grant funds, except for applications for grants proposing to serve older Indians and Pacific Island and Asian Americans with funds reserved under OAA § 506(a)(3), must submit their applications to the Governor, or the highest government official, of each State in which projects are proposed so that he or she has a reasonable opportunity to make the recommendations described in § 641.480, before submitting the application to the Department. (OAA § 503(a)(5)).

(c) *State Applicants.* A State that submits a Unified Plan under § 501 of WIA may include the State's SCSEP grant application in its Unified Plan. Any State that submits a SCSEP grant application as part of its WIA Unified Plan must address all of the application requirements as published in the Department's instructions. Sections 641.300 through 641.365 address State Plans and modifications.

**§ 641.420 What are the eligibility criteria that each applicant must meet?**

To be eligible to receive SCSEP funds, each applicant must demonstrate:

(a) An ability to administer a program that serves the greatest number of eligible participants, giving particular consideration to individuals with greatest economic need, individuals with greatest social need, and individuals described in § 641.570(b) or § 641.520(a)(2) through (a)(8).

(b) An ability to administer a program that provides employment in community service assignments for eligible individuals in communities in which they reside, or in nearby communities, that will contribute to the general welfare of the community;

(c) An ability to administer a program that moves eligible participants into unsubsidized employment;

(d) Where the applicant has previously received a SCSEP grant, the applicant's prior performance in meeting SCSEP core measures of performance and addressing SCSEP additional measures of performance; and where the applicant has not received a SCSEP grant, the applicant's prior performance under other Federal or State programs; relevant past performance will also be used for scoring criterion and will be set forth more fully in the Solicitation for Grant Applications (see § 641.460);

(e) An ability to move participants with multiple barriers to employment, including individuals described in § 641.570(b) or § 641.520(a)(2) through (a)(8), into unsubsidized employment;

(f) An ability to coordinate activities with other organizations at the State and local levels, including the One-Stop delivery system;

(g) An ability to properly manage the program, as reflected in its plan for fiscal management of the SCSEP;

(h) An ability to administer a project that provides community service;

(i) An ability to minimize program disruption for current participants and in community services provided if there is a change in project sponsor and/or location, and its plan for minimizing disruptions;

(j) Any additional criteria that the Department deems appropriate to minimize disruptions for current participants. (OAA § 514(c)).

### § 641.430 What are the responsibility conditions that an applicant must meet?

Subject to § 641.440, each applicant must meet the listed responsibility "tests" by not having committed the following acts:

(a) The Department has been unable to recover a debt from the applicant, whether incurred by the applicant or by one of its sub-recipients, or the applicant has failed to comply with a debt repayment plan to which it agreed. In this context, a debt is established by final agency action, followed by three demand letters to the applicant, without payment in full by the applicant.

(b) Established fraud or criminal activity of a significant nature within the applicant's organization.

(c) Serious administrative deficiencies identified by the Department, such as failure to maintain a financial management system as required by Federal regulations.

(d) Willful obstruction of the auditing or monitoring process.

(e) Failure to provide services to applicants as agreed to in a current or recent grant or to meet applicable core performance measures or address other applicable indicators of performance.

(f) Failure to correct deficiencies brought to the grantee's attention in writing as a result of monitoring activities, reviews, assessments, or other activities.

(g) Failure to return a grant closeout package or outstanding advances within 90 days after the grant expiration date or receipt of closeout package, whichever is later, unless an extension has been requested and granted.

(h) Failure to submit required reports.

(i) Failure to properly report and dispose of Government property as instructed by the Department.

(j) Failure to have maintained effective cash management or cost controls resulting in excess cash on hand.

(k) Failure to ensure that a sub-recipient complies with applicable audit requirements, including OMB Circular A–133 and the audit requirements specified at § 641.821.

(l) Failure to audit a sub-recipient within the period required under § 641.821.

(m) Final disallowed costs in excess of five percent of the grant or contract award if, in the judgment of the Grant Officer, the disallowances are egregious findings.

(n) Failure to establish a mechanism to resolve a sub-recipient's audit in a timely fashion. (OAA § 514(d)(4)).

### § 641.440 Are there responsibility conditions that alone will disqualify an applicant?

(a) Yes, an applicant may be disqualified if

(1) Either of the first two responsibility tests, a or b, listed in § 641.430 is not met, or

(2) The applicant substantially, or persistently for two or more consecutive years, fails one of the other responsibility tests listed in § 641.430.

(b) The second responsibility test addresses "fraud or criminal activity of a significant nature." The Department will determine the existence of significant fraud or criminal activity which typically will include willful or grossly negligent disregard for the use or handling of, or other fiduciary duties concerning, Federal funding, where the grantee has no effective systems, checks, or safeguards to detect or prevent fraud or criminal activity. Additionally, significant fraud or criminal activity will typically include coordinated patterns or behaviors that pervade a grantee's administration or are committed by the higher levels of a grantee's management or authority. The Department will determine whether "fraud or criminal activity of a significant nature" has occurred on a case-by-case basis, regardless of what party identifies the alleged fraud or criminal activity.

### § 641.450 How will the Department examine the responsibility of eligible entities?

The Department will review available records to assess each applicant's overall fiscal and administrative ability to manage Federal funds. The Department's responsibility review may consider all relevant information, including the organization's history of managing other grants awarded by the Department or by other Federal agencies. (OAA § 514(d)(1) and (d)(2)).

### § 641.460 What factors will the Department consider in selecting national grantees?

The Department will select national grantees from among applicants that are able to meet the eligibility and responsibility review criteria at § 514 of the OAA. (Section 641.420 contains the eligibility criteria and §§ 641.430 and 641.440 contain the responsibility criteria.) The Department also will take the rating criteria described in the Solicitation for Grant Applications or other instrument into consideration. These rating criteria will include relevant past performance.

### § 641.465 Under what circumstances may the Department reject an application?

(a) The Department may question any proposed project component of an application if it believes that the component will not serve the purposes of the SCSEP. The Department may reject the application if the applicant does not submit or negotiate an acceptable alternative.

(b) The Department may reject any application that the Grant Officer determines unacceptable based on the content of the application, rating score, past performance, fiscal management, or any other factor the Grant Officer believes serves the best interest of the program, including the application's comparative rating in a competition.

### § 641.470 What happens if an applicant's application is rejected?

(a) Any entity whose application is rejected in whole or in part will be informed that it has not been selected. The non-selected entity may request an explanation of the Department's basis for its rejection. If requested, the Department will provide the entity with feedback on its proposal. The non-selected entity may follow the procedures in § 641.900.

(b) Incumbent grantees will not have an opportunity to obtain technical assistance provided by the Department under OAA § 513(d)(2)(B)(i) to cure, in an open competition, any deficiency in a proposal because that will create inequity in favor of incumbents. Nor, during an open competition, will the Department provide assistance to any applicant to improve its application.

(c) If the Administrative Law Judge (ALJ) rules, under § 641.900, that the organization should have been selected, in whole or in part, the matter must be remanded to the Grant Officer. The Grant Officer must, within 10 working days, determine whether the organization continues to meet the requirements of this part, and whether the positions which are the subject of the ALJ's decision will be awarded, in whole or in part, to the organization and the timing of the award. In making this determination, the Grant Officer must take into account disruption to participants, disruption to grantees, and the operational needs of the SCSEP.

(d) In the event that the Grant Officer determines that it is not feasible to award any positions to the appealing applicant, the applicant will be awarded its bid preparation costs, or a pro rata share of those costs if the Grant Officer's finding applies to only a portion of the funds that would be awarded. If positions are awarded to the appealing applicant, that applicant is not entitled to the full grant amount but will only receive the funds remaining in the grant that have not been expended by the current grantee through its operation of the grant and its subsequent closeout. The available remedy in a SCSEP non-selection appeal is neither retroactive nor immediately effective selection; rather it is the potential to be selected as a SCSEP grantee as quickly as administratively feasible in the future, for the remainder of the grant cycle.

(e) In the event that any party notifies the Grant Officer that it is not satisfied with the Grant Officer's decision, the Grant Officer must return the decision to the ALJ for review.

(f) Any organization selected and/or funded as a SCSEP grantee is subject to having its positions reduced or to being removed as a SCSEP grantee if an ALJ decision so orders. The Grant Officer provides instructions on transition and closeout to both the newly designated grantee and to the grantee whose positions are affected or which is being removed. All parties must agree to the provisions of this paragraph as a condition of being a SCSEP grantee.

### § 641.480 May the Governor, or the highest government official, make recommendations to the Department on national grant applications?

(a) Yes, in accordance with § 641.410(b), each Governor, or highest government official, will have a reasonable opportunity to make comments on any application to operate a SCSEP project located in the Governor's, or the highest government official's, State before the Department makes a final decision on a grant award. The Governor's, or the highest government official's, comments should be directed to the Department and may include the anticipated effect of the proposal on the overall distribution of program positions within the State; recommendations for redistribution of positions to underserved areas as vacancies occur in previously encumbered positions in other areas; and recommendations for distributing any new positions that may become available as a result of an increase in funding for the State. The Governor's, or the highest government official's, recommendations should be consistent with the State Plan. (OAA § 503(a)(5)).

(b) The Governor, or the highest government official, has the option of making the authorized recommendations on all applications or only on those applications proposed for award following the rating process. It is incumbent on each Governor, or the highest government official, to inform the Department of his or her intent to review the applications before or after the rating process.

### § 641.490 When will the Department compete SCSEP grant awards?

(a)(1) The Department will hold a full and open competition for national grants every four years. (OAA § 514(a)(1)).

(2) If a national grantee meets the expected level of performance for each of the core indicators for each of the four years, the Department may provide an additional one-year grant to the national grantee. (OAA § 514(a)(2)).

### § 641.495 When must a State compete its SCSEP award?

If a State grantee fails to meet its expected levels of performance for three consecutive Program Years, the State must hold a full and open competition, under such conditions as the Secretary may provide, for the State SCSEP funds for the full Program Year following the determination of consecutive failure. (OAA § 513(d)(3)(B)(iii)). The incumbent (failed) grantee is not eligible to compete. Other states are also not eligible to compete for these funds. § 641.400(b)(2).

## Subpart E—Services to Participants

### § 641.500 Who is eligible to participate in the SCSEP?

Anyone who is at least 55 years old, unemployed (as defined in § 641.140), and who is a member of a family with an income that is not more than 125 percent of the family income levels prepared by the Department of Health and Human Services and approved by OMB (Federal poverty guidelines) is eligible to participate in the SCSEP. (OAA § 518(a)(3), (8)). A person with a disability may be treated as a "family of one" for income eligibility determination purposes at the option of the applicant.

### § 641.505 When is eligibility determined?

Initial eligibility is determined at the time individuals apply to participate in the SCSEP. Once individuals become SCSEP participants, the grantee or sub-recipient is responsible for verifying their continued eligibility at least once every 12 months. Grantees and sub-recipients may also verify an individual's eligibility as circumstances require, including instances when enrollment is delayed.

### § 641.507 How is applicant income computed?

An applicant's income is computed by calculating the includable income received by the applicant during the 12-month period ending on the date an individual submits an application to participate in the SCSEP, or the annualized income for the 6-month period ending on the application date. The Department requires grantees to use whichever method is more favorable to the individual. (OAA § 518(a)(4)).

