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WHEN: Tuesday, October 5, 2010
9 a.m.–12:30 p.m.

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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EXPORT-IMPORT BANK OF THE UNITED STATES

5 CFR Part 6201

12 CFR Part 400

[Public Notice 2010–31]

Supplemental Standards of Ethical Conduct for Employees of the Export-Import Bank of the United States

AGENCY: Export-Import Bank of the United States (Ex-Im Bank).

ACTION: Final rule.

SUMMARY: The Ex-Im Bank, with the concurrence of the Office of Government Ethics (OGE), is issuing a final rule that supplements the Standards of Ethical Conduct for Employees of the Executive Branch (Standards). This final rule adopts prior interim regulations as final, with a revision deleting a section related to prohibited financial interests. This rule also adopts as final, without change, the Ex-Im Bank's residual cross-reference provision.

DATES: *Effective Date:* September 15, 2010.

ADDRESSES: Office of the General Counsel, Export-Import Bank of the United States, 811 Vermont Ave., NW., Washington, DC 20571.

FOR FURTHER INFORMATION CONTACT: Faisal B. Siddiqui, Assistant General Counsel for Administration, Export-Import Bank of the United States, *Phone:* (202) 565–3435/*Fax:* (202) 565–3563.

SUPPLEMENTARY INFORMATION:

I. Background

On April 7, 1995, Ex-Im Bank, with the concurrence of OGE, published an interim rule setting forth the Supplemental Standards of Ethical Conduct for Employees of the Export-Import Bank of the United States—5 CFR part 6201. See 60 FR 17625–17628. It is noted that no comments were received in response to the request for comments published in the **Federal Register** as part of the interim rule. In that rulemaking, Ex-Im Bank also issued a residual cross-reference provision in place of its older standards of conduct at 12 CFR part 400. The Ex-Im Bank, with OGE concurrence, now publishes as final, with the changes to the interim rule noted below, the Supplemental Standards of Ethical Conduct for Employees of the Export-Import Bank of the United States. Ex-Im Bank is also publishing as final, without change, its residual cross-reference provision.

II. Analysis of Revisions

The final rule amends the interim rule Ex-Im Bank Supplemental Standards by removing the section related to prohibited financial interests at 5 CFR 6201.102, and by re-designating § 6201.103—Prior Approval for Outside Employment as § 6201.102.

In light of over a decade of experience, Ex-Im Bank has determined that the provisions of § 6201.102 of the interim rule that prohibit Ex-Im Bank employees who are required to file public or confidential financial disclosure forms (SF278s or OGE Form 450s), as well their spouses and dependent children, from owning specified securities in "designated entities" with which Ex-Im Bank conducts business are unnecessary given the Bank's practice of screening employees for potential financial conflicts.

Ex-Im Bank has determined that its implementation of the government-wide statutory and regulatory scheme is sufficient to ensure that Ex-Im Bank employees do not take official agency action with regard to prohibited financial interests. Ex-Im Bank employees will continue to be bound by 5 CFR 2635.401–2635.403 (Standards of Ethical Conduct for the Employees of the Executive Branch, Subpart D: Conflicting Financial Interests) and related statutes and regulations, including 18 U.S.C. 208 and 5 CFR part 2640, with regard to their financial interests.

The revision will not impact Ex-Im Bank's ability to ensure that its employees do not engage in conduct that violates applicable conflict of interest statutes and regulations. Ex-Im Bank will continue to utilize its participant database—which lists the lenders, exporters, suppliers, borrowers and buyers that utilize Ex-Im Bank programs—to carefully screen all financial disclosure reports (both the public and confidential reports) and maintain regular contact with filers regarding the matters in which they are working to ensure that no conflicts arise.

Upon determining that an employee owns a security or has a financial interest that poses a potential conflict of interest, Ex-Im Bank's Designated Agency Ethics Official (DAEO) or his designated alternate, writes a memorandum to the employee advising him or her of the potential conflict and the applicable law and regulation regarding conflicts. If recusal or waiver is not appropriate, the employee is directed to divest the interest.

Ex-Im Bank is confident that the policy and practices noted above, carried out in accordance with the government-wide laws and regulations governing financial conflicts of interest, are a sufficient means of screening for and handling conflicts of interest with regard to securities ownership and ensure that a reasonable person would not question the impartiality and objectivity with which Ex-Im Bank administers its programs.

III. Matters of Regulatory Procedure

Administrative Procedure Act

Pursuant to 5 U.S.C. 553(b)(3)(A) and (B), (d)(1) and (d)(3), good cause exists for the waiver of a general notice of proposed rulemaking, the opportunity for public comment, and the 30-day delay in effectiveness of this final rule, which adopts as final a prior interim rule, with revisions. This determination is based on the fact that this rulemaking applies solely to agency practices and procedures, and relieves a restriction on certain financial interests of employees who file public or confidential financial disclosure reports, and their spouses and minor children, that Ex-Im Bank has determined is no longer needed. It is important and in the public interest that the revisions take effect as promptly as possible.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a "major rule," as defined by the Small Business Regulatory Enforcement Fairness Act of

1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets. 5 U.S.C. 804.

Unfunded Mandates Reform Act

For the purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25), this rule will not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, or by the private sector, of $100 million or more (as adjusted for inflation).

List of Subjects in 5 CFR Part 6201 and 12 CFR Part 400

Conflict of interests, Government employees.

Dated: August 25, 2010.

Jonathan J. Cordone,

General Counsel, Export-Import Bank of the United States.

Approved: August 30, 2010.

Robert I. Cusick,

Director, Office of Government Ethics.

■ Accordingly, for the reasons set forth in the preamble, the Export-Import Bank of the United States, with the concurrence of the Office of Government Ethics, is adopting the interim rule, adding 5 CFR part 6201 and revising 12 CFR part 400, which was published at 60 FR 17625–17628, April 7, 1995, as a final rule with the following changes:

TITLE 5—ADMINISTRATIVE PERSONNEL

PART 6201—SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE EXPORT-IMPORT BANK OF THE UNITED STATES

■ 1. The authority citation for part 6201 is revised to read as follows:

Authority: 5 U.S.C. 7301; 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306; 5 CFR 2635.105, 2635.803.

§ 6201.102 [Removed]

■ 2. Section 6201.102 is removed.

§ 6201.103 [Redesignated as § 6201.102]

■ 3. Section 6201.103 is redesignated as § 6201.102.

[FR Doc. 2010–22410 Filed 9–14–10; 8:45 am]

BILLING CODE 6690–01–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 915

[Doc. No. AMS–FV–10–0067; FV10–915–1 IR]

Avocados Grown in South Florida; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim rule with request for comments.

SUMMARY: This rule increases the assessment rate established for the Avocado Administrative Committee (Committee) for the 2010–11 and subsequent fiscal periods from $0.27 to $0.37 per 55-pound bushel container of Florida avocados handled. The Committee locally administers the marketing order which regulates the handling of avocados grown in South Florida. Assessments upon Florida avocado handlers are used by the Committee to fund reasonable and necessary expenses of the program. The fiscal period begins April 1 and ends March 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective September 16, 2010. Comments received by November 15, 2010, will be considered prior to issuance of a final rule.

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

FOR FURTHER INFORMATION CONTACT: Doris Jamieson, Marketing Specialist or Christian D. Nissen, Regional Manager, Southeast Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; *Telephone:* (863) 324–3375, *Fax:* (863) 325–8793, or *E-mail: Doris.Jamieson@ams.usda.gov* or *Christian.Nissen@ams.usda.gov.*

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

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 915, as amended (7 CFR part 915), regulating the handling of avocados grown in South Florida, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the "Act."

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

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, Florida avocado handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable Florida avocados beginning April 1, 2010, and continue until amended, suspended, or terminated.

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

provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule increases the assessment rate established for the Committee for the 2010–11 and subsequent fiscal periods from $0.27 to $0.37 per 55-pound bushel container of Florida avocados.

Section 915.29(c) of the Florida avocado marketing order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers and handlers of Florida avocados. They are familiar with the Committee's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

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

The Committee met on July 22, 2010, and unanimously recommended 2010–11 expenditures of $351,502 and an assessment rate of $0.37 per 55-pound bushel container of avocados. In comparison, last year's budgeted expenditures were $259,400. The assessment rate of $0.37 is $0.10 higher than the rate currently in effect.

The Committee held an emergency meeting to discuss an increase in the assessment rate in order to fund research to find an insecticide that will kill or control the Red Bay Ambrosia beetle. The beetle carries the Laurel Wilt fungus which can infect and kill avocado trees. Research into the beetle and fungus had been funded by the University of Florida. However, the Committee was informed that funding ceased on August 1, 2010. Without funding, researchers will be unable to continue testing to determine which insecticides work best to kill/control the beetle and at what application rate. The Committee believes it is essential for the industry that the research continues. Therefore, they voted to increase the assessment rate to provide the additional research money.

The major expenditures recommended by the Committee for the 2010–11 year include $110,000 for research, $98,732 for salaries, $48,000 for employee benefits, and $25,300 for insurance and bonds. Budgeted expenses for these items in 2009–10 were $25,000, $94,030, $48,000, and $25,300, respectively.

The assessment rate recommended by the Committee was derived by dividing anticipated expenses by expected shipments of Florida avocados. Florida avocado shipments for the year are estimated at 1,000,000 55-pound bushel containers which should provide $370,000 in assessment income. Income derived from handler assessments, along with interest income and funds from the Committee's authorized reserve, will be adequate to cover budgeted expenses. Funds in the reserve (currently $242,000) will be kept within the maximum permitted by the order (approximately three fiscal periods' expenses as stated in § 915.42).

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

Although this assessment rate is effective for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 2010–11 budget and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by USDA.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

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

There are approximately 30 handlers of Florida avocados subject to regulation under the order and approximately 300 producers of avocados in the production area. Small agricultural service firms, which include avocado handlers, are defined by the Small Business Administration (SBA) as those whose annual receipts are less than $7,000,000, and small agricultural producers are defined as those having annual receipts less than $750,000 (13 CFR 121.201).

According to Committee data and information from the National Agricultural Statistical Service, the average price for Florida avocados during the 2009–10 season was around $16.50 per 55-pound bushel container and total shipments were near 900,000 55-pound bushels. Using the average price and shipment information provided by the Committee, the majority of avocado handlers could be considered small businesses under SBA's definition. In addition, based on avocado production, producer prices, and the total number of Florida avocado producers, the average annual producer revenue is less than $750,000. Consequently, the majority of avocado handlers and producers may be classified as small entities.

This rule increases the assessment rate established for the Committee and collected from handlers for the 2010–11 and subsequent fiscal periods from $0.27 to $0.37 per 55-pound bushel container of Florida avocados. The Committee unanimously recommended 2010–11 expenditures of $351,502 and an assessment rate of $0.37 per 55-poound bushel container. The assessment rate of $0.37 is $0.10 higher than the 2009–10 rate. The quantity of assessable Florida avocados for the 2010–11 season is estimated at 1,000,000. Thus, the $0.37 rate should provide $370,000 in assessment income and be adequate to meet this years expenses. Income derived from handler assessments, along with interest income and funds from the Committee's authorized reserve fund, will be adequate to cover budgeted expenses.

The major expenditures recommended by the Committee for the 2010–11 year include $110,000 for research, $98,732 for salaries, $48,000 for employee benefits, and $25,300 for insurance and bonds. Budgeted expenses for these items in 2009–10 were $25,000, $94,030, $48,000, and $25,300, respectively.

The increase in assessment rate is needed to fund research to find an

insecticide that will kill or control the Red Bay Ambrosia beetle. The beetle carries the Laurel Wilt fungus which can infect and kill avocado trees. Research into the beetle and fungus had been funded by the University of Florida. However, the Committee was informed that funding ceased on August 1, 2010. Without funding, researchers will be unable to continue testing to determine which insecticides work best to kill/control the beetle and at what application rate. The Committee believes it is essential for the industry that the research continues. Therefore, they voted to increase the assessment rate to provide the additional research money.

The Committee reviewed and unanimously recommended 2010–11 expenditures of $351,502 which included increases in research programs. Prior to arriving at this budget, alternative expenditure levels were discussed based upon the relative value of various research projects to the Florida avocado industry. The assessment rate of $0.37 per 55-pound bushel container of assessable Florida avocados was then determined by dividing the total recommended budget by the quantity of assessable avocados, estimated at 1,000,000 55-pound bushel containers for the 2010–11 season. This is approximately $18,400 above the anticipated expenses, which the Committee determined to be acceptable.

A review of historical information and preliminary information pertaining to the upcoming crop year indicates that the grower price for the 2010–11 season could range between $9.00 and $66.00 per 55-pound bushel container of avocados. Therefore, the estimated assessment revenue for the 2010–11 season as a percentage of total grower revenue could range between .6 and 4 percent.

This action increases the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to producers. However, these costs are offset by the benefits derived by the operation of the marketing order. In addition, the Committee's meeting was widely publicized throughout the Florida avocados industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the July 22, 2010, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit comments on this interim rule, including the regulatory and informational impacts of this action on small businesses.

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

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

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

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/MarketingOrdersSmallBusinessGuide.* Any questions about the compliance guide should be sent to Antoinette Carter at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

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

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The 2010–11 fiscal period began on April 1, 2010, and the marketing order requires that the rate of assessment for each fiscal period apply to all assessable Florida avocados handled during such fiscal period; (2) the Committee needs to have sufficient funds to pay its expenses which are incurred on a continuous basis; (3) handlers are aware of this action which was unanimously recommended by the Committee at an emergency, public meeting and is similar to other assessment rate actions issued in past years; and (4) this interim rule provides a 60-day comment period, and all comments timely received will be considered prior to the finalization of this rule.

List of Subjects in 7 CFR Part 915

Avocados, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 915 is amended as follows:

PART 915—AVOCADOS GROWN IN SOUTH FLORIDA

■ 1. The authority citation for 7 CFR part 915 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 915.235 is revised to read as follows:

§ 915.235 Assessment rate.

On and after April 1, 2010, an assessment rate of

$0.37 per 55-pound container or equivalent is established for avocados grown in South Florida.

Dated: September 10, 2010.

David R. Shipman,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2010–22978 Filed 9–14–10; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 984

[Doc. No. AMS–FV–10–0060; FV10–984–1 IR]

Walnuts Grown in California; Decreased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim rule with request for comments.

SUMMARY: This rule decreases the assessment rate established for the California Walnut Board (Board) for the 2010–11 and subsequent marketing years from $0.0177 to $0.0174 per kernelweight pound of assessable walnuts. The Board locally administers the marketing order that regulates the handling of walnuts grown in California. Assessments upon walnut handlers are used by the Board to fund reasonable and necessary expenses of the program. The marketing year begins September 1 and ends August 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: September 16, 2010; comments received by November 15, 2010 will be considered prior to issuance of a final rule.

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

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

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

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 984, as amended (7 CFR part 984), regulating the handling of walnuts grown in California, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the "Act."