### § 641.510 What types of income are included and excluded for participant eligibility determinations?

(a) With certain exceptions, the Department will use the definition of income from the U.S. Census Bureau's Current Population Survey (CPS) as the standard for determining SCSEP applicant income eligibility.

(b) Any income that is unemployment compensation, a benefit received under title XVI of the Social Security Act (42 U.S.C. 1381 *et seq.*), a payment made to or on behalf of veterans or former members of the Armed Forces under the laws administered by the Secretary of Veterans Affairs, or 25 percent of a benefit received under title II of the Social Security Act (42 U.S.C. 401 *et seq.*), must be excluded from SCSEP income eligibility determinations. (OAA § 518(a)(3)(A)).

(c) The Department has issued administrative guidance on income

inclusions and exclusions and procedures for determining SCSEP income eligibility. This guidance may be updated periodically.

**§ 641.512 May grantees and sub-recipients enroll otherwise eligible job ready individuals and place them directly into unsubsidized employment?**

No, grantees and sub-recipients may not enroll as SCSEP participants job-ready individuals who can be directly placed into unsubsidized employment. Such individuals should be referred to an employment provider, such as the One-Stop Center for job placement assistance under WIA or another employment program.

**§ 641.515 How must grantees and sub-recipients recruit and select eligible individuals for participation in the SCSEP?**

(a) Grantees and sub-recipients must develop methods of recruitment and selection that assure that the maximum number of eligible individuals have an opportunity to participate in the program. To the extent feasible, grantees and sub-recipients should seek to enroll minority and Indian eligible individuals, eligible individuals with limited English proficiency, and eligible individuals with greatest economic need, at least in proportion to their numbers in the area, taking into consideration their rates of poverty and unemployment. (OAA § 502(b)(1)(M)).

(b) Grantees and sub-recipients must use the One-Stop delivery system as one method in the recruitment and selection of eligible individuals to ensure that the maximum number of eligible individuals have an opportunity to participate in the project. (OAA § 502(b)(1)(H)).

(c) States may enter into agreements among themselves to permit cross-border enrollment of eligible participants. Such agreements should cover both State and national grantee positions and must be submitted to the Department for approval in the grant application or a modification of the grant.

**§ 641.520 Are there any priorities that grantees and sub-recipients must use in selecting eligible individuals for participation in the SCSEP?**

(a) Yes, in selecting eligible individuals for participation in the SCSEP, priority must be given to individuals who have one or more of the following characteristics:

(1) Are 65 years of age or older;

(2) Have a disability;

(3) Have limited English proficiency or low literacy skills;

(4) Reside in a rural area;

(5) Are veterans (or, in some cases, spouses of veterans) for purposes of § 2(a) of the Jobs for Veterans Act, 38 U.S.C. 4215(a) as set forth in paragraph (b) of this section;

(6) Have low employment prospects;

(7) Have failed to find employment after using services provided through the One-Stop delivery system; or

(8) Are homeless or are at risk for homelessness.

(OAA § 518(b)).

(b) Section 2(a) of the Jobs for Veterans Act creates a priority for service for veterans (and, in some cases, spouses of veterans) who otherwise meet the program eligibility criteria for the SCSEP. 38 U.S.C. 4215(a). Priority is extended to veterans. Priority is also extended to the spouse of a veteran who died of a service-connected disability; the spouse of a member of the Armed Forces on active duty who has been listed for a total of more than 90 days as missing in action, captured in the line of duty by a hostile force, or forcibly detained by a foreign government or power; the spouse of any veteran who has a total disability resulting from a service-connected disability; and the spouse of any veteran who died while a disability so evaluated was in existence.

(c) Grantees and sub-recipients must apply these priorities in the following order:

(1) Persons who qualify as a veteran or qualified spouse under § 2(a) of the Jobs for Veterans Act, 38 U.S.C. 4215(a), and who possess at least one of the other priority characteristics;

(2) Persons who qualify as a veteran or qualified spouse under § 2(a) of the Jobs for Veterans Act, 38 U.S.C. 4215(a), who do not possess any other of the priority characteristics;

(3) Persons who do not qualify as a veteran or qualified spouse under § 2(a) of the Jobs for Veterans Act (non-veterans), and who possess at least one of the other priority characteristics.

**§ 641.535 What services must grantees and sub-recipients provide to participants?**

(a) When individuals are selected for participation in the SCSEP, the grantee or sub-recipient is responsible for:

(1) Providing orientation to the SCSEP, including information on project goals and objectives, community service assignments, training opportunities, available supportive services, the availability of a free physical examination, participant rights and responsibilities, and permitted and prohibited political activities;

(2) (i) Assessing participants' work history, skills and interests, talents, physical capabilities, aptitudes, needs for supportive services, occupational preferences, training needs, potential for performing community service assignments, and potential for transition to unsubsidized employment;

(ii) Performing an initial assessment upon program entry, unless an assessment has already been performed under title I of WIA as provided in § 641.230. Subsequent assessments may be made as necessary, but must be made no less frequently than two times during a twelve month period (including the initial assessment);

(3)(i) Using the information gathered during the initial assessment to develop an IEP that includes an appropriate employment goal for each participant, except that if an assessment has already been performed and an IEP developed under title I of WIA, the WIA assessment and IEP will satisfy the requirement for a SCSEP assessment and IEP as provided in § 641.230;

(ii) Updating the IEP as necessary to reflect information gathered during the subsequent participant assessments (OAA § 502(b)(1)(N));

(iii) The initial IEP should include an appropriate employment goal for each participant. Thereafter, if the grantee determines that the participant is not likely to obtain unsubsidized employment, the IEP must reflect other approaches to help the participant achieve self-sufficiency, including the transition to other services or programs.

(4) Placing participants in appropriate community service assignments in the community in which they reside, or in a nearby community (OAA § 502(b)(1)(B));

(5) Providing or arranging for training identified in participants' IEPs and consistent with the SCSEP's goal of unsubsidized employment (OAA § 502(a)(1), 502(b)(1)(B), 502(b)(1)(I), 502(b)(1)(N)(ii));

(6) Assisting participants in obtaining needed supportive services identified in their IEPs (OAA § 502(b)(1)(N));

(7) Providing appropriate services for participants, or referring participants to appropriate services, through the One-Stop delivery system established under WIA (OAA § 502(b)(1)(O));

(8) Providing counseling on participants' progress in meeting the goals and objectives identified in their IEPs, and in meeting their supportive service needs (OAA § 502(b)(1)(N)(iii));

(9) Providing participants with wages and benefits for time spent in the community service assignment, orientation, and training (OAA § 502(b)(1)(I), 502(b)(1)(J), 502(c)(6)(A)(i)) (see also §§ 641.565 and 641.540(f), addressing wages and benefits);

(10) Ensuring that participants have safe and healthy working conditions at

their community service employment worksites (OAA § 502(b)(1)(J));

(11) Assisting participants in obtaining unsubsidized employment, including providing or arranging for employment counseling in support of their IEPs;

(b) The Department may issue administrative guidance that clarifies the requirements of paragraph (a).

(c) Grantees may not use SCSEP funds for job ready individuals who only need job search assistance or job referral services. Grantees may provide job search assistance and job club activities to participants who are enrolled in the SCSEP and are assigned to community service assignments. (See also § 641.512).

**§ 641.540 What types of training may grantees and sub-recipients provide to SCSEP participants in addition to the training received at a community service assignment?**

(a) In addition to the training provided in a community service assignment, grantees and sub-recipients may arrange skill training provided that it:

(1) Is realistic and consistent with the participants' IEP;

(2) Makes the most effective use of the participant's skills and talents; and

(3) Prepares the participant for unsubsidized employment.

(b) Training may be provided before or during a community service assignment.

(c) Training may be in the form of lectures, seminars, classroom instruction, individual instruction, online instruction, on-the-job experiences. Training may be provided by the grantee or through other arrangements, including but not limited to, arrangements with other workforce development programs such as WIA. (OAA § 502(c)(6)(A)(ii)).

(d) Grantees and sub-recipients are encouraged to obtain training through locally available resources, including host agencies, at no cost or reduced cost to the SCSEP.

(e) Grantees and sub-recipients may pay for participant training, including the payment of reasonable costs of instructors, classroom rental, training supplies, materials, equipment, and tuition. (OAA § 502(c)(6)(A)(ii)).

(f) Participants must be paid wages while in training, as described in § 641.565(a). (OAA § 502(b)(1)(I)).

(g) As provided in § 641.545, grantees and sub-recipients may pay for costs associated with supportive services, such as transportation, necessary to participate in training. (OAA § 502(b)(1)(L)).

(h) Nothing in this section prevents or limits participants from engaging in self-development training available through other sources, at their own expense, during hours when not performing their community service assignments.

**§ 641.545 What supportive services may grantees and sub-recipients provide to participants?**

(a) Grantees and sub-recipients are required to assess all participants' need for supportive services and to make every effort to assist participants in obtaining needed supportive services. Grantees and sub-recipients may provide directly or arrange for supportive services that are necessary to enable an individual to successfully participate in a SCSEP project, including but not limited to payment of reasonable costs of transportation; health and medical services; special job-related or personal counseling; incidentals such as work shoes, badges, uniforms, eyeglasses, and tools; dependent care; housing, including temporary shelter; needs-related payments; and follow-up services. (OAA §§ 502(c)(6)(A)(iv), 518(a)(7)).

(b) To the extent practicable, the grantee or sub-recipient should arrange for the payment of these expenses from other resources.

(c) Grantees and sub-recipients are encouraged to contact placed participants throughout the first 12 months following placement to determine if they have the necessary supportive services to remain in the job and to provide or arrange to provide such services if feasible.

**§ 641.550 What responsibility do grantees and sub-recipients have to place participants in unsubsidized employment?**

For those participants whose IEPs include a goal of unsubsidized employment, grantees and sub-recipients are responsible for working with participants to ensure that the participants are receiving services and taking actions designed to help them achieve this goal. Grantees and sub-recipients must contact private and public employers directly or through the One-Stop delivery system to develop or identify suitable unsubsidized employment opportunities. They must also encourage host agencies to assist participants in their transition to unsubsidized employment, including unsubsidized employment with the host agency.

**§ 641.565 What policies govern the provision of wages and benefits to participants?**

(a) *Wages.*

(1)(i) Grantees and sub-recipients must pay participants the highest applicable required wage for time spent in orientation, training, and community service assignments.

(ii) SCSEP participants may be paid the highest applicable required wage while receiving WIA intensive services.

(2) The highest applicable required wage is either the minimum wage applicable under the Fair Labor Standards Act of 1938; the State or local minimum wage for the most nearly comparable covered employment; or the prevailing rate of pay for persons employed in similar public occupations by the same employer.

(3) Grantees and sub-recipients must make any adjustments to minimum wage rates payable to participants as may be required by Federal, State, or local statute during the grant term.

(b) *Benefits.*

(1) *Required benefits.* Except as provided in paragraph (b)(2) of this section, grantees and sub-recipients must ensure that participants receive such benefits as are required by law.

(i) Grantees and sub-recipients must provide benefits uniformly to all participants within a project or subproject, unless the Department agrees to waive this provision due to a determination that such a waiver is in the best interests of applicants, participants, and project administration.

(ii) Grantees and sub-recipients must offer participants the opportunity to receive physical examinations annually.

(A) Physical examinations are a benefit, and not an eligibility criterion. The examining physician must provide, to the participant only, a written report of the results of the examination.

(B) Participants may choose not to accept the physical examination. In that case, the grantee or sub-recipient must document this refusal, through a signed statement, within 60 workdays after commencement of the community service assignment. Each year thereafter, grantees and sub-recipients must offer the physical examination and document the offer and any participant's refusal.

(C) Grantees and sub-recipients may use SCSEP funds to pay the costs of physical examinations.

(iii) When participants are not covered by the State workers' compensation law, the grantee or sub-recipient must provide participants with workers' compensation benefits equal to those provided by law for covered employment. OAA § 504(b).

(iv) If required by State law, grantees/sub-recipients must provide unemployment compensation coverage for participants.

(v) Grantees and sub-recipients must provide compensation for scheduled work hours during which a host agency's business is closed for a Federal holiday, which may be paid or in the form of rescheduled work time.

(vi) Grantees and sub-recipients must provide necessary sick leave that is not part of an accumulated sick leave program, which may be paid or in the form of rescheduled work time.

(2) *Prohibited wage and benefits costs.*

(i) Participants may not carry over allowable benefits from one Program Year to the next;

(ii) Grantees and sub-recipients may not provide payment or otherwise compensate participants for unused benefits such as sick leave or holidays;

(iii) Grantees and sub-recipients may not use SCSEP funds to cover costs associated with the following participant benefits:

(A) Retirement. Grantees and sub-recipients may not use SCSEP funds to provide contributions into a retirement system or plan, or to pay the cost of pension benefits for program participants.

(B) Annual leave.

(C) Accumulated sick leave.

(D) Bonuses.

(OAA § 502(c)(6)(A)(i)).

**§ 641.570 Is there a time limit for participation in the program?**

(a) *Individual time limit.* (1) Eligible individuals may participate in the program for a maximum duration of 48 months in the aggregate (whether or not consecutive), from the later of July 1, 2007, or the date of the individual's enrollment in the program.

(2) At the time of enrollment, the grantee or sub-recipient must inform the participant of this time limit and the possible extension available under paragraph (b) of this section, and the grantee or sub-recipient must provide for a system to transition participants to unsubsidized employment or other assistance before the maximum enrollment duration has expired. Provisions for transition must be reflected in the participant's IEP.

(3) If requested by a grantee or sub-recipient, the Department will authorize an extension for individuals who meet the criteria in paragraph (b) of this section. Notwithstanding any individual extensions granted, grantees and sub-recipients must ensure that projects do not exceed the overall average participation cap for all participants, as described in paragraph (c) of this section.

(b) *Increased periods of individual participation.* If requested by a grantee, the Department will authorize increased periods of participation for individuals who:

(1) Have a severe disability;

(2) Are frail or are age 75 or older;

(3) Meet the eligibility requirements related to age for, but do not receive, benefits under title II of the Social Security Act (42 U.S.C. 401 *et seq.*);

(4) Live in an area with persistent unemployment and are individuals with severely limited employment prospects; or

(5) Have limited English proficiency or low literacy skills.

(c) *Average grantee participation cap.* (1) Notwithstanding any individual extension authorized under paragraph (b) of this section, each grantee must manage its SCSEP project in such a way that the grantee does not exceed an average participation cap for all participants of 27 months (in the aggregate).

(2) A grantee may request, and the Department may authorize, an extended average participation period of up to 36 months (in the aggregate) for a particular project area in a given Program Year if the Department determines that extenuating circumstances exist to justify an extension, due to one more of the following factors:

(i) High rates of unemployment or of poverty or of participation in the program of block grants to States for temporary assistance for needy families established under part A of title IV of the Social Security Act, in the areas served by a grantee, relative to other areas of the State involved or the Nation;

(ii) Significant downturns in the economy of an area served by the grantee or in the national economy;

(iii) Significant numbers or proportions of participants with one or more barriers to employment, including "most-in-need" individuals described in § 641.710(a)(6), served by a grantee relative to such numbers or proportions for grantees serving other areas of the State or Nation;

(iv) Changes in Federal, State, or local minimum wage requirements; or

(v) Limited economies of scale for the provision of community service employment and other authorized activities in the areas served by the grantee.

(3) For purposes of the average participation cap, each grantee will be considered to be one project.

(d) *Authorized break in participation.* On occasion a participant takes an authorized break in participation from the program, such as a formal leave of absence necessitated by personal circumstances or a break caused because a suitable community service assignment is not available. Such an authorized break, if taken under a formal grantee policy allowing such breaks and formally entered into the SCSEP Performance and Results Quarterly Performance Reporting (SPARQ) system, will not count toward the individual time limit described in paragraph (a) or the average participation cap described in paragraph (c) of this section.

(e) *Administrative guidance.* The Department will issue administrative guidance detailing the process by which a grantee may request increased periods of individual participation, and the process by which a grantee may request an extension of the average participation cap. The process will require that the determination of individual participant extension requests is made in a fair and equitable manner.

(f) *Grantee authority.* Grantees may limit the time of participation for individuals to less than the 48 months described in paragraph (a) of this section, if the grantee uniformly applies the lower participation limit, and if the grantee submits a description of the lower participation limit policy in its grant application or modification of the grant and the Department approves the policy. (OAA §§ 502(b)(1)(C), 518(a)(3)(B)).

**§ 641.575 May a grantee or sub-recipient establish a limit on the amount of time its participants may spend at a host agency?**

Yes, grantees and sub-recipients may establish limits on the amount of time that participants spend at a particular host agency, and are encouraged to rotate participants among different host agencies, or to different assignments within the same host agency, as such rotations may increase participants' skills development and employment opportunities. Such limits must be established in the grant agreement or modification of the grant, and approved by the Department. The Department will not approve any limit that does not require an individualized determination that rotation is in the best interest of the participant and will further the acquisition of skills listed in the IEP. Host agency rotations have no effect on either the individual participation limit or the average participation cap.

**§ 641.577 Is there a limit on community service assignment hours?**

While there is no specific limit on the number of hours that may be worked in a community service assignment, a community service assignment must be a part-time position. However, the Department strongly encourages grantees to use 1,300 hours as a

benchmark and good practice for monitoring community service hours.

**§ 641.580 Under what circumstances may a grantee or sub-recipient terminate a participant?**

(a) If, at any time, a grantee or sub-recipient determines that a participant was incorrectly declared eligible as a result of false information knowingly given by that individual, the grantee or sub-recipient must give the participant immediate written notice explaining the reason(s) for termination and may terminate the participant 30 days after it has provided the participant with written notice.

(b) If, during eligibility verification under § 641.505, a grantee or sub-recipient finds a participant to be no longer eligible for enrollment, the grantee or sub-recipient must give the participant written notice explaining the reason(s) for termination and may terminate the participant 30 days after it has provided the participant with written notice.

(c) If, at any time, the grantee or sub-recipient determines that it incorrectly determined a participant to be eligible for the program through no fault of the participant, the grantee or sub-recipient must give the participant immediate written notice explaining the reason(s) for termination and may terminate the participant 30 days after it has provided the participant with written notice.

(d) A grantee or sub-recipient may terminate a participant for cause. Grantees must include their policies concerning for-cause terminations in the grant application and obtain the Department's approval. The grantee or sub-recipient must give the participant written notice explaining the reason(s) for termination and may terminate the participant 30 days after it has provided the participant with written notice.

(e) A grantee or sub-recipient may terminate a participant if the participant refuses to accept a reasonable number of job offers or referrals to unsubsidized employment consistent with the IEP and there are no extenuating circumstances that would hinder the participant from moving to unsubsidized employment. The grantee or sub-recipient must give the participant written notice explaining the reason(s) for termination and may terminate the participant 30 days after it has provided the participant with written notice.

(f) When a grantee or sub-recipient makes an unfavorable determination of enrollment eligibility under paragraph (b) or (c) of this section, it should refer the individual to other potential sources of assistance, such as the One-Stop delivery system. When a grantee or sub-recipient terminates a participant under paragraph (d) or (e) of this section, it may refer the individual to other potential sources of assistance, such as the One-Stop delivery system.

(g) Grantees and sub-recipients must provide each participant at the time of enrollment with a written copy of its policies for terminating a participant for cause or otherwise, and must verbally review those policies with each participant.

(h) Any termination, as described in paragraphs (a) through (e) of this section, must be consistent with administrative guidelines issued by the Department and the termination notice must inform the participant of the grantee's grievance procedure, and the termination must be subject to the applicable grievance procedures described in § 641.910.

(i) Participants may not be terminated from the program solely on the basis of their age. Grantees and sub-recipients may not impose an upper age limit for participation in the SCSEP.

**§ 641.585 What is the employment status of SCSEP participants?**

(a) Participants are not considered Federal employees solely as a result of their participation in the SCSEP. (OAA § 504(a)).

(b) Grantees must determine whether or not a participant qualifies as an employee of the grantee, sub-recipient, local project, or host agency, under applicable law. Responsibility for this determination rests with the grantee even when a Federal agency is a grantee or host agency.

## Subpart F—Pilot, Demonstration, and Evaluation Projects

**§ 641.600 What is the purpose of the pilot, demonstration, and evaluation projects authorized under § 502(e) of the OAA?**

The purpose of the pilot, demonstration, and evaluation projects authorized under § 502(e) of the OAA is to develop and implement techniques and approaches, and to demonstrate the effectiveness of these techniques and approaches, in addressing the employment and training needs of individuals eligible for SCSEP.

**§ 641.610 How are pilot, demonstration, and evaluation projects administered?**

The Department may enter into agreements with States, public agencies, nonprofit private organizations, or private business concerns, as may be necessary, to conduct pilot, demonstration, and evaluation projects.

**§ 641.620 How may an organization apply for pilot, demonstration, and evaluation project funding?**

Organizations applying for pilot, demonstration, and evaluation project funding must follow the instructions issued by the Department. Instructions for these unique funding opportunities are published in TEGLs available at *http://www.doleta.gov/Seniors.*

**§ 641.630 What pilot, demonstration, and evaluation project activities are allowable under § 502(e)?**

Allowable pilot, demonstration and evaluation projects include:

(a) Activities linking businesses and eligible individuals, including activities providing assistance to participants transitioning from subsidized activities to private sector employment;

(b) Demonstration projects and pilot projects designed to:

(1) Attract more eligible individuals into the labor force;

(2) Improve the provision of services to eligible individuals under One-Stop delivery systems established under title I of WIA;

(3) Enhance the technological skills of eligible individuals; and

(4) Provide incentives to SCSEP grantees for exemplary performance and incentives to businesses to promote their participation in the SCSEP;

(c) Demonstration projects and pilot projects, as described in paragraph (b) of this section, for workers who are older individuals (but targeted to eligible individuals) only if such demonstration projects and pilot projects are designed to assist in developing and implementing techniques and approaches in addressing the employment and training needs of eligible individuals;

(d) Provision of training and technical assistance to support a SCSEP project;

(e) Dissemination of best practices relating to employment of eligible individuals; and

(f) Evaluation of SCSEP activities.