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

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, California walnut handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate will be applicable to all assessable walnuts beginning on September 1, 2010, and continue until amended, suspended, or terminated.

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

This rule decreases the assessment rate established for the Board for the 2010–11 and subsequent marketing years from $0.0177 to $0.0174 per kernelweight pound of assessable walnuts.

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

For the 2009–10 and subsequent marketing years, the Board recommended, and USDA approved, an assessment rate of $0.0177 per kernelweight pound of assessable walnuts that would continue in effect from year to year unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Board or other information available to USDA.

The Board met on June 11, 2010, and unanimously recommended 2010–11 expenditures of $6,812,100 and a modified assessment rate of $0.0174 per kernelweight pound of assessable walnuts. In comparison, last year's budgeted expenditures were $5,894,100. The assessment rate of $0.0174 is $0.0003 per pound lower than the rate currently in effect. The quantity of assessable walnuts for the 2010–11 marketing year is estimated at 435,000 tons (inshell), which is 65,000 tons more than the 370,000 tons assessed during the 2009–10 marketing year. At the recommended lower assessment rate of $0.0174 per kernelweight pound, the Board should collect approximately $6,812,100 in assessment income, which would be adequate to cover its 2010–11 budgeted expenses of $6,812,000.

The following table compares major budget expenditures recommended by the Board for the 2009–10 and 2010–11 marketing years:

Budget expense categories	2009–10	2010–11
Employee expenses	$535,000	$577,500
Travel/Board Expenses/Annual Audit	161,000	208,000
Office Expenses	123,750	118,850
Program Expenses Including Research:		
Controlled Purchases	5,000	20,000
Crop Acreage Survey	0	95,000
Crop Estimate	120,000	105,000
Production Research Director	80,000	88,500
Production Research	725,000	1,042,000
Grades and Standards Research	100,000	125,000
Domestic Market Development	4,030,500	4,400,000
Reserve for Contingency	13,850	32,250

The assessment rate recommended by the Board was derived by dividing anticipated expenses by expected shipments of California walnuts certified as merchantable. The 435,000-ton (inshell) estimate for merchantable shipments is an average of the two prior years' shipments. The Board met on June 11, 2010, and unanimously approved using a two prior years' average to formulate the 2010–11 estimate. Pursuant to § 984.51(b) of the order, this figure is converted to a merchantable kernelweight basis using a factor of 0.45 (435,000 tons × 2,000 pounds per ton × 0.45), which yields 391,500,000 kernelweight pounds. At $0.0174 per pound, the new assessment rate should generate $6,812,100 in assessment income and allow the Board to cover its expenses.

Section 984.69 of the order authorizes the Board to maintain a financial reserve of not more than two years' budgeted expenses. Excess assessment funds may be retained in the reserve or may be used temporarily to defray expenses of the subsequent marketing year, but if so used, must be made available to the handlers from whom they were collected within five months after the end of the marketing year.

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Board or other available information. Although this assessment rate is effective for an indefinite period, the Board will continue to meet prior to or during each marketing year to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Board meetings are available from the Board or USDA. Board meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Board recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Board's 2010–11 budget and those for subsequent marketing years will be reviewed and, as appropriate, approved by USDA.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

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

There are approximately 4,500 growers of California walnuts in the production area and approximately 58 handlers subject to regulation under the marketing order. Small agricultural producers are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $750,000. Small agricultural service firms are defined as those whose annual receipts are less than $7,000,000.

USDA's National Agricultural Statistics Service (NASS) reports that California walnuts were harvested from a total of 223,000 bearing acres during 2009–10. The average yield for the 2009–10 crop was 1.96 tons per acre, which was higher than the 1.65 tons per acre average for the previous five years. NASS reported the value of the 2009–10 crop at $1,690 per ton, which was higher than the previous five-year average of $1,632 per ton.

At the time of the 2007 Census of Agriculture, which is the most recent information available, approximately 89 percent of California's walnut farms were smaller than 100 acres. Fifty-four percent were between 1 and 15 acres. A 100-acre farm with an average yield of 1.96 tons per acre would have been expected to produce about 196 tons of walnuts during 2009–10. At $1,690 per ton, that farm's production would have had an approximate value of $331,240. Assuming that the majority of California's walnut farms are still smaller than 100 acres, it could be concluded that the majority of the growers had receipts of less than $331,240 in 2009–10. This is well below the SBA threshold of $750,000; thus, the majority of California's walnut growers could be considered small growers according to SBA's definition.

According to information supplied by the industry, approximately two-thirds of California's walnut handlers shipped merchantable walnuts valued under $7,000,000 during the 2009–10 marketing year and would therefore be considered small handlers according to the SBA definition.

This rule decreases the assessment rate established for the Board and collected from handlers for the 2010–11 and subsequent marketing years from $0.0177 to $0.0174 per kernelweight pound of assessable walnuts. The Board unanimously recommended 2010–11 expenditures of $6,812,100 and an assessment rate of $0.0174 per kernelweight pound of assessable walnuts, which is $0.0003 lower than the assessment rate currently in effect. The quantity of assessable walnuts for the 2010–11 marketing year is estimated to be 65,000 tons greater than the quantity assessed for the 2009–10 marketing year. Therefore, even at the reduced assessment rate, the Board should collect approximately $6,812,100 in assessment income, which should be adequate to cover its budgeted expenses.

The following table compares major budget expenditures recommended by the Board for the 2009–10 and 2010–11 marketing years:

Budget expense categories	2009–10	2010–11
Employee expenses	$535,000	$577,500
Travel/Board Expenses/Annual Audit	161,000	208,000
Office Expenses	123,750	118,850
Program Expenses Including Research:		
Controlled Purchases	5,000	20,000
Crop Acreage Survey	0	95,000
Crop Estimate	120,000	105,000
Production Research Director	80,000	88,500
Production Research	725,000	1,042,000
Grades and Standards Research	100,000	125,000
Domestic Market Development	4,030,500	4,400,000
Reserve for Contingency	13,850	32,250

The Board reviewed and unanimously recommended 2010–11 expenditures of $6,812,100. Prior to arriving at this budget, the Board considered alternative expenditure levels but ultimately decided that the recommended levels were reasonable to properly administer the order. The assessment rate of $0.0174 per kernelweight pound of assessable walnuts was derived by dividing anticipated expenses of $6,812,100 by expected 2010–11 shipments of California walnuts certified as merchantable. Merchantable shipments for the year are estimated at 391,500,000 kernelweight pounds, which should provide $6,812,100 in assessment income and allow the Board to cover its expenses. Unexpended funds may be retained in a financial reserve, provided that funds in the financial reserve do not exceed approximately two years' budgeted expenses. If not retained in a financial reserve, unexpended funds may be used temporarily to defray expenses of the subsequent marketing year, but must be made available to the handlers from whom they were collected within five months after the end of the year, according to § 984.69 of the order.

According to NASS, the season average grower prices for the years 2008 and 2009 were $1,280 and $1,690 per ton, respectively. Although no official NASS data is yet available regarding the 2010 average grower price, the 2008 and 2009 prices provide a range within which the 2010–11 season average price could fall. Dividing these average grower prices by 2,000 pounds per ton provides an inshell price per pound range of $0.640 to $0.845. Dividing these inshell prices per pound by the 0.45 conversion factor (inshell to kernelweight) established in the order yields a 2010–11 price range estimate of $1.42 to $1.88 per kernelweight pound of assessable walnuts.

To calculate the percentage of grower revenue represented by the assessment rate, the assessment rate of $0.0174 per kernelweight pound is divided by the low and high estimates of the price range. The estimated assessment revenue for the 2010–11 marketing year, stated as a percentage of total grower revenue, will thus likely range between 1.22 and 0.927 percent.

This action decreases the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the cost savings may be passed on to growers. In addition, the Board's meeting was widely publicized throughout the California walnut industry, and all interested persons were invited to attend the meeting and participate in Board deliberations on all issues. Like all Board meetings, the June 11, 2010, meeting was a public meeting, and all entities, both large and small, were able to express their views on this issue. Finally, interested persons are invited to submit comments on this interim rule, including the regulatory and informational impacts of this action on small businesses.

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

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

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

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/MarketingOrdersSmallBusinessGuide.* Any questions about the compliance guide should be sent to Antoinette Carter at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

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

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The 2010–11 marketing year begins on September 1, 2010, and the marketing order requires that the rate of assessment for each marketing year apply to all assessable walnuts handled during the year; (2) the Board needs to have sufficient funds to pay its expenses, which are incurred on a continuous basis; and (3) handlers are aware of this action, which was unanimously recommended by the Board at a public meeting and is similar to other assessment rate actions issued in past years.

List of Subjects in 7 CFR Part 984

Marketing agreements, Nuts, Reporting and recordkeeping requirements, Walnuts.

■ For the reasons set forth in the preamble, 7 CFR part 984 is amended as follows:

PART 984—WALNUTS GROWN IN CALIFORNIA

■ 1. The authority citation for 7 CFR part 984 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 984.347 is revised to read as follows:

§ 984.347 Assessment rate.

On and after September 1, 2010, an assessment rate of $0.0174 per kernelweight pound is established for California merchantable walnuts.

Dated: September 10, 2010.

David R. Shipman,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2010–22982 Filed 9–14–10; 8:45 am]

BILLING CODE 3410–02–P

FEDERAL ELECTION COMMISSION

11 CFR Part 109

[Notice 2010–17]

Coordinated Communications

AGENCY: Federal Election Commission.

ACTION: Final rules.

SUMMARY: The Federal Election Commission is revising its regulations regarding coordinated communications. The Commission is issuing these rules and offering a more complete explanation and justification for parts of the existing rules to comply with the decision of the Court of Appeals for the District of Columbia Circuit in *Shays* v. *FEC* and to address other issues involving the coordinated communications rules.

DATES: These rules are effective on December 1, 2010.

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

SUPPLEMENTARY INFORMATION: The Commission is revising its regulations regarding coordinated communications at 11 CFR 109.21. The Commission is: (1) Adding a new content standard at 11 CFR 109.21(c)(5) for communications

that are the functional equivalent of express advocacy; and (2) creating a safe harbor for certain business and commercial communications. The Commission is retaining the conduct standards for common vendors and former employees at 11 CFR 109.21(d)(4) and (5) and is providing further explanation and justification for those rules. The Commission is not, at this time, adopting a safe harbor for certain public communications paid for by non-profit organizations described in 26 U.S.C. 501(c)(3) ("501(c)(3) organizations") or revising the rules concerning party coordinated communications at 11 CFR 109.37.

Transmission of Final Rules to Congress

Under the Administrative Procedure Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate, and publish them in the **Federal Register**, at least thirty calendar days before they take effect. The final rules that follow were transmitted to Congress on September 7, 2010.

Explanation and Justification

I. Background

The Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* ("the Act"), and Commission regulations limit the amount a person may contribute to a candidate and that candidate's authorized committee with respect to any election for Federal office, and also limit the amount a person may contribute to other political committees in a given calendar year. *See* 2 U.S.C. 441a(a)(1); 11 CFR 110.1(b)(1), (c)(1), and (d); *see also* 2 U.S.C. 441b; 11 CFR 114.2 (prohibitions on corporate contributions). A "contribution" may take the form of money or "anything of value," including an in-kind contribution, provided to a candidate or political committee for the purpose of influencing a Federal election. *See* 2 U.S.C. 431(8)(A)(i) and (9)(A)(i); 11 CFR 100.52(a) and (d)(1), 100.111(a) and (e)(1). An expenditure made in coordination with a candidate, a candidate's authorized political committee, or political party committee constitutes an in-kind contribution to that candidate or party committee subject to contribution limits and prohibitions and must, subject to certain exceptions, be reported both as a contribution to and as an expenditure by that candidate or party committee. *See* 2 U.S.C. 441a(a)(7); 11 CFR 109.20 and 109.21(b).

A. The Rulemaking Record

These final rules for coordinated communications respond to the decision of the Court of Appeals for the District of Columbia Circuit in *Shays* v. *FEC,* 528 F.3d 914 (DC Cir. 2008) ("*Shays III Appeal*"), discussed below. The Commission published a Notice of Proposed Rulemaking ("NPRM") in the **Federal Register** on October 21, 2009. *See* Notice of Proposed Rulemaking on Coordinated Communications, 74 FR 53893 (Oct. 21, 2009). The NPRM comment period closed on January 19, 2010. The Commission received nine comments from 16 commenters on the NPRM. The NPRM comments are available at *http://www.fec.gov/pdf/nprm/coord_commun/2009/shays3comments.shtml.*

The Commission published a Supplemental Notice of Proposed Rulemaking ("SNPRM") in the **Federal Register** on February 10, 2010. *See* Supplemental Notice of Proposed Rulemaking on Coordinated Communications, 75 FR 6590 (Feb. 10, 2010). The SNPRM invited comments on the effect, if any, of the Supreme Court's decision in *Citizens United* v. *FEC,* 130 S.Ct. 876, 78 U.S.L.W. 4078 (U.S. Jan. 21, 2010), on the rulemaking. The SNPRM comment period closed on February 24, 2010. The Commission received twelve comments from fifteen commenters on the SNPRM. The SNPRM comments are available at *http://www.fec.gov/pdf/nprm/coord_commun/2009/snprmcoordinatedcomments.shtml.*

The Commission held a public hearing on March 2 and 3, 2010, at which eleven witnesses testified. Audio files of the hearing and a transcript of the proceeding are available at *http://www.fec.gov/pages/hearings/coordinationshays3hearing.shtml.*

The Commission kept the rulemaking record open until March 17, 2010. During this post-hearing period, the Commission received three additional comments from four commenters. These additional comments are available at *http://www.fec.gov/law/law_rulemakings.shtml#coordinationshays3.*[1]

B. Coordinated Communications Before the Bipartisan Campaign Reform Act of 2002

The Supreme Court first examined independent expenditures and coordination or cooperation between candidates and other persons in *Buckley* v. *Valeo,* 424 U.S. 1, 58 (1976), although coordination was not explicitly addressed in the Act at that time. *See* Public Law 93–443, 88 Stat. 1263 (1974); Public Law 92–225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. 431 *et seq.*). In *Buckley,* the Court distinguished expenditures that were not truly independent—that is, expenditures made in coordination with a candidate or the candidate's authorized committee—from "independent expenditures." *Buckley,* 424 U.S. at 46–47. The Court noted that a third party's "prearrangement and coordination of an expenditure with the candidate or his agent" presents a "danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* at 47. The Court further noted that the Act's contribution limits must not be circumvented through "prearranged or coordinated expenditures amounting to disguised contributions." *Id.* The Court concluded that a "contribution" includes "all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." *Id.* at 78; *see also id.* at 47 n.53.

After *Buckley,* Congress amended the Act to define an "independent expenditure" as "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate" and "not made in concert with, or at the request or suggestion of" a candidate or the candidate's authorized committee or agent. 2 U.S.C. 431(p) (1976) (current version at 2 U.S.C. 431(17)). Congress also amended the Act to provide that an expenditure "shall be considered to be a contribution" when it is made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of" a candidate, a candidate's authorized committees, or their agents. 2 U.S.C. 441a(a)(7)(B)(i) (1976). The Act separately addressed as contributions expenditures made for the dissemination, distribution, or republication of campaign materials prepared by a candidate, a candidate's authorized committees, or their agents. *See* 2 U.S.C. 441a(a)(7)(B)(ii) (1976) (now codified at 2 U.S.C. 441a(a)(7)(B)(iii)). Although Congress made some further adjustments to the Act in the decades following *Buckley,* the coordination provisions in the Act remained substantially unchanged until

[1] For purposes of this document, "comment" and "commenter" apply to both written comments and oral testimony at the public hearing.

the Bipartisan Campaign Reform Act of 2002 [2] ("BCRA"), as discussed below.

The Commission issued new regulations to implement these post-*Buckley* changes to the Act. *See* H.R. Doc. No. 95–1A (1977). The new rules defined an "independent expenditure" as an "expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate which is not made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of" a candidate or committee and set forth the "arrangements or conduct" constituting coordination. 11 CFR 109.1 (1977). In 2001, the Commission adopted new coordinated communications regulations in response to several court decisions.[3] *See* 11 CFR 100.23 (2001); Explanation and Justification for Final Rules on General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures, 65 FR 76138 (Dec. 6, 2000). Drawing on judicial guidance in *Christian Coalition,* the Commission defined a new term, "coordinated general public political communication" ("GPPC"), to address communications paid for by unauthorized committees, advocacy groups, and individuals that were coordinated with candidates or party committees. A GPPC that "included" a clearly identified candidate was coordinated if a third party paid for it and if it was created, produced, or distributed (1) at the candidate's or party committee's request or suggestion; (2) after the candidate or party committee exercised control or decision-making authority over certain factors; or (3) after "substantial discussion or negotiation" with the candidate or party committee regarding certain factors. 11 CFR 100.23(b) and (c) (2001). The regulations explained that "substantial discussion or negotiation may be evidenced by one or more meetings, conversations or conferences regarding the value or importance of the communication for a particular election." 11 CFR 100.23(c)(2)(iii) (2001).

[2] Public Law 107–155, 116 Stat. 81 (2002).

[3] *See Colo. Republican Fed. Campaign Comm.* v. *FEC,* 518 U.S. 604 (1996) (concluding that political parties may make independent expenditures on behalf of their Federal candidates); *FEC* v. *Christian Coalition,* 52 F. Supp. 2d 45, 92 (D.D.C. 1999) ("*Christian Coalition*") (setting forth a test for concluding when an "expressive expenditure" becomes "coordinated" with a candidate).

C. Impact of BCRA on Coordinated Communications

In 2002, Congress revised the coordination provisions in the Act. *See* BCRA at secs. 202, 214, 116 Stat. at 90–91, 94–95. BCRA retained the statutory provision that an expenditure is a contribution to a candidate when it is made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of" that candidate, the candidate's authorized committee, or the agents of either. *See* 2 U.S.C. 441a(a)(7)(B)(i). BCRA added a similar provision governing coordination with political party committees: expenditures made by any person, other than a candidate or the candidate's authorized committee, "in cooperation, consultation, or concert, with, or at the request or suggestion of" a national, State, or local party committee, are contributions to that political party committee. 2 U.S.C. 441a(a)(7)(B)(ii). BCRA also amended the Act to specify that a coordinated electioneering communication shall be a contribution to, and expenditure by, the candidate supported by that communication or that candidate's party. *See* 2 U.S.C. 441a(a)(7)(C); *see also* 2 U.S.C. 434(f)(3) (defining "electioneering communication").

BCRA expressly repealed the GPPC regulation at 11 CFR 100.23 and directed the Commission to promulgate new regulations on "coordinated communications" in their place. *See* BCRA at sec. 214, 116 Stat. at 94–95. Although Congress did not define the term "coordinated communications" in BCRA, the statute specified that the Commission's new regulations "shall not require agreement or formal collaboration to establish coordination." [4] BCRA at sec. 214(c), 116 Stat. at 95. BCRA also required that, "[i]n addition to any subject determined by the Commission, the regulations shall address (1) payments for the republication of campaign materials; (2) payments for the use of a common vendor; (3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and (4) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party." BCRA at sec. 214(c), 116 Stat. at 95; 2 U.S.C. 441a(7)(B)(ii) note.

[4] The Court of Appeals for the District of Columbia has noted that "[a]part from this negative command—'shall not require'—BCRA merely listed several topics the rules 'shall address,' providing no guidance as to how the FEC should address them." *Shays* v. *Federal FEC,* 414 F.3d 76, 97–98 (DC Cir. 2005).

D. Coordinated Communications After BCRA

As detailed below, the Commission promulgated revised coordinated communications regulations in 2002 as required by BCRA. Several aspects of those revised regulations were successfully challenged in *Shays* v. *FEC,* 337 F. Supp. 2d 28 (D.DC 2004) ("*Shays I District*"), *aff'd, Shays v. FEC,* 414 F.3d 76 (DC Cir. 2005) ("*Shays I Appeal*"), *petition for reh'g en banc denied,* No. 04–5352 (DC Cir. Oct. 21, 2005).

In 2006, the Commission further revised its coordination regulations in response to *Shays I Appeal.* These revised rules were themselves challenged in *Shays* v. *FEC,* 508 F. Supp. 2d 10 (D.DC 2007) ("*Shays III District*"), *aff'd, Shays III Appeal,* 528 F.3d 914.[5] The NPRM in this rulemaking was issued in response to *Shays III Appeal.*

1. 2002 Rulemaking

On December 17, 2002, the Commission promulgated regulations as required by BCRA. *See* 11 CFR 109.21 (2003); *see also* Explanation and Justification for Final Rules on Coordinated and Independent Expenditures, 68 FR 421 (Jan. 3, 2003) ("2002 E&J"). The Commission's 2002 coordinated communication regulations set forth a three-prong test for determining whether a communication is a coordinated communication, and therefore an in-kind contribution to, and an expenditure by, a candidate, a candidate's authorized committee, or a political party committee. *See* 11 CFR 109.21(a). First, the communication must be paid for by someone other than a candidate, a candidate's authorized committee, a political party committee, or the agents of either (the "payment prong"). *See* 11 CFR 109.21(a)(1) (2003). Second, the communication must satisfy one of four content standards (the "content prong"). *See* 11 CFR 109.21(a)(2), (c) (2003). Third, the communication must satisfy one of five conduct standards (the "conduct prong").[6] *See* 11 CFR 109.21(a)(3) and (d) (2003). A communication must satisfy

[5] A third case filed by the same Plaintiff, referred to as "*Shays II,*" addressed the Commission's approach to regulating section 527 organizations and is not relevant to the coordination rules at issue in this rulemaking. *See Shays* v. *FEC,* 511 F. Supp. 2d 19 (D.D.C. 2007).

[6] A sixth conduct standard clarifies the application of the other five to the dissemination, distribution, or republication of campaign materials. *See* 11 CFR 109.21(d)(6) (2003).

all three prongs to be a "coordinated communication."

The Commission also adopted a safe harbor at 11 CFR 109.21(f) for responses to inquiries about legislative or policy issues. *See* 2002 E&J, 68 FR at 440–41.

a. Content Standards

The 2002 coordinated communication regulations contained four content standards identifying communications whose "subject matter is reasonably related to an election." 2002 E&J, 68 FR at 427. The first content standard was satisfied if the communication was an electioneering communication.[7] *See* 11 CFR 109.21(c)(1) (2003). The second content standard was satisfied by a public communication [8] made at any time that disseminates, distributes, or republishes campaign materials prepared by a candidate, a candidate's authorized committee, or agents thereof. *See* 11 CFR 109.21(c)(2) (2003) and 109.37(a)(2)(i) (2003). The third content standard was satisfied if a public communication made at any time expressly advocates the election or defeat of a clearly identified candidate for Federal office. *See* 11 CFR 109.21(c)(3) (2003) and 109.37(a)(2)(ii) (2003). The 2002 version of the fourth content standard was satisfied if a public communication (1) refers to a political party or a clearly identified Federal candidate; (2) is publicly distributed or publicly disseminated 120 days or fewer before an election (the "120-day time window"); and (3) is directed to voters in the jurisdiction of the clearly identified Federal candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot. *See* 11 CFR 109.21(c)(4) (2003).

b. Conduct Standards

The 2002 coordinated communication regulations also contained five conduct standards. A communication created, produced, or distributed (1) at the request or suggestion of, (2) after material involvement by, or (3) after substantial discussion with, a candidate, a candidate's authorized committee, or a political party committee, would satisfy the first three conduct standards. *See* 11 CFR 109.21(d)(1)–(3) (2003). These three conduct standards were not at issue in *Shays III Appeal,* and are not addressed in this rulemaking.

The remaining two conduct standards, which are at issue in this rulemaking, are the (1) "common vendor" and (2) "former employee" standards. The 2002 version of the common vendor conduct standard was satisfied if (1) the person paying for the communication contracts with, or employs, a "commercial vendor" to create, produce, or distribute the communication, (2) the commercial vendor has provided certain specified services to the political party committee or the clearly identified candidate referred to in the communication within the current election cycle, and (3) the commercial vendor uses or conveys information to the person paying for the communication about the plans, projects, activities, or needs of the candidate or political party committee, or information used by the commercial vendor in serving the candidate or political party committee, and that information is material to the creation, production, or distribution of the communication. *See* 11 CFR 109.21(d)(4) (2003).

The 2002 version of the former employee conduct standard was satisfied if (1) the communication is paid for by a person, or by the employer of a person, who was an employee or independent contractor of the candidate or the political party committee clearly identified in the communication within the current election cycle, and (2) the former employee or independent contractor uses or conveys information to the person paying for the communication about the plans, projects, activities, or needs of the candidate or political party committee, or information used by the former employee or independent contractor in serving the candidate or political party committee, and that information is material to the creation, distribution, or production of the communication. *See* 11 CFR 109.21(d)(5) (2003).

These two conduct standards covered only former employees, independent contractors, and vendors [9] who had provided services to a candidate or party committee during the "current election cycle," as defined in 11 CFR 100.3. 2002 E&J, 68 FR at 436; 11 CFR 109.21(d)(4) and (5) (2003).

2. Shays I Appeal

The Court of Appeals in *Shays I Appeal* held that the Act did not preclude content-based standards for coordinated communications. *Shays I Appeal,* 414 F.3d at 99–100 (applying *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984)). Nonetheless, the court found the 120-day time window in the fourth standard of the content prong of the coordinated communication regulations to be unsupported by adequate explanation and justification and, thus, arbitrary and capricious under the Administrative Procedure Act ("APA"). *Shays I Appeal,* 414 F.3d at 102. Although the Court of Appeals found the explanation for the particular time frame to be lacking, the *Shays I Appeal* court rejected the argument that the Commission is precluded from establishing a "bright line test." *Id.* at 99.

The *Shays I Appeal* court concluded that the regulation's "fatal defect" was in offering no persuasive justification for the 120-day time window and "the weak restraints applying outside of it." *Id.* at 100. The court concluded that, by limiting coordinated communications made outside of the 120-day time window to communications containing express advocacy or the republication of campaign materials, the Commission "has in effect allowed a coordinated communication free-for-all for much of each election cycle." *Id.* Indeed, the "most important" question the court asked was, "would candidates and collaborators aiming to influence elections simply shift coordinated spending outside that period to avoid the challenged rules' restrictions?" *Id.* at 102.

The *Shays I Appeal* decision required the Commission to undertake a factual inquiry to determine whether the temporal line that it drew "reasonably defines the period before an election when non-express advocacy likely relates to purposes other than 'influencing' a Federal election" or whether it "will permit exactly what BCRA aims to prevent: evasion of campaign finance restrictions through unregulated collaboration." *Id.* at 101–02.

3. 2005 Rulemaking

Following the *Shays I Appeal* decision, the Commission proposed seven alternatives for revising the content prong. *See* Notice of Proposed Rulemaking on Coordinated

[7] "Electioneering communication" is defined as "any broadcast, cable, or satellite communication that: (1) Refers to a clearly identified candidate for Federal office; (2) is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and (3) is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives." 11 CFR 100.29; *see also* 2 U.S.C. 434(f)(3).

[8] "Public communication" is defined as "communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." 11 CFR 100.26; *see also* 2 U.S.C. 431(22).

[9] *See* 11 CFR 109.21(d)(4)(ii) for the specific services that a vendor must provide in order to trigger the common vendor standard.

Communications, 70 FR 73946 (Dec. 14, 2005) ("2005 NPRM"). The Commission also used licensed data that provided empirical information regarding the timing, frequency, and cost of television advertising spots in the 2004 election cycle. *See* Supplemental Notice of Proposed Rulemaking on Coordinated Communications, 71 FR 13306 (Mar. 15, 2006).

Although not challenged in *Shays I Appeal,* the "election cycle" time frame of the common vendor and former employee conduct standards at 11 CFR 109.21(d)(4) and (5), among other aspects of that prong, was also reconsidered in the 2005 NPRM. The Commission sought comment on how the "election cycle" time limitation works in practice and whether the strategic value of information on a candidate's plans, products, and activities lasts throughout the election cycle. 2005 NPRM, 70 FR at 73955–56.

In 2006, the Commission promulgated revised rules that retained the content prong at 11 CFR 109.21(c), but revised the time periods in the fourth content standard. *See* Explanation and Justification for Final Rules on Coordinated Communications, 71 FR 33190 (June 8, 2006) ("2006 E&J"). Relying on the licensed empirical data, the Commission revised the coordinated communication regulation at 11 CFR 109.21(c)(4) and applied different time periods for communications coordinated with Presidential candidates (120 days before a state's primary through the general election), congressional candidates (separate 90-day time windows before a primary and before a general election), and political parties (tied to either the Presidential or congressional time periods, depending on the communication and election cycle). *See id.*

The 2006 coordinated communication regulations also reduced the period of time during which a common vendor's or former employee's relationship with the authorized committee or political party committee referred to in the communication could satisfy the conduct prong, from the entire election cycle to 120 days. 2006 E&J, 71 FR at 33204. The 2006 E&J noted that, especially in regard to the six-year Senate election cycles, the "election cycle" time limit was "overly broad and unnecessary to the effective implementation of the coordination provisions." *Id.* The 2006 E&J reasoned that 120 days was a "more appropriate" limit. *Id.*

The Commission also adopted new safe harbors at 11 CFR 109.21(d)(2)–(5) for use of publicly available information, 11 CFR 109.21(g) for endorsements and solicitations by Federal candidates, and 11 CFR 109.21(h) for the establishment and use of a firewall. *See* 2006 E&J, 71 FR at 33201–02, 33205–07.