**§ 641.640 Should pilot, demonstration, and evaluation project entities coordinate with SCSEP grantees and sub-recipients, including area agencies on aging?**

(a) To the extent practicable, the Department will provide an opportunity, before the development of a demonstration or pilot project, for the appropriate area agency on aging and SCSEP grantees and sub-grantees to submit comments on the project in order to ensure coordination of SCSEP activities with activities carried out under this subpart.

(b) To the extent practicable, entities carrying out pilot, demonstration, and evaluation projects must consult with

appropriate area agencies on aging, SCSEP grantees and sub-grantees, and other appropriate agencies and entities to promote coordination of SCSEP and pilot, demonstration, and evaluation activities. (OAA § 502(e)).

## Subpart G—Performance Accountability

### § 641.700 What performance measures/indicators apply to SCSEP grantees?

(a) *Indicators of performance.* There are currently eight performance measures, of which six are core indicators and two are additional indicators. Core indicators (defined in § 641.710) are subject to goal-setting and corrective action (described in § 641.720); that is, performance level goals for each core indicator must be agreed upon between the Department and each grantee before the start of each program year, and if a grantee fails to meet the performance level goals for the core indicators, that grantee is subject to corrective action. Additional indicators (defined in § 641.710) are not subject to goal-setting and are, therefore, also not subject to corrective action.

(b) *Core Indicators.* Section 513(b)(1) of the 2006 OAA establishes the following core indicators of performance:

(1) Hours (in the aggregate) of community service employment;

(2) Entry into unsubsidized employment;

(3) Retention in unsubsidized employment for six months;

(4) Earnings;

(5) The number of eligible individuals served; and

(6) The number of most-in-need individuals served (the number of participating individuals described in § 518(a)(3)(B)(ii) or (b)(2) of the OAA).

(c) *Additional indicators.* Section 513(b)(2) of the 2006 OAA establishes the following additional indicators of performance:

(1) Retention in unsubsidized employment for one year; and

(2) Satisfaction of the participants, employers, and their host agencies with their experiences and the services provided.

(3) Any other indicators of performance that the Secretary determines to be appropriate to evaluate services and performance.

(d) *Affected entities.* The core indicators of performance and additional indicators of performance are applicable to each grantee without regard to whether the grantee operates the program directly or through sub-contracts, sub-grants, or agreements with other entities. Grantees must assure that their sub-grantees and lower-tier sub-grantees are collecting and reporting program data.

(e) *Required evaluation and reporting.* An agreement to be evaluated on the core indicators of performance and to report information on the additional indicators of performance is a requirement for application for, and is a condition of, all SCSEP grants.

### § 641.710 How are the performance indicators defined?

(a) The core indicators are defined as follows:

(1) "Hours of community service employment" is defined as the total number of hours of community service provided by SCSEP participants divided by the number of hours of community service funded by the grantee's grant, after adjusting for differences in minimum wage among the States and areas. Paid training hours are excluded from this measure.

(2) "Entry into unsubsidized employment" is defined by the formula: Of those who are not employed at the date of participation: The number of participants who are employed in the first quarter after the exit quarter divided by the number of adult participants who exit during the quarter.

(3) "Retention in unsubsidized employment for six months" is defined by the formula: Of those who are employed in the first quarter after the exit quarter: The number of adult participants who are employed in both the second and third quarters after the exit quarter divided by the number of adult participants who exit during the quarter.

(4) "Earnings" is defined by the formula: Of those participants who are employed in the first, second and third quarters after the exit quarter: Total earnings in the second quarter plus total earnings in the third quarter after the exit quarter divided by the number of participants who exit during the quarter.

(5) "The number of eligible individuals served" is defined as the total number of participants served divided by a grantee's authorized number of positions, after adjusting for differences in minimum wage among the States and areas.

(6) "Most-in-need" or the number of participating individuals described in § 518(a)(3)(B)(ii) or (b)(2) is defined by counting the total number of the following characteristics for all participants and dividing by the number of participants served. Participants are characterized as most-in-need if they:

(i) Have a severe disability;

(ii) Are frail;

(iii) Are age 75 or older;

(iv) Meet the eligibility requirements related to age for, but do not receive, benefits under title II of the Social Security Act (42 U.S.C. 401 *et seq.*);

(v) Live in an area with persistent unemployment and are individuals with severely limited employment prospects;

(vi) Have limited English proficiency;

(vii) Have low literacy skills;

(viii) Have a disability;

(ix) Reside in a rural area;

(x) Are veterans;

(xi) Have low employment prospects;

(xii) Have failed to find employment after utilizing services provided under title I of the Workforce Investment Act of 1998 (29 U.S.C. 2801 *et seq.*); or

(xiii) Are homeless or at risk for homelessness.

(b) The additional indicators are defined as follows:

(1) "Retention in unsubsidized employment for 1 year" is defined by the formula: Of those who are employed in the first quarter after the exit quarter: The number of participants who are employed in the fourth quarter after the exit quarter divided by the number of participants who exit during the quarter.

(2) "Satisfaction of the participants, employers, and their host agencies with their experiences and the services provided" is defined as the results of customer satisfaction surveys administered to each of these three customer groups. The Department will prescribe the content of the surveys.

### § 641.720 How will the Department and grantees initially determine and then adjust expected levels of performance for the core performance measures?

(a) *Initial agreement.* Before the beginning of each Program Year, the Department and each grantee will undertake to agree upon expected levels of performance for each core indicator, except as provided in paragraph (b) of § 641.730.

(1) As a first step in this process, the Department proposes a performance level for each core indicator, taking into account any statutory performance requirements, the need to promote continuous improvement in the program overall and in each grantee, the grantee's past performance, and the statutory adjustment factors articulated in paragraph (b) of this section.

(2) A grantee may request a revision to the Department's initial performance level goal determination. The request must be based on data that supports the revision request. The data supplied by the grantee at this stage may concern the statutory adjustment factors articulated in paragraph (b) of this section, but is not limited to those factors; it is permissible for a grantee to supply data

on "other appropriate factors as determined by the Secretary." (OAA § 513(a)(2)(C)).

(3) The Department may revise the performance level goal in response to the data provided. The Department then sets the expected levels of performance for the core indicators. At this point, agreement is reached by the parties and funds may be awarded. If a grantee does not agree with the offered expected level of performance, agreement is not reached and no funds may be awarded. A grantee may submit comments to the Department about the grantee's satisfaction with the expected levels of performance.

(4) Funds may not be awarded under the grant until such agreement is reached.

(5) At the conclusion of performance level negotiations with all grantees, the Department will make available for public review the final negotiated expected levels of performance for each grantee, including any comments submitted by the grantee about the grantee's satisfaction with the negotiated levels.

(6) The minimum percentage for the expected level of performance for the entry into unsubsidized employment core indicator is:

(i) 21 percent for Program Year 2007;

(ii) 22 percent for Program Year 2008;

(iii) 23 percent for Program Year 2009;

(iv) 24 percent for Program Year 2010; and

(v) 25 percent for Program Year 2011.

(b) *Adjustment during the Program Year.* After the Department and grantees reach agreement on the core indicator levels, those levels may only be revised in response to a request from a grantee based on data supporting one or more of the following statutory adjustment factors:

(1) High rates of unemployment or of poverty or of participation in the program of block grants to States for temporary assistance for needy families established under part A of title IV of the Social Security Act (42 U.S.C. 601 *et seq.*), in the areas served by a grantee, relative to other areas of the State involved or Nation.

(2) Significant downturns in the economy of the areas served by the grantee or in the national economy.

(3) Significant numbers or proportions of participants with one or more barriers to employment, including individuals described in § 518(a)(3)(B)(ii) or (b)(2) of the 2006 OAA (most-in-need), served by a grantee relative to such numbers or proportions for grantees serving other areas of the State or Nation.

(4) Changes in Federal, State, or local minimum wage requirements.

(5) Limited economies of scale for the provision of community service employment and other authorized activities in the areas served by the grantee.

**§ 641.730 How will the Department assist grantees in the transition to the new core performance indicators?**

(a) *General transition provision.* As soon as practicable after July 1, 2007, the Department will determine if a SCSEP grantee has, for Program Year 2006, met the expected levels of performance for the Program Year 2007. If the Department determines that the grantee failed to meet Program Year 2007 goals in Program Year 2006, the Department will provide technical assistance to help the grantee meet those expected levels of performance in Program Year 2007.

(b) *Exception for most-in-need for Program Year 2007.* Because the 2006 OAA Amendments expanded the list of most-in-need characteristics, neither the Department nor the grantees have sufficient data to set a goal for measuring performance. Accordingly, Program Year 2007 will be treated as a baseline year for the most-in-need indicator so that the grantees and the Department may collect sufficient data to set a meaningful goal for this measure for Program Year 2008.

**§ 641.740 How will the Department determine whether a grantee fails, meets, or exceeds the expected levels of performance for the core indicators and what will be the consequences of failing to meet expected levels of performance?**

(a) *Aggregate calculation of performance.* Not later than 120 days after the end of each Program Year, the Department will determine if a national grantee has met the expected levels of performance (including any adjustments to such levels) by aggregating the grantee's core indicators. The aggregate is calculated by combining the percentage of goal achieved on each of the individual core indicators to obtain an average score. A grantee will fail to meet its performance measures when it is does not meet 80 percent of the agreed-upon level of performance for the aggregate of all the core indicators. Performance in the range of 80 to 100 percent constitutes meeting the level for the core performance measures. Performance in excess of 100 percent constitutes exceeding the level for the core performance measures.

(b) Consequences—

(1) *National grantees.* (i) If the Department determines that a national grantee fails to meet the expected levels of performance in a Program Year, the Department, after each year of such failure, will provide technical assistance and will require such grantee to submit a corrective action plan not later than 160 days after the end of the Program Year.

(ii) The corrective action plan must detail the steps the grantee will take to meet the expected levels of performance in the next Program Year.

(iii) Any national grantee that has failed to meet the expected levels of performance for 4 consecutive years (beginning with Program Year 2007) will not be allowed to compete in the subsequent grant competition, but may compete in the next grant competition after that subsequent competition.

(2) *State Grantees.* (i) If the Department determines that a State fails to meet the expected levels of performance, the Department, after each year of such failure, will provide technical assistance and will require the State to submit a corrective action plan not later than 160 days after the end of the Program Year.

(ii) The corrective action plan must detail the steps the State will take to meet the expected levels of performance in the next Program Year.

(iii) If the Department determines that the State fails to meet the expected levels of performance for 3 consecutive Program Years (beginning with Program Year 2007), the Department will require the State to conduct a competition to award the funds allotted to the State under § 506(e) of the OAA for the first full Program Year following the Department's determination. The new grantee will be responsible for administering the SCSEP in the State and will be subject to the same requirements and responsibilities as had been the State grantee.

(c) *Evaluation.* The Department will annually evaluate, publish and make available for public review, information on the actual performance of each grantee with respect to the levels achieved for each of the core indicators of performance, compared to the expected levels of performance, and the actual performance of each grantee with respect to the levels achieved for each of the additional indicators of performance. The results of the Department's annual evaluation will be reported to Congress.

**§ 641.750 Will there be performance-related incentives?**

The Department is authorized by §§ 502(e)(2)(B)(iv) and 517(c)(1) of the 2006 OAA to use recaptured SCSEP funds to provide incentive awards. The Department will exercise this authority at its discretion.