4. Shays III Appeal

On June 13, 2008, the Court of Appeals issued its opinion in *Shays III Appeal.* The court addressed both the content and conduct prongs of the coordinated communication regulations.

a. Content Standards

The *Shays III Appeal* opinion held that the Commission's decision to apply "express advocacy" as the only content standard [10] outside the 90-day and 120-day windows "runs counter to BCRA's purpose as well as the APA." *Shays III Appeal,* 528 F.3d at 926. The court found that, although the administrative record demonstrated that the "vast majority" of advertisements were run in the more strictly regulated 90-day and 120-day windows, a "significant number" of advertisements ran before those windows and "very few ads contain magic words." [11] *Id.* at 924. The *Shays III Appeal* court held that "the FEC's decision to regulate ads more strictly within the 90/120-day windows was perfectly reasonable, but its decision to apply a 'functionally meaningless' standard outside those windows was not." *Id.* at 924 (quoting *McConnell* v. *FEC,* 540 U.S. 93, 193 (2003) (concluding that *Buckley's* 'magic words' requirement is "functionally meaningless"), *overruled in part by Citizens United,* 130 S. Ct. at 913); *see also McConnell* v. *FEC,* 251 F. Supp. 2d 176, 303–04 (D.DC 2003) (Henderson, J.); *id.* at 534 (Kollar-Kotelly, J.); *id.* at 875–79 (Leon, J.)) (discussing "magic words").

The court noted that "although the FEC * * * may choose a content standard less restrictive than the most restrictive it could impose, it must demonstrate that the standard it selects 'rationally separates election-related advocacy from other activity falling outside FECA's expenditure definition.'" [12] *Shays III Appeal,* 528 F.3d at 926 (quoting *Shays I Appeal,* 414 F.3d at 102). The court stated that "the 'express advocacy' standard fails that test," but did not explicitly articulate a less restrictive standard that would meet the test. *Id.*

The court expressed particular concern about a possible scenario in which, "more than 90/120 days before an election, candidates may ask wealthy supporters to fund ads on their behalf, so long as those ads do not contain magic words." *Id.* at 925. The court noted that the Commission "would do nothing about" such coordination, "even if a contract formalizing the coordination and specifying that it was 'for the purpose of influencing a federal election' appeared on the front page of the New York Times." *Id.* The court held that such a rule not only frustrates Congress's purpose to prohibit funds in excess of the applicable contribution limits from being used in connection with Federal elections, but "provides a clear roadmap for doing so." *Id.*

b. Conduct Standards

The *Shays III Appeal* court also invalidated the 120-day period of time during which a common vendor's or former campaign employee's relationship with an authorized committee or political party committee could satisfy the conduct prong at 11 CFR. 109.21(d)(4) and (d)(5). *Shays III Appeal,* 528 F.3d at 928–29. The *Shays III Appeal* court found that with respect to the change in the 2006 coordinated communication regulations from the "current election cycle" to a 120-day period, "the Commission's generalization that material information may not remain material for long overlooks the possibility that *some* information * * * may very well remain material for at least the duration of a campaign." *Id.* at 928. The court therefore found that the Commission had failed to justify the change to a 120-day time window, and, as such, the change was arbitrary and capricious. *Id.* The court concluded that, while the Commission may have discretion in drawing a bright line in this area, it had not provided an adequate explanation for the 120-day time period, and that the Commission must support its decision with reasoning and evidence. *Id.* at 929.

E. Current Rulemaking

On October 21, 2009, the Commission published the NPRM in this rulemaking in response to *Shays III Appeal. See* 74 FR 53893. The deadline for public comment on the NPRM was January 19, 2010. Two days after the close of the NPRM's comment period, on January 21, 2010, the Supreme Court issued its decision in *Citizens United.* Because

[10] The court did not address the republication of campaign materials, *see* 11 CFR 109.21(c)(2), in its analysis of the period outside the time windows.

[11] "Magic words" are "examples of words of express advocacy, such as 'vote for,' 'elect,' 'support,' * * * 'defeat,' [and] 'reject.'" *McConnell* v. *FEC,* 540 U.S. 93, 191 (2003) (quoting *Buckley,* 424 U.S. at 44 n.52).

[12] An "expenditure" includes "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(9); *see also* 11 CFR 100.111(a).

Citizens United raised issues that were potentially relevant to this rulemaking, the Commission published the SNPRM. *See* 75 FR 6590. As discussed more fully below, the SNPRM re-opened the comment period and sought additional comment as to the effect of the *Citizens United* decision on the proposed rules, issues, and questions raised in the NPRM.

II. Coordinated Communications Content Prong Revisions (11 CFR 109.21(c)(3) and (c)(5))

The Commission is revising the content prong of the coordinated communication rules at 11 CFR 109.21(c) in response to *Shays III Appeal.* As explained further below, the Commission is adding a new standard to the content prong of the coordinated communication rules. New 11 CFR 109.21(c)(5) covers public communications that are the functional equivalent of express advocacy.

The new functional equivalent content standard was the second of four alternative approaches that the Commission proposed in the NPRM. The Commission also proposed adopting a content standard that would cover public communications that promote, support, attack, or oppose a political party or a clearly identified candidate (the "PASO standard"). In addition, the Commission proposed clarifying the express advocacy content standard by including a cross-reference to 11 CFR 100.22. Finally, the Commission proposed covering all public communications made for the purpose of influencing an election that are the product of an explicit agreement between a candidate, authorized committee, or political party committee and the person paying for the communication (the "Explicit Agreement" standard). The proposed approaches that the Commission is not adopting are discussed in Part III, below.

A. Functional Equivalent of Express Advocacy—11 CFR 109.21(c)(5)

The new content standard applies to any public communication that is the "functional equivalent of express advocacy." New 11 CFR 109.21(c)(5) specifies that a communication is the functional equivalent of express advocacy if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate. The new content standard applies without regard to the timing of the communication or the targeted audience.

Shays III Appeal required the Commission to adopt a content standard that " 'rationally separates election-related advocacy from other activity falling outside FECA's expenditure definition.' " *Shays III Appeal,* 528 F.3d at 926 (quoting *Shays I Appeal,* 414 F.3d at 102). Specifically, the Court indicated that the Commission must choose a content standard that is more inclusive than "express advocacy" to apply outside the 90-day and 120-day time windows. *Id.* The Commission has determined that the functional equivalent of express advocacy content standard best meets these criteria. In this, the Commission agrees with the majority of the commenters that the concept of the functional equivalent of express advocacy, which the Supreme Court first articulated in *McConnell,* then explained in *FEC* v. *Wisconsin Right to Life, Inc.* ("*WRTL*"), and later applied in *Citizens United,* is broader than express advocacy and provides a rational basis for separating electoral from non-electoral speech. *See Citizens United,* 130 S. Ct. at 889–90; *WRTL,* 551 U.S. 449, 469–70 (2007); *McConnell,* 540 U.S. at 204–06, *overruled in part by Citizens United,* 130 S. Ct. at 913.

1. Origin and Application of the New Standard

The functional equivalent of express advocacy standard has its origins in the Supreme Court's decision in *McConnell.* In that case, the Supreme Court rejected a facial challenge to BCRA's prohibition on the use of corporate and labor organization treasury funds to pay for electioneering communications, "to the extent that issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy." *McConnell,* 540 U.S. at 206.

In *WRTL,* the Supreme Court explained the standard when it addressed BCRA's prohibitions on corporate and labor organization funding of electioneering communications, as they applied to three particular ads financed by a nonprofit corporation. As discussed below, the Court's controlling opinion set forth a test for determining when communications contain the "functional equivalent of express advocacy." 551 U.S. at 466–67, 469–70. Following the *WRTL* decision, the Commission promulgated rules that incorporated the functional equivalent of express advocacy test, discussed below, in a provision governing the funding of electioneering communications by corporations and labor organizations.[13]

The Supreme Court applied the functional equivalent of express advocacy test a second time in *Citizens United.* In that decision, the Court found, among other things, that the provision in BCRA prohibiting corporations and labor organizations from using their general treasury funds to pay for electioneering communications was unconstitutional. *See Citizens United,* 130 S. Ct. at 889–90, 913.

The final rule at 11 CFR 109.21(c)(5) adopts the Supreme Court's functional equivalent of express advocacy test. "As explained by The Chief Justice's controlling opinion in *WRTL,* the functional-equivalent test is objective: 'a court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.' " *Citizens United,* 130 S. Ct. at 889–90 (quoting *WRTL,* 551 U.S. at 469–470).

In applying the test, the Commission will follow the Supreme Court's reasoning and application of the test to the communications at issue in *WRTL* and *Citizens United.*

In *WRTL,* the Court found that the particular ads in question were not the functional equivalent of express advocacy. WRTL ran three similar radio advertisements. The transcript of "Wedding" reads as follows:

> PASTOR: And who gives this woman to be married to this man?
>
> BRIDE'S FATHER: Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up * * *
>
> VOICE–OVER: Sometimes it's just not fair to delay an important decision. But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple yes or no vote. So qualified candidates don't get a chance to serve. It's politics at work, causing gridlock and backing up some of our courts to a state of emergency. Contact Senators Feingold and Kohl and tell them to oppose the filibuster. Visit: BeFair.org. Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's Committee.

WRTL aired a similar radio advertisement entitled "Loan," which only differs from "Wedding" in its introduction. The "Loan" radio script begins:

> LOAN OFFICER: Welcome Mr. and Mrs. Shulman. We've reviewed your loan

[13] *See* 11 CFR 114.15. The Commission intends to issue a separate NPRM to address the regulations at 11 CFR 114.15 in light of the Supreme Court's decision in *Citizens United.*

application, along with your credit report, the appraisal on the house, the inspections, and well * * *

COUPLE: Yes, yes * * * we're listening.

OFFICER: Well, it all reminds me of a time I went fishing with my father. We were on the Wolf River Waupaca * * *

VOICE–OVER: Sometimes it's just not fair to delay an important decision. But in Washington it's happening * * *.

The remainder of the script is identical to "Wedding."

The third WRTL communication is a television advertisement, "Waiting," where "the images on the television ad depict a middle-aged man being as productive as possible while his professional life is in limbo. The man reads the morning paper, polishes his shoes, scans through his Rolodex, and does other similar activities." *WRTL,* 551 U.S. at 459 n.5. The television script reads:

VOICE–OVER: There are a lot of judicial nominees out there who can't go to work. Their careers are put on hold because a group of Senators is filibustering—blocking qualified nominees from a simple yes or no vote. It's politics at work and it's causing gridlock.

The Supreme Court stated that "the remainder of the script is virtually identical to 'Wedding.'" *Id.*

In finding that the advertisements were not the functional equivalent of express advocacy and explaining its rationale, the Supreme Court stated:

Under this test, WRTL's three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

WRTL, 551 U.S. at 470.

In *Citizens United,* the Court applied the same "functional-equivalent test" to a 90-minute documentary about then-Senator Hillary Clinton, who was a candidate in the Democratic Party's 2008 Presidential primary elections. *Citizens United,* 130 S. Ct. at 887. The Court found:

Under this test, *Hillary* is equivalent to express advocacy. The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President. In light of historical footage, interviews with persons critical of her, and voiceover narration, the film would be understood by most viewers as an extended criticism of Senator Clinton's character and her fitness for the office of the Presidency. The narrative may contain more suggestions and arguments than facts, but there is little doubt that the thesis of the film is that she is unfit for the Presidency. The movie concentrates on alleged wrongdoing during the Clinton administration, Senator Clinton's qualifications and fitness for office, and policies the commentators predict she would pursue if elected President. It calls Senator Clinton "Machiavellian" and asks whether she is "the most qualified to hit the ground running if elected President." The narrator reminds viewers that "Americans have never been keen on dynasties" and that "a vote for Hillary is a vote to continue 20 years of a Bush or a Clinton in the White House."

Citizens United argues that *Hillary* is just "a documentary film that examines certain historical events." We disagree. The movie's consistent emphasis is on the relevance of these events to Senator Clinton's candidacy for President. The narrator begins by asking "could [Senator Clinton] become the first female President in the history of the United States?" And the narrator reiterates the movie's message in his closing line: "Finally, before America decides on our next president, voters should need no reminders of * * * what's at stake—the well being and prosperity of our nation."

As the District Court found, there is no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton. Under the standard stated in *McConnell* and further elaborated in *WRTL,* the film qualifies as the functional equivalent of express advocacy.

Id. at 890 (internal citations to record omitted).

As stated above, in its application of the functional equivalent of express advocacy test, the Commission will be guided by the Supreme Court's reasoning and application of the test. A communication will be considered the functional equivalent of express advocacy if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

2. Proposed Rule and Comments Received

The new functional equivalent content standard at 11 CFR 109.21(c)(5) is identical to the one proposed in the NPRM. Sixteen commenters provided comments on the proposed content standard. Of the sixteen, eleven commenters supported the proposal and five opposed it.

Three commenters argued that the functional equivalent of express advocacy standard does not apply to coordinated communications. They noted that the court cases in which the standard was developed did not address coordinated speech. In their view, the functional equivalent of express advocacy standard, like the express advocacy standard, was developed as a constitutional limitation for independent speech by persons other than candidates and political committees and was never intended to apply to candidates, political parties, or those who coordinate with them.

Eight commenters disagreed and argued that the functional equivalent of express advocacy test could be appropriately used in the coordinated communication context. In particular, several commenters asserted that nothing in the test is expressly or impliedly limited to independent speech; rather, the functional equivalent test, which focuses on the communication's content, incorporates general principles of campaign finance law that are equally applicable to coordinated speech.

A number of the commenters supporting the functional equivalent standard noted that the standard "both has the imprimatur of the Supreme Court and the virtue of using language with which the regulated community is now familiar." As one commenter stated:

[A]lthough it is not perfect, the *Wisconsin Right to Life* standard is something that people are familiar with, it is already in [Commission] regulations, and in fact, the regulated community has had experience under that standard in the 2008 election, and * * * both corporate and union and other types of organizations seem to have effectively used that standard just two days before the *Citizens United* opinion in a special election in Massachusetts.

The Commission received eight comments on whether the proposed functional equivalent content standard would satisfy the concerns of the *Shays III Appeal* court. A majority of those commenters who addressed the topic concluded that the test would satisfy the court. In particular, several commenters asserted that a functional equivalent content standard would rationally separate election-related speech from non-electoral speech. Two of these commenters observed that the proposed functional equivalent standard would accomplish this goal because it is an objective standard that was designed by the Supreme Court as a means of identifying election-related advocacy. One commenter noted that the Supreme Court had developed the functional equivalent of express advocacy test to "address exactly what *Shays III* criticized—regulation based solely on a 'functionally meaningless' express advocacy standard."

By contrast, three commenters maintained that a functional equivalent content standard would be overly similar to the express advocacy content standard, which was rejected by the *Shays III Appeal* court. These

commenters argued that the proposed standard, like the express advocacy standard, is under-inclusive, and would fail to rationally separate election-related speech from other communications as required by *Shays III Appeal.*

Several commenters urged the Commission to adopt a standard that would protect lobbying and similar policy communications, and that would neither deter nor prohibit the legitimate efforts of groups to influence legislation and policy. These commenters observed that groups often work closely with officeholders who are also Federal candidates on public communications involving legislative efforts, grassroots lobbying, issue advocacy, and educational messages that are completely unrelated to elections. They noted that groups often coordinate with these officeholders on the timing and content of communications in order to generate public support for legislation.