## Subpart H—Administrative Requirements

### § 641.800 What uniform administrative requirements apply to the use of SCSEP funds?

(a) SCSEP recipients and sub-recipients must follow the uniform administrative requirements and allowable cost requirements that apply to their type of organization. (OAA § 503(f)(2)).

(b) Governments, State, local, and Indian tribal organizations that receive SCSEP funds under grants or cooperative agreements must follow the common rule implementing OMB Circular A–102, "Grants and Cooperative Agreements with State and Local Governments" (10/07/1994) (further amended 08/29/1997), codified at 29 CFR part 97.

(c) Nonprofit and commercial organizations, institutions of higher education, hospitals, other nonprofit organizations, and commercial organizations that receive SCSEP funds under grants or cooperative agreements must follow the common rule implementing OMB Circular A–110, codified at 29 CFR part 95.

### § 641.803 What is program income?

Program income, as described in 29 CFR 97.25 (State and local governments) and 29 CFR 95.2(bb) (non-profit and commercial organizations), is income earned by the recipient or sub-recipient during the grant period that is directly generated by an allowable activity supported by grant funds or earned as a result of the award of grant funds. Program income includes income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under an award. (*See* 29 CFR 95.24(e) (non-profit and commercial organizations) and 29 CFR 97.25(e) (State and local governments)). Costs of generating SCSEP program income may be deducted from gross income received by SCSEP recipients and sub-recipients to determine SCSEP program income earned or generated provided these costs have not been charged to the SCSEP.

### § 641.806 How must SCSEP program income be used?

(a) SCSEP recipients that earn or generate program income during the grant period must add the program income to the Federal and non-Federal funds committed to the SCSEP and must use it to further the purposes of the program and in accordance with the terms and conditions of the grant award. Program income may only be spent during the grant period in which it was earned (except as provided for in paragraph (b)), as provided in 29 CFR 95.24(a) (non-profit and commercial organizations) or 29 CFR 97.25(g) (2) (State and local governments), as applicable.

(b)(1) Except as provided for in paragraph (b)(2), recipients that continue to receive a SCSEP grant from the Department must spend program income earned from SCSEP-funded activities in the Program Year in which the earned income was received.

(b)(2) Any program income remaining at the end of the Program Year in which it was earned will remain available for expenditure in the subsequent Program Year only. Any program income remaining after the second Program Year must be remitted to the Department.

(c) Recipients that do not continue to receive a SCSEP grant from the Department must remit unexpended program income earned during the grant period from SCSEP funded activities to the Department at the end of the grant period. These recipients have no obligation to the Department for program income earned after the end of the grant period.

### § 641.809 What non-Federal share (matching) requirements apply to the use of SCSEP funds?

(a) The Department will pay no more than 90 percent of the total cost of activities carried out under a SCSEP grant. (OAA sec. 502(c)(1)).

(b) All SCSEP recipients, including Federal agencies if there is no statutory exemption, must provide or ensure that at least 10 percent of the total cost of activities carried out under a SCSEP grant (non-Federal share of costs) consists of allowable costs paid for with non-Federal funds, except as provided in paragraphs (e) and (f) of this section.

(c) Recipients must determine the non-Federal share of costs in accordance with 29 CFR 97.24 for governmental units, or 29 CFR 95.23 for nonprofit and commercial organizations.

(d) The non-Federal share of costs may be provided in cash, or in-kind, or a combination of the two. (OAA § 502(c)(2)).

(e) A recipient may not require a sub-recipient or host agency to provide non-Federal resources for the use of the SCSEP project as a condition of entering into a sub-recipient or host agency relationship. This does not preclude a sub-recipient or host agency from voluntarily contributing non-Federal resources for the use of the SCSEP project.

(f) The Department may pay all of the costs of activities in an emergency or disaster project or a project in an economically distressed area. (OAA § 502(c)(1)(B)).

### § 641.812 What is the period of availability of SCSEP funds?

(a) Except as provided in § 641.815, recipients must expend SCSEP funds during the Program Year for which they are awarded (July 1–June 30). (OAA § 517(b)).

(b) SCSEP recipients must ensure that no sub-agreement provides for the expenditure of any SCSEP funds before the start of the grant year, or after the end of the grant period, except as provided in § 641.815.

### § 641.815 May the period of availability be extended?

SCSEP recipients may request in writing, and the Department may grant, an extension of the period during which SCSEP funds may be obligated or expended. SCSEP recipients requesting an extension must justify that an extension is necessary. (OAA § 517(b)). The Department will notify recipients in writing of the approval or disapproval of any such requests.

### § 641.821 What audit requirements apply to the use of SCSEP funds?

(a) Recipients and sub-recipients receiving Federal awards of SCSEP funds must follow the audit requirements in paragraphs (b) and (c) of this section that apply to their type of organization. As used here, Federal awards of SCSEP funds include Federal financial assistance and Federal cost-reimbursement contracts received directly from the Department or indirectly under awards by SCSEP recipients or higher-tier sub-recipients. (OAA § 503(f)(2)).

(b) All governmental and nonprofit organizations that are recipients or sub-recipients must follow the audit requirements of OMB Circular A–133. These requirements are codified at 29 CFR parts 96 and 99 and referenced in 29 CFR 97.26 for governmental organizations and in 29 CFR 95.26 for institutions of higher education, hospitals, and other nonprofit organizations.

(c) (1) The Department is responsible for audits of SCSEP recipients that are commercial organizations.

(2) Commercial organizations that are sub-recipients under the SCSEP and that expend more than the minimum level specified in OMB Circular A–133 ($500,000, for fiscal years ending after December 31, 2003) must have either an organization-wide audit or a program-specific financial and compliance audit

conducted in accordance with OMB Circular A–133.

**§ 641.824 What lobbying requirements apply to the use of SCSEP funds?**

SCSEP recipients and sub-recipients must comply with the restrictions on lobbying codified in the Department's regulations at 29 CFR part 93. (Also refer to § 641.850(c), "Lobbying costs.")

**§ 641.827 What general nondiscrimination requirements apply to the use of SCSEP funds?**

(a) SCSEP recipients, sub-recipients, and host agencies are required to comply with the nondiscrimination provisions codified in the Department's regulations at 29 CFR parts 31 and 32 and the provisions on the equal treatment of religious organizations at 29 CFR part 2 subpart D.

(b) Recipients and sub-recipients of SCSEP funds are required to comply with the nondiscrimination provisions codified in the Department's regulations at 29 CFR part 37 if:

(1) The recipient:

(i) Is a One-Stop partner listed in § 121(b) of WIA, and

(ii) Operates programs and activities that are part of the One-Stop delivery system established under WIA; or

(2) The recipient otherwise satisfies the definition of "recipient" in 29 CFR 37.4.

(c) Recipients must ensure that participants are provided informational materials relating to age discrimination and/or their rights under the Age Discrimination in Employment Act of 1975 that are distributed to recipients by the Department as required by § 503(b)(3) of the OAA.

(d) Questions about or complaints alleging a violation of the nondiscrimination requirements cited in this section may be directed or mailed to the Director, Civil Rights Center, U.S. Department of Labor, Room N–4123, 200 Constitution Avenue, NW., Washington, DC, 20210, for processing. (See § 641.910(d)).

(e) The specification of any right or protection against discrimination in paragraphs (a) through (d) of this section must not be interpreted to exclude or diminish any other right or protection against discrimination in connection with a SCSEP project that may be available to any participant, applicant for participation, or other individual under any applicable Federal, State, or local laws prohibiting discrimination, or their implementing regulations.

**§ 641.833 What policies govern political patronage?**

(a) A recipient or sub-recipient must not select, reject, promote, or terminate an individual based on political services provided by the individual or on the individual's political affiliations or beliefs. In addition, as provided in § 641.827(b), certain recipients and sub-recipients of SCSEP funds are required to comply with WIA nondiscrimination regulations in 29 CFR part 37. These regulations prohibit discrimination on the basis of political affiliation or belief.

(b) A recipient or sub-recipient must not provide, or refuse to provide, funds to any sub-recipient, host agency, or other entity based on political affiliation.

(c) SCSEP recipients must ensure that every entity that receives SCSEP funds through the recipient is applying the policies stated in paragraphs (a) and (b) of this section.

**§ 641.836 What policies govern political activities?**

(a) No project under title V of the OAA may involve political activities. SCSEP recipients must ensure compliance with the requirements and prohibitions involving political activities described in paragraphs (b) and (c) of this section.

(b) State and local employees involved in the administration of SCSEP activities may not engage in political activities prohibited under the Hatch Act (5 U.S.C. chapter 15), including:

(1) Seeking partisan elective office;

(2) Using official authority or influence for the purpose of affecting elections, nominations for office, or fund-raising for political purposes. (5 U.S.C. 1502).

(c) SCSEP recipients must provide all persons associated with SCSEP activities with a written explanation of allowable and unallowable political activities under the Hatch Act. A notice explaining these allowable and unallowable political activities must be posted in every workplace in which SCSEP activities are conducted. The Department will provide the form and content of the notice and explanatory material by administrative issuance. (OAA § 502(b)(l)(P)).

(d) SCSEP recipients must ensure that:

(1) No SCSEP participants or staff persons engage in partisan or nonpartisan political activities during hours for which they are being paid with SCSEP funds.

(2) No participants or staff persons engage in partisan political activities in which such participants or staff persons represent themselves as spokespersons for the SCSEP.

(3) No participants are employed or out-stationed in the offices of a Member of Congress, a State or local legislator, or on the staff of any legislative committee.

(4) No participants are employed or out-stationed in the immediate offices of any elected chief executive officer of a State or unit of general government, except that:

(i) Units of local government may serve as host agencies for participants, provided that their assignments are non-political; and

(ii) While assignments may place participants in such offices, such assignments actually must be concerned with program and service activities and not in any way involved in political functions.

(5) No participants are assigned to perform political activities in the offices of other elected officials. Placement of participants in such offices in non-political assignments is permissible, however, provided that:

(i) SCSEP recipients develop safeguards to ensure that participants placed in these assignments are not involved in political activities; and

(ii) These safeguards are described in the grant agreement and are approved by the Department and are subject to review and monitoring by the SCSEP recipient and by the Department.

**§ 641.839 What policies govern union organizing activities?**

Recipients must ensure that SCSEP funds are not used in any way to assist, promote, or deter union organizing.

**§ 641.841 What policies govern nepotism?**

(a) SCSEP recipients must ensure that no recipient or sub-recipient hires, and no host agency serves as a worksite for, a person who works in a SCSEP community service assignment if a member of that person's immediate family is engaged in a decision-making capacity (whether compensated or not) for that project, subproject, recipient, sub-recipient, or host agency. The Department may exempt worksites on Native American reservations and in rural areas from this requirement provided that adequate justification can be documented, such as that no other persons are eligible and available for participation in the program.

(b) To the extent that an applicable State or local legal nepotism requirement is more restrictive than this provision, SCSEP recipients must ensure that the more restrictive requirement is followed.

(c) For purposes of this section, "immediate family" means wife, husband, son, daughter, mother, father, brother, sister, son-in-law, daughter-in-law, mother- in-law, father-in-law, brother-in-law, sister-in-law, aunt,

uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild.