The Commission received thirteen comments on whether a functional equivalent content standard should incorporate any elements of the regulations at 11 CFR 114.15 implementing the Supreme Court's decision in *WRTL,* or whether the Commission should use criteria other than those set forth in *WRTL* and *Citizens United* for determining when a communication is the functional equivalent of express advocacy.

The commenters were divided in their approach. Six commenters opposed adding additional criteria to the proposed functional equivalent content standard; they argued that there was no need, after *Citizens United,* for any regulatory elaboration of the test. Conversely, one commenter argued that the functional equivalent test as developed by the Supreme Court was neither objective nor clear, and urged the Commission to enumerate specific words that would indicate that a communication was unambiguously related to an election because of a reference to a candidacy, voting, or election. Another commenter supported incorporating all the elements of 11 CFR 114.15 into a functional equivalent content standard, while a different commenter argued that the rules at 11 CFR 114.15 are too vague. Five commenters argued in favor of a bright line rule. Two commenters urged the Commission to adopt language from the *WRTL* decision stating that, in considering whether a communication is the functional equivalent of express advocacy, "the tie goes to the speaker." [14] *WRTL,* 551 U.S. at 474 & n.7.

The new content standard applies to all speakers subject to revised 11 CFR 109.21 [15]—including individuals and advocacy organizations—without regard to when a communication is made or its intended audience. The functional equivalent of express advocacy test has been applied by the Supreme Court as a stand-alone test for separating election-related speech that is not express advocacy from non-election related speech. Additionally, the Supreme Court developed the functional equivalent of express advocacy test for communications by the full range of speakers covered by the coordinated communication rules. As noted by the commenters, groups often work closely with officeholders on public communications involving legislation, grassroots lobbying, issue advocacy, and educational messages that are completely unrelated to elections. In recognition of these interests, the Commission has decided to use an objective, well-established standard that has been sanctioned by the Supreme Court and that is familiar to those subject to it. As the court noted in *Shays III Appeal,* "the FEC, properly motivated by First Amendment concerns, may choose a content standard less restrictive than the most restrictive it could impose." 528 F.3d at 926.

In addition, the functional equivalent of express advocacy content standard best serves to separate election-related advocacy from other speech in the periods outside the 90- and 120-day pre-election time windows, where the content standard likely will have its greatest impact. *See* 11 CFR 109.21(c)(4) (public communications satisfy content standard *within* the pre-election windows with references to clearly identified candidates or political parties). Like the express advocacy and republication content standards at 11 CFR 109.21(c)(2) and (c)(3), the new content standard applies both inside and outside of the 90- and 120-day time windows in the fourth content standard at 11 CFR 109.21(c)(4). Outside of those time windows, a significantly lower percentage of ads have the purpose and effect of influencing Federal elections. *See* 2006 Final Rule at 33193–97; *Citizens United,* 130 S. Ct. at 895 ("It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence.").

As required by *Shays III Appeal,* the new content standard also captures more communications than the express advocacy content standard outside of the 90-day and 120-day time windows. As one commenter noted, the functional equivalent of express advocacy necessarily encompasses more than express advocacy. As discussed above, the functional equivalent of express advocacy content standard would apply to all communications that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." For each of these reasons, the Commission concludes that the functional equivalent test satisfies the concerns of the *Shays III Appeal* court. Accordingly, the Commission has decided to adopt the functional equivalent of express advocacy test as a new content prong for determining whether a communication is coordinated.

B. Technical Amendment—11 CFR 109.21(c)(3)

The Commission is making a technical change to the express advocacy content standard at 11 CFR 109.21(c)(3) by adding a cross-reference to the definition of express advocacy at 11 CFR 100.22.

This change is identical to the one proposed as part of Alternative 2 in the NPRM. The Commission received no comments on this aspect of proposed Alternative 2.[16]

III. Proposed Content Standards Not Adopted

The Commission is not adopting any of the other proposals from the NPRM for revising the content prong of the coordinated communications rule. In addition to the functional equivalent of express advocacy content standard discussed above, the NPRM contained three alternative proposals: (1) Adopting a content standard to cover public communications that promote, support, attack, or oppose a political party or a clearly identified Federal candidate (the "PASO standard"); (2) clarifying the express advocacy content standard by adding a reference to the definition of express advocacy in 11 CFR 100.22; and

[14] The NPRM also sought comment on the application of the functional equivalent of express advocacy test to a number of examples. The Commission received no comments on those examples. As noted above, the Commission will follow the Supreme Court's reasoning and application of the test.

[15] Party coordinated communications are addressed in 11 CFR 109.37.

[16] *See* Part III(B) below, regarding the proposal in the NPRM to address the *Shays III Appeal* court's concerns solely by adding a cross reference to the express advocacy definition in the express advocacy content standard.

(3) adopting a new content standard and a new conduct standard to address public communications for which there is explicit agreement (the "Explicit Agreement" standard).

A. Proposed Alternative 1—Promote, Support, Attack or Oppose ("PASO")

The Commission is not adopting proposed Alternative 1, which would have amended 11 CFR 109.21(c) by replacing the express advocacy standard with a PASO standard. Under the proposed PASO standard, any public communication that promoted, supported, attacked, or opposed a political party or a clearly identified Federal candidate would have met the content prong of the coordinated communications test, without regard to when the communication was made or the targeted audience. The Commission is also not adopting a definition of PASO as proposed in the NPRM.

1. Background

In BCRA, Congress created a number of new campaign finance provisions that apply to communications that PASO Federal candidates. For example, Congress included public communications that refer to a candidate for Federal office and that PASO a candidate for that office as one type of Federal election activity ("Type III" Federal election activity). BCRA requires that State, district, and local party committees, Federal candidates, and State candidates pay for PASO communications entirely with Federal funds. *See* 2 U.S.C. 431(20)(A)(iii) and 441i(b), (e), and (f); *see also* 2 U.S.C. 441i(d) (prohibiting national, State, district, and local party committees from soliciting donations for tax-exempt organizations that make expenditures or disbursements for Federal election activity).

Congress also included PASO as part of the backup definition of "electioneering communication," should that term's primary definition be found to be constitutionally insufficient. *See* 2 U.S.C. 434(f)(3)(A)(ii). In addition, Congress incorporated by reference Type III Federal election activity as a limit on the exemptions that the Commission may make from the definition of "electioneering communication." *See* 2 U.S.C. 434(f)(3)(B)(iv); *see also* 2 U.S.C. 431(20)(A)(iii). Congress did not define PASO or any of its component terms.

Accordingly, the Commission incorporated PASO in its regulations defining "Federal election activity," and in the soft money rules governing State and local party committee communications and the allocation of funds for these communications. *See* 11 CFR 100.24(b)(3) and (c)(1), 300.33(c), 300.71, and 300.72. The Commission also incorporated PASO as a limit to the exemption for State and local candidates from the definition of "electioneering communication," and as a limit to the safe harbors from the coordinated communications rules for endorsements and solicitations. *See* 11 CFR 100.29(c)(5) and 109.21(g). To date, the Commission has not adopted a regulatory definition of either PASO or any of its component terms.

The Supreme Court in *McConnell* upheld the statutory PASO standard in the context of BCRA's provisions limiting party committees' Federal election activities to Federal funds, noting that "any public communication that promotes or attacks a clearly identified federal candidate directly affects the election in which he is participating." *McConnell,* 540 U.S. at 170. The Court further found that Type III Federal election activity was not unconstitutionally vague because the "words 'promote,' 'oppose,' 'attack,' and 'support' clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision." *Id.* at 170 n.64. The Court stated that the PASO words "'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'" *Id.* (quoting *Grayned* v. *City of Rockford,* 408 U.S. 104, 108–09 (1972)). The Court stated that this is "particularly the case" with regard to Federal election activity, "since actions taken by political parties are presumed to be in connection with election campaigns." *Id.*

2. Comments Received

The commenters were divided on the proposed PASO content standard. Some commenters asserted that PASO would be most consistent with BCRA's purpose; that it would be a "fair proxy" for determining when a communication is for the purpose of influencing a Federal election; and that it would be most responsive to the *Shays III Appeal* court's requirement that the Commission adopt a content standard that rationally separates election-related advocacy from other activity falling outside of the Act's expenditure definition. Other commenters, however, argued that the PASO standard would reach non-electoral speech and, thus, would not rationally separate election-related advocacy from activity falling outside of the Act's expenditure definition as required by *Shays III Appeal.* Additionally, some of these commenters argued that the PASO standard should not be extended to contexts other than those defined in BCRA and approved by the Supreme Court in *McConnell*—that is, Federal election activities of political parties. *See McConnell,* 540 U.S. at 170.

The Commission notes that it has used PASO in both the coordinated communications safe harbor for endorsements and solicitations, and in the new coordination safe harbor for commercial communications discussed in Part V below, even though such uses were not required by BCRA. *See* 11 CFR 109.21(g) and (i). Nonetheless, the Commission is not adopting the PASO standard because it has decided that the *Shays III Appeal* court's mandate is best addressed by adopting a content standard based on the functional equivalent of express advocacy, for the reasons given in Part II above.

Nor is the Commission adopting any definition of PASO, as proposed in the NPRM. In the NPRM, the Commission stated that it was considering possible definitions of PASO "[a]s part of its consideration of a PASO content standard." Because the Commission is not adopting a PASO content standard, it is also not adopting a definition of that standard.

B. Proposed Alternative 3—Clarification of the Express Advocacy Content Standard

The Commission is not adopting proposed Alternative 3, which would have addressed *Shays III Appeal* solely by incorporating a cross-reference to the express advocacy definition at 11 CFR 100.22 in the express advocacy content standard at 11 CFR 109.21(c)(3).

As discussed above, *Shays III Appeal* interpreted the existing express advocacy content standard as follows: "more than 90/120 days before an election, candidates may ask wealthy supporters to fund ads on their behalf, so long as those ads do not contain *magic words.*" *Shays III Appeal,* 528 F.3d at 925 (emphasis added). However, "magic words" are only one part of the Commission's express advocacy regulation. *See* 11 CFR 100.22.

The Commission proposed adding an explicit reference to 11 CFR 100.22 to the express advocacy content standard at 11 CFR 109.21(c)(3) to clarify that, outside of the 90- and 120-day windows, communications containing more than just "magic words" are coordinated communications, provided that the conduct and payment prongs of the coordinated communication test are also met. The Commission sought comment on whether, by itself, the clarification of 11 CFR 109.21(c)(3) as encompassing not only "magic words,"

but also the entirety of the express advocacy definition at 11 CFR 100.22, would fully address the *Shays III Appeal* court's concern about the current limitations of the content prong.

Ten commenters addressed this proposal, all of whom opposed it. Eight commenters challenged the definition of "express advocacy" at 11 CFR 100.22, which is beyond the scope of this rulemaking. Two commenters asserted that the proposal "is still an express advocacy test and, for that reason * * * would be radically under-inclusive and would not comply with the [*Shays III Appeal*] remand."

The Commission agrees that merely clarifying the express advocacy content standard at 11 CFR 109.21(c)(3) by adding a cross-reference to the definition of the term at 11 CFR 100.22 would not, by itself, satisfy the direction of the court in *Shays III Appeal.* The Commission therefore is not adopting the proposal in Alternative 3 of the NPRM.

Although the Commission is not adopting proposed Alternative 3 as a response to the *Shays III Appeal* court decision, it is adding a cross reference to the definition of express advocacy as described in Part II above.

C. Proposed Alternative 4—The "Explicit Agreement" Standard

The Commission is not adopting proposed Alternative 4, which would have revised 11 CFR 109.21(c)(5), (d)(7), and (e), to provide that both the content and conduct prongs of the coordinated communication test would be satisfied by a formal or informal agreement between a candidate, candidate's committee or political party committee, and a person paying for a "public communication," as defined in 11 CFR 100.26. Under the proposal, either the agreement or the communication would have had to be made for the purpose of influencing a Federal election. Like the other proposed content standards, the proposed "Explicit Agreement" alternative would have applied without regard to when the communication was made or the targeted audience. The Commission sought comment on whether the Explicit Agreement alternative should be adopted in conjunction with another content proposal.

The proposed Explicit Agreement alternative was an attempt to address a concern that appears to have motivated the courts in both *Shays I Appeal* and *Shays III Appeal:* communications plainly intended to influence a Federal election could be explicitly coordinated outside the 90- and 120-day windows, so long as such communications did not contain the "magic words" of express advocacy. *See Shays III Appeal,* 528 F.3d at 925–26; *Shays I Appeal,* 414 F.3d 98. In concluding that the current coordinated communications regulations "frustrate Congress's goal of 'prohibiting soft money from being used in connection with Federal elections,'" the *Shays III Appeal* court stated that, "[o]utside the 90/120-day windows, the regulation allows candidates to evade—almost completely—BCRA's restrictions on the use of soft money." *Id.* (quoting *McConnell,* 540 U.S. at 177 n. 69).

The *Shays III Appeal* court presented an example (the "*NY Times* hypothetical") to illustrate that "the regulation still permits exactly what we worried about" in *Shays I Appeal:* "more than 90/120 days before an election, candidates may ask wealthy supporters to fund ads on their behalf, so long as those ads do not contain magic words," and the Commission would do nothing about this, "even if a contract formalizing the coordination and specifying that it was 'for the purpose of influencing a Federal election' appeared on the front page of the New York Times." *Id.* The *Shays III Appeal* court's discussion referenced the identical concern raised in *Shays I Appeal,* where the court noted that:

> [M]ore than 120 days before an election or primary, a candidate may sit down with a well-heeled supporter and say, "Why don't you run some ads about my record on tax cuts?" The two may even sign a formal written agreement providing for such ads. Yet so long as the supporter neither recycles campaign materials nor employs the "magic words" of express advocacy—"vote for," "vote against," "elect," and so forth—the ads won't qualify as contributions subject to FECA.

Shays III Appeal, 528 F.3d at 921 (quoting *Shays I Appeal,* 414 F.3d 98).

Comments Received

Of the twelve commenters who addressed the Explicit Agreement proposal, none supported the proposal on its own. Five commenters did, however, support the proposal if it were adopted in addition to another content standard. Two commenters supported the Explicit Agreement standard only if it were adopted in addition to the PASO content standard, and three commenters supported the proposal only if it were adopted in addition to a functional equivalent of express advocacy content standard.

Seven commenters expressed concern that the "fact specific" determination of whether a communication or agreement was made for the purpose of influencing a Federal election would require broad and intrusive investigations to determine the speaker's intent. Eight commenters noted that the Supreme Court has rejected intent-based standards requiring broad discovery, most explicitly and recently in *WRTL:* "an intent-based test would chill core political speech by opening the door to a trial on every ad." *WRTL,* 551 U.S. at 467.