**§ 641.844 What maintenance of effort requirements apply to the use of SCSEP funds?**

(a) A community service assignment for a participant under title V of the OAA is permissible only when specific maintenance of effort requirements are met.

(b) Each project funded under title V:

(1) Must not reduce the number of employment opportunities or vacancies that would otherwise be available to individuals not participating in the program;

(2) Must not displace currently employed workers (including partial displacement, such as a reduction in the hours of non-overtime work, wages, or employment benefits);

(3) Must not impair existing contracts or result in the substitution of Federal funds for other funds in connection with work that would otherwise be performed; and

(4) Must not employ or continue to employ any eligible individual to perform the same work or substantially the same work as that performed by any other individual who is on layoff. (OAA § 502(b)(1)(G)).

**§ 641.847 What uniform allowable cost requirements apply to the use of SCSEP funds?**

(a) *General.* Unless specified otherwise in this part or the grant agreement, recipients and sub-recipients must follow the uniform allowable cost requirements that apply to their type of organization. For example, a local government sub-recipient receiving SCSEP funds from a nonprofit organization must use the allowable cost requirements for governmental organizations in OMB Circular A–87. The Department's regulations at 29 CFR 95.27 (non-profit and commercial organizations) and 29 CFR 97.22 (State and local governments) identify the Federal principles for determining allowable costs that each kind of organization must follow. The applicable Federal principles for each kind of organization are described in paragraphs (b)(1) through (b)(5) of this section. (OAA § 503(f)(2)).

(b) *Allowable costs/cost principles.*

(1) Allowable costs for State, local, and Indian tribal government organizations must be determined under OMB Circular A–87, "Cost Principles for State, Local and Indian Tribal Governments."

(2) Allowable costs for nonprofit organizations must be determined under OMB Circular A–122, "Cost Principles for Non-Profit Organizations."

(3) Allowable costs for institutions of higher education must be determined under OMB Circular A–21, "Cost Principles for Educational Institutions."

(4) Allowable costs for hospitals must be determined in accordance with appendix E of 45 CFR part 74, "Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals."

(5) Allowable costs for commercial organizations and those nonprofit organizations listed in Attachment C to OMB Circular A–122 must be determined under the provisions of the Federal Acquisition Regulation (FAR), at 48 CFR part 31.

**§ 641.850 Are there other specific allowable and unallowable cost requirements for the SCSEP?**

(a) Yes, in addition to the generally applicable cost principles in § 641.847(b), the cost principles in paragraphs (b) through (g) of this section apply to SCSEP grants.

(b) *Claims against the Government.* For all types of entities, legal expenses for the prosecution of claims against the Federal Government, including appeals to an Administrative Law Judge, are unallowable.

(c) *Lobbying costs.* In addition to the prohibition contained in 29 CFR part 93, SCSEP funds must not be used to pay any salaries or expenses related to any activity designed to influence legislation or appropriations pending before the Congress of the United States or any State legislature. (See § 641.824).

(d) *One-Stop Costs.* Costs of participating as a required partner in the One-Stop delivery system established in accordance with § 134(c) of the WIA are allowable, provided that SCSEP services and funding are provided in accordance with the MOU required by the WIA and OAA § 502(b)(1)(O), and costs are determined in accordance with the applicable cost principles. The costs of services provided by the SCSEP, including those provided by participants/enrollees, may comprise a portion or the total of a SCSEP project's proportionate share of One-Stop costs.

(e) *Building repairs and acquisition costs.* Except as provided in this paragraph and as an exception to the allowable cost principles in § 641.847(b), no SCSEP funds may be used for the purchase, construction, or renovation of any building except for the labor involved in:

(1) Minor remodeling of a public building necessary to make it suitable for use for project purposes;

(2) Minor repair and rehabilitation of publicly used facilities for the general benefit of the community; and

(3) Repair and rehabilitation by participants of housing occupied by persons with low incomes who are declared eligible for such services by authorized local agencies.

(f) *Accessibility and reasonable accommodation.* Recipients and sub-recipients may use SCSEP funds to meet their obligations under § 504 of the Rehabilitation Act of 1973, as amended, and the Americans with Disabilities Act of 1990, as amended, and any other applicable Federal disability nondiscrimination laws, to provide physical and programmatic accessibility and reasonable accommodation/modifications for, and effective communications with, individuals with disabilities. (29 U.S.C. 794).

(g) *Participants' benefit costs.* Recipients and sub-recipients may use SCSEP funds for participant benefit costs only under the conditions set forth in § 641.565.

**§ 641.853 How are costs classified?**

(a) All costs must be classified as "administrative costs" or "programmatic activity costs." (OAA § 502(c)(6)).

(b) Recipients and sub-recipients must assign participants' wage and benefit costs and other participant (enrollee) costs such as supportive services to the programmatic activity cost category. (See § 641.864). When a participant's community service assignment involves functions whose costs are normally classified as administrative costs, compensation provided to the participants must be charged as programmatic activity costs instead of administrative costs, since participant wage and benefit costs are always charged to the programmatic activity cost category.

**§ 641.856 What functions and activities constitute administrative costs?**

(a) Administrative costs are that allocable portion of necessary and reasonable allowable costs of recipients and program operators that are associated with those specific functions identified in paragraph (b) of this section and that are not related to the direct provision of programmatic activities specified in § 641.864. These costs may be both personnel and non-personnel and both direct and indirect costs.

(b) Administrative costs are the costs associated with:

(1) Performing general administrative and coordination functions, including:

(i) Accounting, budgeting, financial, and cash management functions;

(ii) Procurement and purchasing functions;
(iii) Property management functions;
(iv) Personnel management functions;
(v) Payroll functions;
(vi) Coordinating the resolution of findings arising from audits, reviews, investigations, and incident reports;
(vii) Audit functions;
(viii) General legal services functions;
(ix) Developing systems and procedures, including information systems, required for these administrative functions;
(x) Preparing administrative reports; and
(xi) Other activities necessary for general administration of government funds and associated programs.
(2) Oversight and monitoring responsibilities related to administrative functions;
(3) Costs of goods and services used for administrative functions of the program, including goods and services such as rental or purchase of equipment, utilities, office supplies, postage, and rental and maintenance of office space;
(4) Travel costs incurred for official business in carrying out administrative activities or the overall management of the program;
(5) Costs of information systems related to administrative functions (for example, personnel, procurement, purchasing, property management, accounting, and payroll systems) including the purchase, systems development, and operating costs of such systems and;
(6) Costs of technical assistance, professional organization membership dues, and evaluating results obtained by the project involved against stated objectives.
(OAA § 502(c)(4)).

**§ 641.859 What other special rules govern the classification of costs as administrative costs or programmatic activity costs?**

(a) Recipients and sub-recipients must comply with the special rules for classifying costs as administrative costs or programmatic activity costs set forth in paragraphs (b) through (e) of this section.
(b)(1) Costs of awards by recipients and program operators that are solely for the performance of their own administrative functions are classified as administrative costs.
(2) Costs incurred by recipients and program operators for administrative functions listed in § 641.856(b) are classified as administrative costs.
(3) Costs incurred by vendors and sub-recipients performing the administrative functions of recipients and program operators are classified as administrative costs. (See 29 CFR 99.210 for a discussion of factors differentiating sub-recipients from vendors.)
(4) Except as provided in paragraph (b)(3) of this section, all costs incurred by all vendors, and only those sub-recipients below program operators, are classified as programmatic activity costs. (*See* 29 CFR 99.210 for a discussion of factors differentiating sub-recipients from vendors.)
(c) Personnel and related non-personnel costs of staff who perform both administrative functions specified in § 641.856(b) and programmatic services or activities must be allocated as administrative or programmatic activity costs to the benefiting cost objectives/categories based on documented distributions of actual time worked or other equitable cost allocation methods.
(d) The allocable share of indirect or overhead costs charged to the SCSEP grant are to be allocated to the administrative and programmatic activity cost categories in the same proportion as the costs in the overhead or indirect cost pool are classified as programmatic activity or administrative costs.
(e) Costs of the following information systems including the purchase, systems development and operating (*e.g.,* data entry) costs are charged to the programmatic activity cost category:
(1) Tracking or monitoring of participant and performance information;
(2) Employment statistics information, including job listing information, job skills information, and demand occupation information; and
(3) Local area performance information.

**§ 641.861 Must SCSEP recipients provide funding for the administrative costs of sub-recipients?**

(a) Recipients and sub-recipients must obtain funding for administrative costs to the extent practicable from non-Federal sources. (OAA § 502(c)(5)).
(b) SCSEP recipients must ensure that sufficient funding is provided for the administrative activities of sub-recipients that receive SCSEP funding through the recipient. Each SCSEP recipient must describe in its grant application the methodology used to ensure that sub-recipients receive sufficient funding for their administrative activities. (OAA § 502(b)(1)(R)).

**§ 641.864 What functions and activities constitute programmatic activity costs?**

Programmatic activity costs include, but are not limited to, the costs of the following functions:
(a) Participant wages, such benefits as are required by law (such as workers' compensation or unemployment compensation), the costs of physical examinations, compensation for scheduled work hours during which a host agency is closed for a Federal holiday, and necessary sick leave that is not part of an accumulated sick leave program, except that no amounts provided under the grant may be used to pay the cost of pension benefits, annual leave, accumulated sick leave, or bonuses, as described in § 641.565;
(b) Outreach, recruitment and selection, intake, orientation, assessment, and preparation and updating of IEPs;
(c) Participant training, as described in § 641.540, which may be provided before commencing or during a community service assignment, and which may be provided at a host agency, in a classroom setting, or using other appropriate arrangements, which may include reasonable costs of instructors' salaries, classroom space, training supplies, materials, equipment, and tuition;
(d) Subject to the restrictions in § 641.535(c), job placement assistance, including job development and job search assistance, job fairs, job clubs, and job referrals; and
(e) Participant supportive services, to enable an individual to successfully participate in a SCSEP project, as described in § 641.545.
(OAA § 502(c)(6)(A)).

**§ 641.867 What are the limitations on the amount of SCSEP administrative costs?**

(a) Except as provided in paragraph (b), no more than 13.5 percent of the SCSEP funds received for a Program Year may be used for administrative costs.
(b) The Department may increase the amount available for administrative costs to not more than 15 percent, in accordance with § 641.870.
(OAA § 502(c)(3)).

**§ 641.870 Under what circumstances may the administrative cost limitation be increased?**

(a) SCSEP recipients may request that the Department increase the amount available for administrative costs. The Department may honor the request if:
(1) The Department determines that it is necessary to carry out the project; and
(2) The recipient demonstrates that:
(i) Major administrative cost increases are being incurred in necessary program components, such as liability insurance, payments for workers' compensation for staff, costs associated with achieving unsubsidized placement goals, and

other operation requirements imposed by the Department;

(ii) The number of community service assignment positions in the project or the number of minority eligible individuals participating in the project will decline if the amount available for paying the cost of administration is not increased; or

(iii) The size of the project is so small that the amount of administrative costs incurred to carry out the project necessarily exceeds 13.5 percent of the grant amount.

(OAA § 502(c)(3)).

(b) A request by a recipient or prospective recipient for an increase in the amount available for administrative costs may be submitted as part of the grant application or as a separate submission at any time after the grant award.