Six commenters asserted that the adoption of a revised content standard that rationally separates election-related advocacy from other communications would satisfy the *Shays III Appeal* court's concerns. These commenters argued that the *NY Times* hypothetical was intended to show the weakness of the existing content standard. As one commenter stated, "The court's point here was about how *bad* the express advocacy content standard is, not an endorsement of an 'explicit agreement' conduct standard."

The Commission agrees with the majority of commenters that the Explicit Agreement proposal is not necessary and would not be the best way to carry out the *Shays III Appeal* court's mandate. The court required the Commission to adopt a content standard that "rationally separates election-related advocacy from other activity falling outside FECA's expenditure definition." *Shays III Appeal,* 528 F.3d at 926. The revised content prong of the coordinated communication test does so. It "rationally separates" election-related advocacy from other communications about which a candidate may coordinate with an outside group, such as issue advertisements, by filtering out non-electoral communications.[17] *See* 2002 E&J at 430.

The Commission agrees with the commenters who stated that the *NY Times* hypothetical served to demonstrate the *Shays III Appeal* court's concerns about the sufficiency of the express advocacy standard outside the 90- and 120-day windows. The revised content standard addresses this concern. Thus, the Commission is not required to adopt the Explicit Agreement proposal, which would have significantly altered the structure of the current rules.

Furthermore, the Explicit Agreement proposal would require the Commission to determine whether the agreement or communication in question was made for the purpose of influencing an election. This inquiry could require the Commission to examine the subjective intent of the parties to an agreement.

[17] The court has twice upheld the Commission's determination to promulgate coordinated communications rules that "drew distinctions based on content." *Shays I Appeal,* 414 F.3d at 100; *see also Shays III Appeal,* 528 F.3d at 924.

Although it is possible, as *Shays III Appeal* suggested, that a candidate's supporter would explicitly state that communications are being coordinated for the purpose of influencing an election, in most cases meeting the Explicit Agreement standard would require other proof demonstrating that the agreement or communication was made for the purpose of influencing an election. In such cases, the Commission would need to investigate and evaluate the parties' subjective intent, a task that the Supreme Court has cautioned against. *See, e.g., WRTL,* 551 U.S. at 467 ("[A]n intent-based test would chill core political speech by opening the door to a trial on every ad[.]").

The Commission also recognizes commenters' concerns regarding the practical difficulty of investigating the purpose of agreements or communications. Although the presence of the conduct standard inevitably requires investigation into parties' actions, the content standard serves to limit those inquiries to election-related activity. This screening function is particularly important when considering communications made at any time, without regard to their proximity to a Federal election.

For these reasons, the Commission has decided not to adopt the Explicit Agreement proposal.

IV. Coordinated Communications Conduct Prong—Common Vendor and Former Employee Standards (11 CFR 109.21(d)(4) and (d)(5))

The Commission is not adopting any changes to the common vendor or former employee conduct standards at this time. In order to comply with the *Shays III Appeal* decision, the Commission has decided to retain the current 120-day time period in the common vendor and former employee conduct standards, while providing a more detailed explanation and justification about why this time frame is sufficient to prevent circumvention of the Act.

BCRA required the Commission to promulgate new coordinated communications rules that address "payments for the use of a common vendor" and "payments for communications directed or made by persons who previously served as an employee of a candidate or a political party." BCRA at sec. 214(c), 116 Stat. at 95; 2 U.S.C. 441a(7)(B)(ii) note. In response to these requirements, the Commission adopted two conduct standards in the 2002 coordinated communications rulemaking, at 11 CFR 109.21(d)(4) and (d)(5), that directly addressed common vendors and former employees of candidates and party committees. *See* 2002 E&J, 68 FR 421.

The 2002 regulation provided that the fourth standard of the conduct prong (the "common vendor" standard) was satisfied if three conditions were met. First, the person paying for the communication must contract with or employ a "commercial vendor" to create, produce, or distribute the communication. 11 CFR 109.21(d)(4)(i). Second, the commercial vendor must have provided certain specified services to the candidate clearly identified in the communication, the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee during the same election cycle. 11 CFR 109.21(d)(4)(ii) (2002). Third, the commercial vendor must use or convey to the person paying for the communication information about the plans, projects, activities, or needs of the candidate, candidate's opponent, or political party committee, and that information must be material to the creation, production, or distribution of the communication. 11 CFR 109.21(d)(4)(iii)(A). Alternatively, the commercial vendor must use or convey to the person paying for the communication information used previously by the commercial vendor in providing services to the candidate, the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or the political party committee, and that information must be material to the creation, production, or distribution of the communication. 11 CFR 109.21(d)(4)(iii)(B). Material information that was obtained from a publicly available source does not meet this conduct standard. 11 CFR 109.21(d)(4)(iii).

Similarly, the fifth conduct standard (the "former employee" standard) was satisfied if two conditions were met. First, the communication must be paid for by a person or by the employer of a person who was an employee or independent contractor of the candidate clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee during the same election cycle. 11 CFR 109.21(d)(5)(i) (2002). Second, the former employee or independent contractor must use, or convey to the person paying for the communication, information about the plans, projects, activities, or needs of the candidate or political party committee that is material to the creation, production, or distribution of the communication. 11 CFR 109.21(d)(5)(ii)(A). Alternatively, the former employee or independent contractor must use, or convey to the person paying for the communication, information used previously by the former employee or independent contractor in providing services to the candidate, the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or the political party committee that is material to the creation, production, or distribution of the communication. 11 CFR 109.21(d)(5)(ii)(B). Material information that was obtained from a publicly available source does not meet this conduct standard. 11 CFR 109.21(d)(5)(ii).

In the 2002 rulemaking, the Commission adopted the election cycle as the time period during which a common vendor or former employee must have provided services to an authorized committee or political party committee to come within these conduct standards. The time period effectively operates as a screening mechanism: it provides a bright line to limit potentially difficult investigations into whether particular information is material to a communication, by recognizing that information loses its strategic value as it ages. In 2006, the Commission reduced the time period from the entire election cycle to the previous 120 days. *See* 11 CFR 109.21(d)(4)(ii) and (d)(5)(i); 2006 E&J, 71 FR at 33204.

The 120-day time period was challenged in *Shays III Appeal.* While the court did not disagree with the time period on its merits, it found that "the FEC has provided no explanation for why it believes 120 days is a sufficient time period to prevent circumvention of the Act." *Shays III Appeal,* 528 F.3d at 929. The court recognized that the Commission has discretion in determining where to draw a bright line, but concluded that "it must support its decision with reasoning and evidence, for 'a bright line can be drawn in the wrong place.'" *Id.* (quoting *Shays I Appeal,* 414 F.3d at 101). Thus, although the *Shays III Appeal* court held that the Commission had failed to justify sufficiently the 120-day period applicable to both common vendors and former employees, it did not hold that the 120-day period was inherently improper.

In the NPRM, the Commission proposed three alternatives for the common vendor and former employee conduct standards: retain the 120-day period with a more thorough explanation and justification; replace the 120-day period with a two-year period ending on the date of the general

election; and resume using the former current election cycle period. The Commission sought comment on whether each proposed alternative would comply with the court's holding in *Shays III Appeal.* The Commission also sought comment on whether it should adopt a different time period than the proposed alternatives. In trying to determine the most appropriate period of time, the Commission asked a number of questions, including questions about the factors that may affect the period of time that campaign information remains relevant, and whether particular types of information remain useful to a campaign for shorter or longer periods of time. The Commission also asked whether the shelf life of campaign information depends on the particular election, or the specific type of vendor or media involved.

At the hearing, Commissioners specifically requested empirical or statistical data to be submitted to help determine which alternative would best implement the court's holding. The consensus at the hearing and in written comments appeared to be that no such data exist; several commenters stated that they doubted whether such data existed, and none of the commenters provided any. The Commission also conducted its own research of the existing political science and social science literature, and this research also failed to uncover any data of this kind. Indeed, given the variables involved, such as the different types of campaign information and the dynamics of different campaigns, the Commission is doubtful that it could fashion an empirical or statistical study that would produce meaningful results.

Two commenters opposed retaining the 120-day period. One commenter suggested that a 120-day period does not accurately reflect the period during which a vendor or former employee is likely to possess and convey timely campaign information. The other advocated for a "strong presumption of coordination standard." Neither provided empirical or statistical data to support adoption of a time-period longer than 120 days.

The bulk of the commenters who addressed this issue, however, asserted that virtually no information that would be material to the creation, production, or distribution of a public communication made for the purpose of influencing an election would retain its relevance for longer than 120 days. Several commenters explained that the shelf life of campaign information has been shortened because the Internet and cable news outlets continue to reduce the duration of the news cycle. They agreed that information such as overall campaign strategy or campaign "master plans," purchases of television ad time, donor lists and mailing lists, polling results, and monetary resources and spending loses relevance or becomes public within the 120-day period.

Although the *Shays III Appeal* court stated that a "detailed state-by-state master plan prepared by a chief strategist may very well remain material for at least the duration of a campaign," several commenters stated that, based on their personal campaign experience, this is not the case. *Shays III Appeal* at 928 (quoting *Shays III District* at 51). The commenters testified that overall campaign strategies and master plans grow stale as a campaign progresses, and generally become outdated well within 120 days. They stated that strategies and master plans developed at the outset of a campaign often change in response to the give and take of political campaigns. They stated that what may be a battle plan at one point in time changes, and could change drastically, as events overtake that plan and as participants "react[] to the environment on the ground in the election." One commenter said she felt that "if I miss one particular meeting one week, the plan has completely changed * * * the next."

The commenters also noted that in many cases, a campaign's overall strategy becomes a matter of public knowledge through its advertisements, interactions with the press, and other public avenues. In fact, several commenters noted that often "the entire press and political world knows what the master plan is" because "master plans are drawn up to be presented to the press to show the road map to victory."

Commenters also addressed the purchase of television advertising time, noting that the information is publicly available from television stations. Through this publicly available information, candidates and political committees can determine when and where their allies and opponents are devoting resources, and make decisions about their own television communications accordingly. Information obtained from a publicly available source is the antithesis of the valuable proprietary information known only to campaign insiders that is the focus of the coordinated communications rules. For this reason, such information is exempted from the common vendor and former employee conduct standards. *See* 11 CFR 109.21(d)(4)(iii) and (d)(5)(ii).

Likewise, some commenters pointed out that potentially the most valuable type of information to a campaign—information about a campaign's contributors, available funds, and expenditures—is also publicly available, through the campaign finance reports filed with the Commission. Candidates' authorized committees and political party committees must file reports with the Commission at least every calendar quarter and in many instances more often, detailing all receipts and disbursements. *See* 11 CFR 104.3 and 104.5. This information will thus necessarily become publicly available within the 120-day window. As noted above, information obtained from a publicly available source does not satisfy the common vendor and former employee conduct standards in 11 CFR 109.21(d)(4) and (d)(5), an exemption that was not challenged in *Shays III Appeal.*

Several commenters also pointed to the Commission's own regulations concerning the allocation of polling costs, which provide that after sixty days polls lose 95 percent of their value, and argued that the regulation demonstrates how quickly polling information becomes stale. *See* 11 CFR 106.4(g). The *Shays III Appeal* court also took note of this regulation, pointing out that the regulation indicates that polling data retains some value for 180 days. One commenter stated that this regulation no longer reflects the realities of political campaigns, however, and that "two-month-old polls are not worth five percent" of their original value. Another commenter pointed out that the Commission's regulation concerning polling data was written "decades ago," and observed that polling practices have changed dramatically in the intervening years, shortening the lifespan of polling results significantly.

Several commenters addressed the shelf life and materiality of contributor lists and mailing lists. Most agreed that campaign contributor lists do not provide information that is not also publicly available through reports submitted to the Commission. They also indicated that these lists are of little use to third parties wishing to create or distribute public communications in support of a campaign, because the contributors on the list already presumably support the candidate, and there is thus little incentive for a third party to target its communications to those supporters.

The Commission has decided to retain the 120-day period in the common vendor and former employee provisions at 11 CFR 109.21(d)(4) and (d)(5)

because, based on the record, 120 days has been shown to be a sufficient time period to prevent circumvention of the Act. The clear thrust of the comments is that campaign information must be both current and proprietary (that is, non-public) to be subject to the coordinated communications regulation. The information in the rulemaking record shows the widespread public availability of certain types of campaign information that used to remain confidential for much longer in years past, as well as the rapidity with which campaign strategy changes in response to the give-and-take of the campaign process. The record also indicates that changes in technology have significantly reduced the duration of the news cycle, further decreasing the time that campaign information remains relevant. Moreover, there is no information in the rulemaking record showing that the use or conveyance by common vendors and former employees of information material to public communications outside of the 120-day period has become problematic in the four years that the 120-day period has been in effect. Therefore, the Commission concludes that it is extremely unlikely that a common vendor or former employee may possess information that remains material when it is more than four months old.

The Commission is maintaining the 120-day time period because of the weight of comments and testimony stating that information is not valuable beyond 120 days. Accordingly, adopting either of the alternatives extending the common vendor and former employee conduct standards beyond 120 days would be unsupported by the rulemaking record.

V. Safe Harbor for Certain Business and Commercial Communications (11 CFR 109.21(i))

The Commission is adopting a new coordinated communications safe harbor at 11 CFR 109.21(i) to address certain commercial and business communications, as proposed in the NPRM. The safe harbor excludes from the definition of a coordinated communication any public communication in which a Federal candidate is clearly identified only in his or her capacity as the owner or operator of a business that existed prior to the candidacy, so long as the public communication does not PASO that candidate or another candidate who seeks the same office, and so long as the communication is consistent with other public communications made by the business prior to the candidacy in terms of the medium, timing, content, and geographic distribution.

The new safe harbor is intended to encompass the types of commercial and business communications that were the subjects of several recent enforcement actions. Matter Under Review ("MUR") 6013 (Teahen), MUR 5517 (Stork), and MUR 5410 (Oberweis) concerned advertisements paid for by businesses owned by Federal candidates that had been operating prior to the respective candidacies. Each advertisement included the name, image, and voice of the candidate associated with the business that paid for the advertisement.

Although each of these advertisements served an apparent business purpose and lacked any explicit electoral content, the advertisements were nonetheless coordinated communications under 11 CFR 109.21. *See also* MUR 4999 (Bernstein). The advertisements met the payment prong because the candidates' businesses paid for them. They met the content prong because they referred to the candidates by name and picture and were distributed in the candidate's district within the relevant time windows before the election. They met the conduct prong through the candidates' participation in the production of the advertisements.

To avoid capturing such advertising in the future in the coordinated communications rules, the Commission proposed a new safe harbor for *bona fide* business communications. In the NPRM, the Commission asked a series of questions about the proposed safe harbor. The Commission sought comment on whether to exclude these kinds of commercial and business communications from regulation as coordinated communications, and whether the proposed safe harbor would accomplish this goal. The Commission also sought comment on whether the proposed safe harbor could be used to circumvent the Act's contribution limitations and prohibitions; what changes to the proposed safe harbor might better capture only *bona fide* business communications without also encompassing election-related communications; and whether the rationale for adopting a similar safe harbor in the 2007 electioneering communications rulemaking would apply in the coordinated communications context.