**§ 641.873 What minimum expenditure levels are required for participant wages and benefits?**

(a) Except as provided in § 641.874 or in paragraph (c) of this section, not less than 75 percent of the SCSEP funds provided under a grant from the Department must be used to pay for wages and benefits of participants as described in § 641.864(a). (OAA § 502(c)(6)(B)).

(b) A SCSEP recipient is in compliance with this provision if at least 75 percent of the total expenditure of SCSEP funds provided to the recipient was for wages and benefits, even if one or more sub-recipients did not expend at least 75 percent of their SCSEP sub-recipient award for wages and benefits.

(c) A SCSEP grantee may submit to the Department a request for approval to use not less than 65 percent of the grant funds to pay wages and benefits under § 641.874.

**§ 641.874 What conditions apply to a SCSEP grantee request to use additional funds for training and supportive service costs?**

(a) A grantee may submit to the Department a request for approval—

(1) To use not less than 65 percent of the grant funds to pay the wages and benefits described in § 641.864(a);

(2) To use the percentage of grant funds specified in § 641.867 to pay for administrative costs as described in § 641.856;

(3) To use the 10 percent of grant funds that would otherwise be devoted to wages and benefits under § 641.873 to provide participant training (as described in § 641.540(e)) and participant supportive services to enable participants to successfully participate in a SCSEP project (as described in § 641.545), in which case the grantee must provide (from the funds described in this paragraph) the wages for those individual participants who are receiving training from the funds described in this paragraph, but may not use the funds described in this paragraph to pay for any administrative costs; and

(4) To use the remaining grant funds to provide participant training, job placement assistance, participant supportive services, and outreach, recruitment and selection, intake, orientation and assessment.

(b) In submitting the request the grantee must include in the request—

(1) A description of the activities for which the grantee will spend the grant funds described in paragraphs (a)(3) and (a)(4) of this section;

(2) An explanation documenting how the provision of such activities will improve the effectiveness of the project, including an explanation of whether any displacement of eligible individuals or elimination of positions for such individuals will occur, information on the number of such individuals to be displaced and of such positions to be eliminated, and an explanation of how the activities will improve employment outcomes for the individuals served, based on the assessment conducted under § 641.535(a)(2); and

(3) A proposed budget and work plan for the activities, including a detailed description of how the funds will be spent on the activities described in paragraphs (a)(3) and (a)(4) of this section.

(c)(1) If a grantee wishes to amend an existing grant agreement to use additional funds for training and supportive service costs, the grantee must submit such a request not later than 90 days before the proposed date of implementation contained in the request. Not later than 30 days before the proposed date of implementation, the Department will approve, approve as modified, or reject the request, on the basis of the information included in the request.

(2) If a grantee submits a request to use additional funds for training and supportive service costs in the grant application, the request will be accepted and processed as a part of the grant review process.

(d) Grantees may apply this provision to individual sub-recipients but need not provide this opportunity to all their sub-recipients.

**§ 641.876 How will compliance with cost limitations and minimum expenditure levels be determined?**

The Department will determine compliance by examining expenditures of SCSEP funds. The cost limitations and minimum expenditure level requirements must be met at the time all such funds have been expended or the period of availability of such funds has expired, whichever comes first.

**§ 641.879 What are the financial and performance reporting requirements for recipients?**

(a) In accordance with 29 CFR 97.41 (State and local governments) or 29 CFR 95.52 (non-profit and commercial organizations), each SCSEP recipient must submit a SCSEP Financial Status Report (FSR, ETA Form 9130) in electronic format to the Department via the Internet within 45 days after the ending of each quarter of the Program Year. Each SCSEP recipient must also submit a final closeout FSR to the Department via the Internet within 90 days after the end of the grant period. The Department will provide instructions for the preparation of this report. (OAA § 503(f)(3)).

(1) Financial data must be reported on an accrual basis, and cumulatively by funding year of appropriation. Financial data may also be required on specific program activities as required by the Department.

(2) If the SCSEP recipient's accounting records are not normally kept on the accrual basis of accounting, the SCSEP recipient must develop accrual information through an analysis of the documentation on hand.

(b) In accordance with 29 CFR 97.40 (State and local governments) or 29 CFR 95.51 (non-profit and commercial organizations), each SCSEP recipient must submit updated data on participants (including data on demographic characteristics and data regarding the performance measures), host agencies, and employers in an electronic format specified by the Department via the Internet within 30 days after the end of each of the first three quarters of the Program Year, on the last day of the fourth quarter of the Program Year, and within 90 days after the last day of the Program Year. Recipients wishing to correct data errors or omissions for their final Program Year report must do so within 90 days after the end of the Program Year. The Department will generate SCSEP Quarterly Progress Reports (QPRs), as well as the final QPR, as soon as possible after receipt of the data. (OAA § 503(f)(3)).

(c) Each State agency receiving title V funds must annually submit an equitable distribution report of SCSEP positions by all recipients in the State. The Department will provide instructions for the preparation of this report. (OAA § 508).

(d) In addition to the data required to be submitted under paragraph (b) of this section, each SCSEP recipient may be required to collect data and submit reports on the performance measures. See subpart G. The Department will provide instructions detailing these measures and how recipients must prepare this report.

(e) In addition to the data required to be submitted under paragraph (b) of this section, each SCSEP recipient may be required to collect data and submit reports about the demographic characteristics of program participants. The Department will provide instructions detailing these measures and how recipients must prepare these reports.

(f) Federal agencies that receive and use SCSEP funds under interagency agreements must submit project financial and progress reports in accordance with this section. Federal recipients must maintain the necessary records that support required reports according to instructions provided by the Department. (OAA § 503(f)(3)).

(g) Recipients may be required to maintain records that contain any other information that the Department determines to be appropriate in support of any other reports that the Department may require. (OAA § 503(f)(3)).

(h) Grantees submitting reports that cannot be validated or verified as accurately counting and reporting activities in accordance with the reporting instructions may be treated as failing to submit reports, which may result in failing one of the responsibility tests outlined in § 641.430 and OAA § 514(d).

#### § 641.881 What are the SCSEP recipient's responsibilities relating to awards to sub-recipients?

(a) Recipients are responsible for ensuring that all awards to sub-recipients are conducted in a manner to provide, to the maximum extent practicable, full and open competition in accordance with the procurement procedures in 29 CFR 95.43 (non-profit and commercial organizations) and 29 CFR 97.36 (State and local governments).

(b) The SCSEP recipient is responsible for all grant activities, including the performance of SCSEP activities by sub-recipients, and ensuring that sub-recipients comply with the OAA and this part. (See also OAA § 514(d) and § 641.430 of this part on responsibility tests).

(c) Recipients must follow their own procedures for allocating funds to other entities. The Department will not grant funds to another entity on the recipient's behalf.

(d)(1) National grantees that receive grants to provide services in an area where a substantial population of individuals with barriers to employment exists must, in selecting sub-recipients, give special consideration to organizations (including former national grant recipients) with demonstrated expertise in serving such individuals. (OAA § 514(e)(2)).

(2) For purposes of this section, the term "individuals with barriers to employment" means minority individuals, Indian individuals, individuals with greatest economic need, and most-in-need individuals. (OAA § 514(e)(1)).

#### § 641.884 What are the grant closeout procedures?

SCSEP recipients must follow the grant closeout procedures at 29 CFR 97.50 (State and local governments) or 29 CFR 95.71 (non-profit and government organizations), as appropriate. The Department will issue supplementary closeout instructions to OAA title V recipients as necessary.

### Subpart I—Grievance Procedures and Appeals Process

#### § 641.900 What appeal process is available to an applicant that does not receive a multi-year grant?

(a) An applicant for financial assistance under title V of the OAA that is dissatisfied because it was not awarded financial assistance in whole or in part may request that the Grant Officer provide an explanation for not awarding financial assistance to that applicant. The request must be filed within 10 days of the date of notification indicating that financial assistance would not be awarded. The Grant Officer must provide the protesting applicant with feedback concerning its proposal within 21 days of the protest. Applicants may appeal to the U.S. Department of Labor, Office of Administrative Law Judges (OALJ), within 21 days of the date of the Grant Officer's feedback on the proposal, or within 21 days of the Grant Officer's notification that financial assistance would not be awarded if the applicant does not request feedback on its proposal. The appeal may be for a part or the whole of the denied funding. This appeal will not in any way interfere with the Department's decisions to fund other organizations to provide services during the appeal period.

(b) Failure to file an appeal within the 21 days provided in paragraph (a) of this section constitutes a waiver of the right to a hearing.

(c) A request for a hearing under this section must state specifically those issues in the Grant Officer's notification upon which review is requested. Those provisions of the Grant Officer's notification not specified for review are considered resolved and not subject to further review.

(d) A request for a hearing must be transmitted by certified mail, return receipt requested, to the Chief Administrative Law Judge, U.S. Department of Labor, Suite 400 North, 800 K Street, NW., Washington, DC 20001, with one copy to the Departmental official who issued the determination.

(e) The decision of the ALJ constitutes final agency action unless, within 21 days of the decision, a party dissatisfied with the ALJ's decision, in whole or in part, has filed a petition for review with the Administrative Review Board (ARB) (established under Secretary's Order No. 2–96, published at 61 FR 19978, May 3, 1996), specifically identifying the procedure, fact, law, or policy to which exception is taken. The mailing address for the ARB is 200 Constitution Ave., NW., Room N5404, Washington, DC 20210. The Department will deem any exception not specifically urged to have been waived. A copy of the petition for review must be sent to the grant officer at that time. If, within 30 days of the filing of the petition for review, the ARB does not notify the parties that the case has been accepted for review, then the decision of the ALJ constitutes final agency action. Any case accepted by the ARB must be decided within 180 days of acceptance. If not so decided, the decision of the ALJ constitutes final agency action.

(f) The Rules of Practice and Procedures for Administrative Hearings Before the Office of Administrative Law Judges, at 29 CFR part 18, govern the conduct of hearings under this section, except that:

(1) The appeal is not considered a complaint; and

(2) Technical rules of evidence, such as the Federal Rules of Evidence and subpart B of 29 CFR part 18, will not apply to any hearing conducted under this section. However, rules designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination will be applied when the ALJ conducting the hearing considers them reasonably necessary. The certified copy

of the administrative file transmitted to the ALJ by the official issuing the notification not to award financial assistance must be part of the evidentiary record of the case and need not be moved into evidence.

(g) The ALJ should render a written decision no later than 90 days after the closing of the record.

(h) The remedies available are provided in § 641.470.

**§ 641.910 What grievance procedures must grantees make available to applicants, employees, and participants?**

(a) Each grantee must establish, and describe in the grant agreement, grievance procedures for resolving complaints, other than those described by paragraph (d) of this section, arising between the grantee, employees of the grantee, sub-recipients, and applicants or participants.

(b) The Department will not review final determinations made under paragraph (a) of this section, except to determine whether the grantee's grievance procedures were followed, and according to paragraph (c) of this section.

(c) Allegations of violations of Federal law, other than those described in paragraph (d) of this section, which are not resolved within 60 days under the grantee's procedures, may be filed with the Chief, Division of Adult Services, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Allegations determined to be substantial and credible will be investigated and addressed.