None of the commenters expressed opposition to the proposed safe harbor, and only one commenter explicitly discussed it. Although that commenter did not oppose the safe harbor as proposed, the commenter indicated that it would also support limiting the safe harbor to communications on behalf of businesses whose names include candidates' names.

The Commission has decided not to impose the additional limitation suggested by the commenter. The new safe harbor is already limited to public communications in which a candidate is referred to solely in his or her capacity as owner or operator of the business, thus limiting its reach to businesses with a *bona fide* business or commercial reason to use the candidate's name or likeness in their communications. The public communication must also be consistent with previous public communications with respect to its medium (*e.g.*, television or newspaper), timing (*e.g.*, frequency, time of year, and for television or radio communications, duration and time of day), content, and geographic distribution. Finally, as is the case with the existing safe harbors for endorsements and solicitations, only public communications that do not PASO either the candidate referred to in the communication or any other candidate seeking the same office can qualify for the new safe harbor. Taken together, these multiple safeguards make the additional limitation suggested by the commenter unnecessary.

The Commission considered a similar safe harbor in the 2002 electioneering communications rulemaking, but declined to adopt it then because some public communications might be considered to serve electoral purposes "even if they also serve a business purpose unrelated to the election." Explanation and Justification for Final Rules on Electioneering Communications, 67 FR 65190, 65202 (Oct. 23, 2002). More recently, however, the Commission recognized that many electioneering communications "could reasonably be interpreted as having a non-electoral, business or commercial purpose," Explanation and Justification for Final Rules on Electioneering Communications, 72 FR 72899, 72904 (Dec. 26, 2007), and adopted a safe harbor for communications that propose a commercial transaction. 11 CFR 114.15(b). Similarly, here, the Commission recognizes that commercial advertisements that meet the criteria in the new safe harbor serve non-electoral business and commercial purposes. The new safe harbor at 11 CFR 109.21(i) is an appropriate means of excluding *bona fide* business and commercial communications from regulation as coordinated communications.

VI. Safe Harbor for Public Communications in Support of Certain Tax-Exempt Nonprofit Organizations

The Commission is not adopting the safe harbor proposed in the NPRM to address certain communications paid for by certain tax-exempt nonprofit organizations and in which Federal candidates and officeholders appear. The safe harbor would have excluded from the definition of a coordinated communication any public communication paid for by a non-profit organization described in 26 U.S.C. 501(c)(3) ("501(c)(3) organizations"), in which a candidate expresses or seeks support for the payor organization, or for a public policy or legislative initiative espoused by the payor organization, unless the public communication PASOs the candidate or another candidate who seeks the same office.

The proposed safe harbor was intended to address communications like the one that was the subject of a recent enforcement action. *See* MUR 6020 (Alliance/Pelosi). The enforcement action involved a television advertisement paid for by a 501(c)(3) organization. In the advertisement, a Federal candidate appeared, discussed environmental issues, and asked viewers to visit a Web site sponsored by the organization paying for the advertisement. The advertisement was a public communication that was distributed nationwide, including in the candidate's congressional district, within ninety days before the candidate's primary election, and therefore satisfied the fourth coordinated communications content standard at 11 CFR 109.21(c)(4). The advertisement solicited general support for the organization's Web site and cause, but did not "solicit[] funds * * * for [an] organization[]" under the existing solicitation safe harbor at 11 CFR 109.21(g)(2).[18]

The NPRM sought comment on whether the Commission should adopt such a safe harbor. The Commission asked whether the proposed safe harbor was necessary and permissible, and what restrictions or conditions should apply to the safe harbor if it were adopted.

The seven commenters who addressed the proposed safe harbor were divided. Two commenters opposed the proposed safe harbor, arguing that it would be subject to abuse. These commenters noted that the proposed safe harbor "does not distinguish between ads primarily about the charity from those primarily about the candidate." The commenters expressed concern that candidates could take advantage of the proposed safe harbor to coordinate with 501(c)(3) organizations to create and distribute ads "to promote [the candidates'] campaign agenda, to set forth their policy views, or to associate themselves with a public-spirited endeavor, all for the purpose of influencing that candidate's election." Other commenters supported the proposed safe harbor. One commenter argued that worthy charitable causes should not be limited in the means of expression available to them by campaign finance regulations. Another commenter argued that not all joint efforts between public officials and 501(c)(3) organizations are necessarily campaign-related, and asserted that some communications by 501(c)(3) organizations are more effective if their timing and content can be coordinated with lawmakers.

But even some of the commenters that supported the proposed safe harbor indicated that it may not be necessary at this time. These commenters acknowledged that 501(c)(3) organizations "risk the loss of their tax-exempt status if they engage in any form of partisan political activity" and are, thus, "very wary" about engaging in any activity that would possibly bring their activities within the coordinated communications rules. The commenters stated that the Internal Revenue Service regulations governing 501(c)(3) organizations prohibit a broader range of political activity than Commission regulations, and that few of those 501(c)(3) organizations would therefore benefit from the proposed safe harbor.

The Commission is not adopting the proposed safe harbor for public communications in support of 501(c)(3) organizations. The enforcement action that prompted the proposed safe harbor, MUR 6120 (Alliance/Pelosi), is the only Commission enforcement action in which a 501(c)(3) organization paid for a public communication that satisfied all three prongs of the coordinated communications rule. The lack of any additional complaints against 501(c)(3) organizations under the coordinated communication rules indicates that there is no significant need for the proposed safe harbor at this time. Even without a safe harbor for communications in support of 501(c)(3) organizations, the Commission retains its prosecutorial discretion to dismiss enforcement matters involving such communications.

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

The Commission certifies that the attached rules will not have a significant economic impact on a substantial number of small entities.

The primary basis for this certification is as follows. First, any individuals and not-for-profit enterprises that will be affected by these rules are not "small entities" under 5 U.S.C. 601. The definition of "small entity" does not include individuals. A not-for-profit enterprise is included in the definition as a "small organization" only if it is independently owned and operated and not dominant in its field. 5 U.S.C. 601(4). The National party committees are dominant in their field and do not meet the definition of "small organization." Most State, district, and local party committees also do not meet the definition of "small organization." State, district, and local party committees are not independently owned and operated because they are not financed and controlled by a small identifiable group of individuals, and they are affiliated with the larger national political party organizations. In addition, the State political party committees representing the Democratic and Republican parties have a major controlling influence within the political arena of their State and are thus dominant in their field. District and local party committees are generally considered affiliated with the State committees and need not be considered separately.

Second, any separate segregated funds that will be affected by these rules are not-for-profit political committees that do not meet the definition of "small organization" because they are financed by a combination of individual contributions and receive financial support from corporations, labor organizations, membership organizations, or trade associations, and therefore are not independently owned and operated.

Third, most of the other political committees that will be affected by these rules are also not-for-profit committees that do not meet the definition of "small organization." Most political committees are not independently owned and operated because they are not financed by a small identifiable group of individuals. Most political committees rely on contributions from a large number of

[18] The safe harbor at 11 CFR 109.21(g)(2) provides that a public communication in which a Federal candidate solicits funds for another Federal or non-Federal candidate, a political committee, or certain tax-exempt organizations as permitted by 11 CFR 300.65, is not a coordinated communication with respect to the soliciting candidate unless the public communication PASOs the soliciting candidate or an opponent of that candidate.

individuals to fund the committees' operations and activities.

Fourth, the number of State party committees representing minor political parties or any other political committees that might be considered "small organizations" that might be affected by these rules would not be substantial. These rules affect political committees only if they coordinate expenditures with candidates or political party committees in connection with a Federal election.

Fifth, to the extent that any other entities affected by these rules may fall within the definition of "small entities," any economic impact of complying with these rules will not be significant because any economic impact will not affect the revenue stream of such entities. These rules do not impose any new requirements on commercial vendors. Any indirect economic effects that the rules might have on commercial vendors result from the decisions of their clients rather than Commission requirements.

Finally, to the extent that some small entities may be significantly affected by the attached rules, these rules are promulgated pursuant to a court order. Thus, any economic impact of these rules would be caused by the court mandate, rather than agency decisions contained in these rules.

List of Subjects in 11 CFR Part 109

Coordinated and independent expenditures.

■ For the reasons set out in the preamble, Subchapter A of Chapter 1 of Title 11 of the Code of Federal Regulations is amended as follows:

PART 109—COORDINATED AND INDEPENDENT EXPENDITURES (2 U.S.C. 431(17), 441a(a) AND (d), AND PUB. L. 107–155 SEC. 214(c))

■ 1. The authority citation for part 109 continues to read as follows:

Authority: 2 U.S.C. 431(17), 434(c), 438(a)(8), 441a, 441d; Sec. 214(c) of Pub. L. 107–155, 116 Stat. 81.

■ 2. Section 109.21 is amended by:
■ A. Revising the introductory text of paragraph (c), revising paragraph (c)(3), and adding new paragraph (c)(5);
■ B. Republishing paragraphs (d)(4)(ii) and (d)(5)(i); and
■ C. Adding new paragraph (i).

§ 109.21 What is a "coordinated communication"?

* * * * *

(c) *Content standards.* Each of the types of content described in paragraphs (c)(1) through (c)(5) of this section satisfies the content standard of this section.

* * * * *

(3) A public communication, as defined in 11 CFR 100.26, that expressly advocates, as defined in 11 CFR 100.22, the election or defeat of a clearly identified candidate for Federal office.

* * * * *

(5) A public communication, as defined in 11 CFR 100.26, that is the functional equivalent of express advocacy. For purposes of this section, a communication is the functional equivalent of express advocacy if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

* * * * *

(d) * * *

(4) * * *

(ii) That commercial vendor, including any owner, officer, or employee of the commercial vendor, has provided any of the following services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120 days:

* * *

(5) * * *

(i) The communication is paid for by a person, or by the employer of a person, who was an employee or independent contractor of the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120 days; and

* * * * *

(i) *Safe harbor for commercial transactions.* A public communication in which a Federal candidate is clearly identified only in his or her capacity as the owner or operator of a business that existed prior to the candidacy is not a coordinated communication with respect to the clearly identified candidate if:

(1) The medium, timing, content, and geographic distribution of the public communication are consistent with public communications made prior to the candidacy; and

(2) The public communication does not promote, support, attack, or oppose that candidate or another candidate who seeks the same office as that candidate.

Dated: September 7, 2010.

On behalf of the Commission,

Matthew S. Petersen,

Chairman, Federal Election Commission.

[FR Doc. 2010–22649 Filed 9–14–10; 8:45 am]

BILLING CODE 6715–01–P

DEPARTMENT OF TRANSPORTATION

14 CFR Part 97

[Docket No. 30744; Amdt. No. 3391]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective September 15, 2010. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of September 15, 2010.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which the affected airport is located;

3. The National Flight Procedures Office, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030,

or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Availability—All SIAPs are available online free of charge. Visit *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

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

SUPPLEMENTARY INFORMATION: This rule amends Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) by amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (FDC)/Permanent Notice to Airmen (P–NOTAM), and is incorporated by reference in the amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of Title 14 of the Code of Federal Regulations.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAP and the corresponding effective dates. This amendment also identifies the airport and its location, the procedure and the amendment number.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP as modified by FDC/P–NOTAMs.

The SIAPs, as modified by FDC P–NOTAM, and contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these changes to SIAPs, the TERPS criteria were applied only to specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for all these SIAP amendments requires making them effective in less than 30 days.

Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making these SIAPs effective in less than 30 days.

Conclusion

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

List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, and Navigation (Air).

Issued in Washington, DC, on September 3, 2010.

John M. Allen,

Director, Flight Standards Service.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal regulations, Part 97, 14 CFR part 97, is amended by amending Standard Instrument Approach Procedures, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows:

** * * Effective Upon Publication*

AIRAC date	State	City	Airport	FDC No.	FDC date	Subject
21–Oct–10	MS	GREENVILLE	MID DELTA RGNL	0/0606	8/31/10	ILS OR LOC RWY 18L, AMDT 9D.
21–Oct–10	CO	ERIE	ERIE MUNI	0/0907	8/31/10	TAKEOFF MINIMUMS AND OBSTACLE DP, AMDT 2.
21–Oct–10	CT	DANBURY	DANBURY MUNI	0/1571	9/1/10	LOC RWY 8, AMDT 5A.
21–Oct–10	AZ	FORT HUACHUCA/SIERRA VISTA.	SIERRA VISTA MUNI–LIBBY AAF.	0/5486	8/30/10	TAKEOFF MINIMUMS AND OBSTACLE DP, AMDT 2.
21–Oct–10	LA	LAKE CHARLES	LAKE CHARLES RGNL	0/5876	8/30/10	RNAV (GPS) RWY 33, AMDT 1A.
21–Oct–10	KS	HUTCHINSON	HUTCHINSON MUNI	0/6178	8/30/10	NDB RWY 13, AMDT 15.
21–Oct–10	TX	MIDLAND	MIDLAND INTL	0/6199	8/30/10	ILS OR LOC RWY 10, AMDT 14C.

AIRAC date	State	City	Airport	FDC No.	FDC date	Subject
21–Oct–10	IL	BELLEVILLE	SCOTT AFB/MIDAMERICA	0/6490	8/30/10	ILS OR LOC/DME RWY 14L, ORIG–B.
21–Oct–10	OH	BELLEFONTAINE	BELLEFONTAINE RGNL	0/6532	8/30/10	RNAV (GPS) RWY 25, ORIG–A.
21–Oct–10	OH	BELLEFONTAINE	BELLEFONTAINE RGNL	0/6533	8/30/10	VOR/DME RWY 25, ORIG.
21–Oct–10	OH	BELLEFONTAINE	BELLEFONTAINE RGNL	0/6534	8/30/10	RNAV (GPS) RWY 7, ORIG.
21–Oct–10	OH	BELLEFONTAINE	BELLEFONTAINE RGNL	0/6535	8/30/10	VOR/DME RWY 7, ORIG.
21–Oct–10	IA	FAIRFIELD	FAIRFIELD MUNI	0/6536	8/30/10	NDB RWY 36, AMDT 9.
21–Oct–10	IA	FAIRFIELD	FAIRFIELD MUNI	0/6537	8/30/10	RNAV (GPS) RWY 36, AMDT 1.
21–Oct–10	NE	COLUMBUS	COLUMBUS MUNI	0/6538	8/30/10	LOC/DME RWY 14, AMDT 8.
21–Oct–10	LA	SLIDELL	SLIDELL	0/7403	8/30/10	NDB RWY 36, ORIG–D.
21–Oct–10	FL	MARIANNA	MARIANNA MUNI	0/7508	8/30/10	NDB C, AMDT 4.
21–Oct–10	MS	OXFORD	UNIVERSITY–OXFORD	0/7787	8/30/10	LOC RWY 9, AMDT 2B.
21–Oct–10	MS	OXFORD	UNIVERSITY–OXFORD	0/7788	8/30/10	RNAV (GPS) RWY 9, ORIG.
21–Oct–10	TX	HEREFORD	HEREFORD MUNI	0/7917	8/30/10	RNAV (GPS) RWY 2, ORIG.
21–Oct–10	TX	HEREFORD	HEREFORD MUNI	0/7918	8/30/10	RNAV (GPS) RWY 20, ORIG.
21–Oct–10	MS	LEXINGTON	C.A. MOORE	0/8021	8/30/10	VOR/DME OR GPS A, ORIG.
21–Oct–10	KY	LOUISVILLE	LOUISVILLE INTL–STANDIFORD FIELD.	0/8284	8/30/10	RNAV (GPS) RWY 35R, ORIG.
21–Oct–10	NY	SCHENECTADY	SCHENECTADY COUNTY	0/9174	8/30/10	GPS RWY 22, ORIG–C.
21–Oct–10	PA	CARLISLE	CARLISLE	0/9193	8/30/10	NDB B, ORIG.
21–Oct–10	MD	BALTIMORE	BALTIMORE/WASHINGTON INTL THURGOOD MARSHALL.	0/9989	9/1/10	VOR RWY 10, AMDT 17A.