(d) Questions about, or complaints alleging a violation of, the nondiscrimination requirements of title VI of the Civil Rights Act of 1964, § 504 of the Rehabilitation Act of 1973, § 188 of the Workforce Investment Act of 1998 (WIA), or their implementing regulations, may be directed or mailed to the Director, Civil Rights Center, U.S. Department of Labor, Room N–4123, 200 Constitution Avenue, NW., Washington, DC 20210. In the alternative, complaints alleging violations of WIA § 188 may be filed initially at the grantee level. See 29 CFR 37.71, 37.76. In such cases, the grantee must use complaint processing procedures meeting the requirements of 29 CFR 37.70 through 37.80 to resolve the complaint.

**§ 641.920 What actions of the Department may a grantee appeal and what procedures apply to those appeals?**

(a) Appeals from a final disallowance of costs as a result of an audit must be made under 29 CFR 96.63.

(b) Appeals of suspension or termination actions taken on the grounds of discrimination are processed under 29 CFR 31 or 29 CFR 37, as appropriate.

(c) Protests and appeals of decisions not to award a grant, in whole or in part, will be handled under § 641.900.

(d) Upon a grantee's receipt of the Department's final determination relating to costs (except final disallowance of costs as a result of an audit, as described in paragraph (a) of this section), payment, suspension or termination, or the imposition of sanctions, the grantee may appeal the final determination to the Department's Office of Administrative Law Judges, as follows:

(1) Within 21 days of receipt of the Department's final determination, the grantee may transmit by certified mail, return receipt requested, a request for a hearing to the Chief Administrative Law Judge, United States Department of Labor, Suite 400 North, 800 K Street, NW., Washington, DC 20001 with a copy to the Department official who signed the final determination.

(2) The request for hearing must be accompanied by a copy of the final determination, and must state specifically those issues of the determination upon which review is requested. Those provisions of the determination not specified for review, or the entire determination when no hearing has been requested within the 21 days, are considered resolved and not subject to further review.

(3) The Rules of Practice and Procedures for Administrative Hearings Before the Office of Administrative Law Judges, at 29 CFR part 18, govern the conduct of hearings under this section, except that:

(i) The appeal is not considered as a complaint; and

(ii) Technical rules of evidence, such as the Federal Rules of Evidence and subpart B of 29 CFR part 18, will not apply to any hearing conducted under this section. However, rules designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination will be applied when the Administrative Law Judge conducting the hearing considers them reasonably necessary. The certified copy of the administrative file transmitted to the Administrative Law Judge by the official issuing the final determination must be part of the evidentiary record of the case and need not be moved into evidence.

(4) The Administrative Law Judge should render a written decision no later than 90 days after the closing of the record. In ordering relief, the ALJ may exercise the full authority of the Secretary under the OAA.

(5) The decision of the ALJ constitutes final agency action unless, within 21 days of the decision, a party dissatisfied with the ALJ's decision, in whole or in part, has filed a petition for review with the ARB (established under Secretary's Order No. 2–96), specifically identifying the procedure, fact, law, or policy to which exception is taken. The mailing address for the ARB is 200 Constitution Ave., NW., Room N5404, Washington, DC 20210. The Department will deem any exception not specifically argued to have been waived. A copy of the petition for review must be sent to the grant officer at that time. If, within 30 days of the filing of the petition for review, the ARB does not notify the parties that the case has been accepted for review, then the decision of the ALJ constitutes final agency action. Any case accepted by the ARB must be decided within 180 days of acceptance. If not so decided, the decision of the ALJ constitutes final agency action.

**§ 641.930 Is there an alternative dispute resolution process that may be used in place of an OALJ hearing?**

(a) Parties to a complaint that has been filed according to the requirements of § 641.920 (a), (c), and (d) may choose to waive their rights to an administrative hearing before the OALJ. Instead, they may choose to transfer the settlement of their dispute to an individual acceptable to all parties who will conduct an informal review of the stipulated facts and render a decision in accordance with applicable law. A written decision must be issued within 60 days after submission of the matter for informal review.

(b) Unless the parties agree in writing to extend the period, the waiver of the right to request a hearing before the OALJ will automatically be revoked if a settlement has not been reached or a decision has not been issued within the 60 days provided in paragraph (a) of this section.

(c) The decision rendered under this informal review process will be treated as the final agency decision.

Signed at Washington, DC, this 19th day of August 2010.

**Jane Oates,**

*Assistant Secretary, Employment and Training Administration.*

[FR Doc. 2010–21139 Filed 8–31–10; 8:45 am]

**BILLING CODE 4510–FN–P**

Federal Register

Wednesday,
September 1, 2010

## Part V

# The President

### Executive Order 13551—Blocking Property of Certain Persons With Respect to North Korea

Federal Register
Vol. 75, No. 169
Wednesday, September 1, 2010

# Presidential Documents

**Title 3—**

## The President

**Executive Order 13551 of August 30, 2010**

## Blocking Property of Certain Persons With Respect to North Korea

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), section 5 of the United Nations Participation Act of 1945 (22 U.S.C. 287c) (UNPA), and section 301 of title 3, United States Code; in view of United Nations Security Council Resolution (UNSCR) 1718 of October 14, 2006, and UNSCR 1874 of June 12, 2009; and to take additional steps with respect to the situation in North Korea,

I, BARACK OBAMA, President of the United States of America, hereby expand the scope of the national emergency declared in Executive Order 13466 of June 26, 2008, finding that the continued actions and policies of the Government of North Korea, manifested most recently by its unprovoked attack that resulted in the sinking of the Republic of Korea Navy ship *Cheonan* and the deaths of 46 sailors in March 2010; its announced test of a nuclear device and its missile launches in 2009; its actions in violation of UNSCRs 1718 and 1874, including the procurement of luxury goods; and its illicit and deceptive activities in international markets through which it obtains financial and other support, including money laundering, the counterfeiting of goods and currency, bulk cash smuggling, and narcotics trafficking, destabilize the Korean peninsula and imperil U.S. Armed Forces, allies, and trading partners in the region, and thereby constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.

I hereby order:

**Section 1.** (a) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any overseas branch, of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

(i) the persons listed in the Annex to this order; and

(ii) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:

(A) to have, directly or indirectly, imported, exported, or reexported to, into, or from North Korea any arms or related materiel;

(B) to have, directly or indirectly, provided training, advice, or other services or assistance, or engaged in financial transactions, related to the manufacture, maintenance, or use of any arms or related materiel to be imported, exported, or reexported to, into, or from North Korea, or following their importation, exportation, or reexportation to, into, or from North Korea;

(C) to have, directly or indirectly, imported, exported, or reexported luxury goods to or into North Korea;

(D) to have, directly or indirectly, engaged in money laundering, the counterfeiting of goods or currency, bulk cash smuggling, narcotics trafficking, or other illicit economic activity that involves or supports the Government of North Korea or any senior official thereof;

(E) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, the activities described in subsections (a)(ii)(A)–(D) of this section or any person whose property and interests in property are blocked pursuant to this order;

(F) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order; or (G) to have attempted to engage in any of the activities described in subsections (a)(ii)(A)–(F) of this section.

(b) I hereby determine that, to the extent section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) may apply, the making of donations of the types of articles specified in such section by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order would seriously impair my ability to deal with the national emergency declared in Executive Order 13466 and expanded in scope in this order, and I hereby prohibit such donations as provided by subsection (a) of this section.

(c) The prohibitions in subsection (a) of this section include, but are not limited to:

(i) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order; and

(ii) the receipt of any contribution or provision of funds, goods, or services from any such person.

(d) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order.

**Sec. 2.** (a) Any transaction by a United States person or within the United States that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this order is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

**Sec. 3.** The provisions of Executive Order 13466 remain in effect, and this order does not affect any action taken pursuant to that order.

**Sec. 4.** For the purposes of this order:

(a) the term "person" means an individual or entity;

(b) the term "entity" means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization;

(c) the term "United States person" means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States;

(d) the term "North Korea" includes the territory of the Democratic People's Republic of Korea and the Government of North Korea;

(e) the term "Government of North Korea" means the Government of the Democratic People's Republic of Korea, its agencies, instrumentalities, and controlled entities; and

(f) the term "luxury goods" includes those items listed in 15 C.F.R. 746.4(b)(l) and Supplement No. 1 to part 746 and similar items.

**Sec. 5.** For those persons whose property and interests in property are blocked pursuant to this order who might have a constitutional presence in the United States, I find that because of the ability to transfer funds or other assets instantaneously, prior notice to such persons of measures

to be taken pursuant to this order would render these measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in Executive Order 13466 and expanded in scope in this order, there need be no prior notice of a listing or determination made pursuant to section 1(a) of this order.

**Sec. 6.** The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by IEEPA and the UNPA, as may be necessary to carry out the purposes of this order. The Secretary of the Treasury may redelegate any of these functions to other officers and agencies of the United States Government consistent with applicable law. All agencies of the United States Government are hereby directed to take all appropriate measures within their authority to carry out the provisions of this order.

**Sec. 7.** The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to determine that circumstances no longer warrant the blocking of the property and interests in property of a person listed in the Annex to this order, and to take necessary action to give effect to that determination.

**Sec. 8.** This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, agents, or any other person.

**Sec. 9.** This order is effective at 12:01 p.m., eastern daylight time on August 30, 2010.

THE WHITE HOUSE,

*August 30, 2010.*

Billing code 3195–W9–P

**ANNEX**

Individual

1. KIM Yong Chol [born 1946 or 1947]

Entities

1. Green Pine Associated Corporation
2. Reconnaissance General Bureau
3. Office 39

[FR Doc. 2010–22002
Filed 8–31–10; 8:45 am]
Billing code 4811–33–C

# Reader Aids

**Federal Register**

Vol. 75, No. 169

Wednesday, September 1, 2010

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## FEDERAL REGISTER PAGES AND DATE, SEPTEMBER

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## CFR PARTS AFFECTED DURING SEPTEMBER

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

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**H.R. 511/P.L. 111–231**
To authorize the Secretary of Agriculture to terminate certain easements held by the Secretary on land owned by the Village of Caseyville, Illinois, and to terminate associated contractual arrangements with the Village. (Aug. 16, 2010; 124 Stat. 2489)

**H.R. 2097/P.L. 111–232**
Star-Spangled Banner Commemorative Coin Act (Aug. 16, 2010; 124 Stat. 2490)

**H.R. 3509/P.L. 111–233**
Agricultural Credit Act of 2010 (Aug. 16, 2010; 124 Stat. 2493)

**H.R. 4275/P.L. 111–234**
To designate the annex building under construction for the Elbert P. Tuttle United States Court of Appeals Building in Atlanta, Georgia, as the ''John C. Godbold Federal Building''. (Aug. 16, 2010; 124 Stat. 2494)

**H.R. 5278/P.L. 111–235**
To designate the facility of the United States Postal Service located at 405 West Second Street in Dixon, Illinois, as the ''President Ronald W. Reagan Post Office Building''. (Aug. 16, 2010; 124 Stat. 2495)

**H.R. 5395/P.L. 111–236**
To designate the facility of the United States Postal Service located at 151 North Maitland Avenue in Maitland, Florida, as the ''Paula Hawkins Post Office Building''. (Aug. 16, 2010; 124 Stat. 2496)

**H.R. 5552/P.L. 111–237**
Firearms Excise Tax Improvement Act of 2010 (Aug. 16, 2010; 124 Stat. 2497)

**Last List August 16, 2010**

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