[FR Doc. 2010–22828 Filed 9–14–10; 8:45 am]
BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 30743; Amdt. No. 3390]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective September 15, 2010. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of September 15, 2010.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which the affected airport is located;

3. The National Flight Procedures Office, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or

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

Availability—All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit *http://www.nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Harry J. Hodges, Flight Procedure Standards Branch (AFS–420), Flight Technologies and Programs Divisions, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) *Telephone:* (405) 954–4164.

SUPPLEMENTARY INFORMATION: This rule amends Title 14 of the Code of Federal Regulations, Part 97 (14 CFR part 97), by establishing, amending, suspending, or revoking SIAPS, Takeof Minimums and/or ODPS. The complete regulators description of each SIAP and its associated Takeoff Minimums or ODP for an identified airport is listed on FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR part 97.20. The applicable FAA Forms are FAA Forms 8260–3, 8260–4, 8260–5, 8260–15A, and 8260–15B when required by an entry on 8260–15A.

The large number of SIAPs, Takeoff Minimums and ODPs, in addition to their complex nature and the need for a special format make publication in the **Federal Register** expensive and impractical. Furthermore, airmen do not use the regulatory text of the SIAPs, Takeoff Minimums or ODPs, but instead refer to their depiction on charts printed by publishers of aeronautical materials. The advantages of incorporation by reference are realized and publication of the complete description of each SIAP, Takeoff Minimums and ODP listed on FAA forms is unnecessary. This amendment provides the affected CFR

sections and specifies the types of SIAPs and the effective dates of the associated Takeoff Minimums and ODPs. This amendment also identifies the airport and its location, the procedure, and the amendment number.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP, Takeoff Minimums and ODP as contained in the transmittal. Some SIAP and Takeoff Minimums and textual ODP amendments may have been issued previously by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP and Takeoff Minimums and ODP amendments may require making them effective in less than 30 days. For the remaining SIAPS and Takeoff Minimums and ODPS, an effective date at least 30 days after publication is provided.

Further, the SIAPs and Takeoff Minimums and ODPS contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPS and Takeoff Minimums and ODPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedures before adopting these SIAPS, Takeoff Minimums and ODPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs effective in less than 30 days.

Conclusion

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

List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, and Navigation (Air).

Issued in Washington, DC, on September 3, 2010.

John M. Allen,

Director, Flight Standards Service.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures and/or Takeoff Minimums and/or Obstacle Departure Procedures effective at 0902 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

Effective 21 OCT 2010

El Dorado, AR, South Arkansas Rgnl at Goodwin Field, ILS OR LOC RWY 22, Amdt 2A
Manila, AR, Manila Muni, Takeoff Minimums and Obstacle DP, Orig
Arcata/Eureka, CA, Arcata, RNAV (GPS) RWY 32, Orig-B
Bakersfield, CA, Meadows Field, RNAV (GPS) RWY 12L, Amdt 1A
Titusville, FL, Space Coast Rgnl, ILS OR LOC RWY 36, Amdt 12
Lawrenceville, IL, Lawrenceville-Vincennes Intl, Takeoff Minimums and Obstacle DP, Orig
Pontiac, IL, Pontiac Muni, RNAV (GPS) RWY 6, Orig-A
Sturgis, MI, Kirsch Muni, Takeoff Minimums and Obstacle DP, Amdt 3
Columbus/W Point/Starkville, MS, Golden Triangle Rgnl, LOC RWY 36, Orig-A
Oklahoma City, OK, Will Rogers World, RNAV (RNP) Y RWY 17L, Amdt 1A
Oklahoma City, OK, Will Rogers World, RNAV (RNP) Z RWY 35R, Orig-B
Easton, PA, Braden Airpark, Takeoff Minimums and Obstacle DP, Amdt 1
Laredo, TX, Laredo Intl, NDB RWY 17L, Amdt 3A
Midland, TX, Midland Airpark, Takeoff Minimums and Obstacle DP, Amdt 3
Wichita Falls, TX, Kickapoo Downtown, Takeoff Minimums and Obstacle DP, Amdt 2
Janesville, WI, Southern Wisconsin Rgnl, ILS OR LOC RWY 4, Amdt 12A
West Bend, WI, West Bend Muni, VOR RWY 24, Amdt 3A

Effective 18 NOV 2010

Nome, AK, Nome, RNAV (GPS) RWY 28, Orig-A
Ruby, AK, Ruby, Takeoff Minimums and Obstacle DP, Amdt 1
Bishop, CA, Eastern Sierra Rgnl, Takeoff Minimums and Obstacle DP, Amdt 3
Mountain View, CA, Moffett Federal Airfield, Takeoff Minimums and Obstacle DP, Amdt 1
Willits, CA, Ells Field-Willits Muni, RNAV (GPS) RWY 16, Amdt 1
Willits, CA, Ells Field-Willits Muni, RNAV (GPS) RWY 34, Amdt 1
Chester, CT, Chester, Takeoff Minimums and Obstacle DP, Orig
Fort Lauderdale, FL, Fort Lauderdale/Hollywood Intl, ILS OR LOC RWY 9L, Amdt 21
Fort Lauderdale, FL, Fort Lauderdale/Hollywood Intl, ILS OR LOC RWY 27R, Amdt 9
Fort Lauderdale, FL, Fort Lauderdale/Hollywood Intl, LOC RWY 9R, Amdt 5
Fort Lauderdale, FL, Fort Lauderdale/Hollywood Intl, LOC/DME RWY 13, Amdt 1
Fort Lauderdale, FL, Fort Lauderdale/Hollywood Intl, RNAV (GPS) RWY 13, Amdt 2
Fort Lauderdale, FL, Fort Lauderdale/Hollywood Intl, RNAV (GPS) RWY 31, Amdt 2
Fort Lauderdale, FL, Fort Lauderdale/Hollywood Intl, RNAV (GPS) Y RWY 9R, Amdt 3
Fort Lauderdale, FL, Fort Lauderdale/Hollywood Intl, RNAV (GPS) Y RWY 27R, Amdt 2
Fort Lauderdale, FL, Fort Lauderdale/Hollywood Intl, RNAV (GPS) Z RWY 9L, Amdt 2
Fort Lauderdale, FL, Fort Lauderdale/Hollywood Intl, VOR RWY 27R, Amdt 12, CANCELLED
Panama City, FL, Northwest Florida Beaches Intl, ILS OR LOC/DME RWY 16, Orig-B
Panama City, FL, Northwest Florida Beaches Intl, RNAV (GPS) RWY 16, Orig-B
Panama City, FL, Northwest Florida Beaches Intl, RNAV (GPS) RWY 34, Orig-B
Panama City, FL, Northwest Florida Beaches Intl, Takeoff Minimums and Obstacle DP, Amdt 1
West Palm Beach, FL, Palm Beach Intl, VOR RWY 10L, Amdt 2A, CANCELLED
West Palm Beach, FL, Palm Beach Intl, VOR RWY 14, Amdt 3A, CANCELLED
West Palm Beach, FL, Palm Beach Intl, VOR RWY 28R, Amdt 2A, CANCELLED
West Palm Beach, FL, Palm Beach Intl, VOR RWY 32, Amdt 4A, CANCELLED
Zephyrhills, FL, Zephyrhills Muni, Takeoff Minimums and Obstacle DP, Amdt 1
Atlanta, GA, Hartsfield-Jackson Atlanta Intl, ILS OR LOC RWY 8L, ILS RWY 8L (CAT II), ILS RWY 8L (CAT III), Amdt 3B
Atlanta, GA, Hartsfield-Jackson Atlanta Intl, ILS OR LOC RWY 8R, Amdt 59B
Atlanta, GA, Hartsfield-Jackson Atlanta Intl, ILS PRM RWY 8L (CAT II), ILS PRM RWY 8L (CAT III), Orig-B (Simultaneous Close Parallel)
Atlanta, GA, Hartsfield-Jackson Atlanta Intl, ILS PRM RWY 8R, (Simultaneous Close Parallel), Orig-A

Columbus, GA, Columbus Metropolitan, Takeoff Minimums and Obstacle DP, Amdt 7
Douglas, GA, Douglas Muni, Takeoff Minimums and Obstacle DP, Amdt 2
Pine Mountain, GA, Harris County, NDB RWY 9, Amdt 9
Pine Mountain, GA, Harris County, Takeoff Minimums and Obstacle DP, Amdt 1
Gary, IN, Gary/Chicago Intl, Takeoff Minimums and Obstacle DP, Amdt 7
Indianapolis, IN, Mount Comfort, Takeoff Minimums and Obstacle DP, Amdt 2
Washington, IN, Daviess County, NDB RWY 18, Amdt 7, CANCELLED
Mayfield, KY, Mayfield Graves County, NDB RWY 36, Amdt 2, CANCELLED
Churchville, MD, Hartford County, Takeoff Minimums and Obstacle DP, Amdt 1
Westminster, MD, Carroll County Rgnl/Jack B. Poage Field, Takeoff Minimums and Obstacle DP, Amdt 5
Ann Arbor, MI, Ann Arbor Muni, Takeoff Minimums and Obstacle DP, Amdt 9
Charlotte, MI, Fitch H Beach, VOR RWY 20, Amdt 11
Detroit, MI, Coleman A. Young Muni, Takeoff Minimums and Obstacle DP, Amdt 7
Detroit, MI, Detroit Metropolitan Wayne County, Takeoff Minimums and Obstacle DP, Amdt 1
Detroit, MI, Willow Run, RNAV (GPS) RWY 5L, Orig-A
Detroit, MI, Willow Run, RNAV (GPS) RWY 9R, Amdt 1, CANCELLED
Detroit, MI, Willow Run, RNAV (GPS) RWY 23L, Amdt 1A
Detroit, MI, Willow Run, Takeoff Minimums and Obstacle DP, Amdt 10
Pontiac, MI, Oakland County Intl, Takeoff Minimums and Obstacle DP, Amdt 6
Appleton, MN, Appleton Muni, GPS RWY 13, Orig, CANCELLED
Appleton, MN, Appleton Muni, RNAV (GPS) RWY 13, Orig
Owatonna, MN, Owatonna Degner Rgnl, ILS OR LOC RWY 30, Amdt 2
Glenwood, MN, Glenwood Muni, Takeoff Minimums and Obstacle DP, Amdt 3
Silver Bay, MN, Silver Bay Muni, GPS RWY 25, Amdt 1, CANCELLED
Silver Bay, MN, Silver Bay Muni, RNAV (GPS) RWY 25, Orig
Silver Bay, MN, Silver Bay Muni, Takeoff Minimums and Obstacle DP, Amdt 1
Windom, MN, Windom Muni, Takeoff Minimums and Obstacle DP, Orig
Missoula, MT, Missoula Intl, RNAV (GPS) Y RWY 11, Amdt 2
Raeford, NC, P K Airpark, Takeoff Minimums and Obstacle DP, Amdt 1
Raleigh/Durham, NC, Raleigh-Durham Intl, Takeoff Minimums and Obstacle DP, Amdt 6
Siler City, NC, Siler City Muni, Takeoff Minimums and Obstacle DP, Amdt 1
Cooperstown, ND, Cooperstown Muni, GPS RWY 13, Orig, CANCELLED
Cooperstown, ND, Cooperstown Muni, GPS RWY 31, Orig, CANCELLED
Cooperstown, ND, Cooperstown Muni, RNAV (GPS) RWY 13, Orig
Cooperstown, ND, Cooperstown Muni, RNAV (GPS) RWY 31, Orig
Cooperstown, ND, Cooperstown Muni, Takeoff Minimums and Obstacle DP, Orig
Mesquite, NV, Mesquite, Takeoff Minimums and Obstacle DP, Orig, CANCELLED
Niagara Falls, NY, Niagara Falls Intl, RNAV (GPS) RWY 10L, Orig-A, CANCELLED
Ottawa, OH, Putnam County, VOR RWY 27, Amdt 2A
Medford, OR, Rogue Valley Intl-Medford, ILS OR LOC/DME RWY 14, Amdt 2
Medford, OR, Rogue Valley Intl-Medford, LOC/DME BC–B, Amdt 7
Medford, OR, Rogue Valley Intl-Medford, RNAV (GPS)–D, Amdt 1
Medford, OR, Rogue Valley Intl-Medford, RNAV (GPS) Y RWY 14, Amdt 1
Medford, OR, Rogue Valley Intl-Medford, RNAV (RNP) Z RWY 14, Orig
Winnsboro, SC, Fairfield County, GPS RWY 4, Orig, CANCELLED
Winnsboro, SC, Fairfield County, GPS RWY 22, Orig-B, CANCELLED
Winnsboro, SC, Fairfield County, RNAV (GPS) RWY 4, Orig
Winnsboro, SC, Fairfield County, RNAV (GPS) RWY 22, Orig
Winnsboro, SC, Fairfield County, Takeoff Minimums and Obstacle DP, Orig
Bryce Canyon, UT, Bryce Canyon, BRYCE ONE Graphic Obstacle DP
Bryce Canyon, UT, Bryce Canyon, RNAV (GPS) RWY 3, Orig
Bryce Canyon, UT, Bryce Canyon, RNAV (GPS) RWY 21, Orig
Bryce Canyon, UT, Bryce Canyon, Takeoff Minimums and Obstacle DP, Orig
Fillmore, UT, Fillmore Muni, RNAV (GPS) RWY 4, Orig
Fillmore, UT, Fillmore Muni, RNAV (GPS) RWY 22, Orig
Fillmore, UT, Fillmore Muni, Takeoff Minimums and Obstacle DP, Orig
Milwaukee, WI, Lawrence J. Timmerman, Takeoff Minimums and Obstacle DP, Amdt 1

[FR Doc. 2010–22829 Filed 9–14–10; 8:45 am]

BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 232

[Release Nos. 33–9140; 34–62873; 39–2471; IC–29413]

Adoption of Updated EDGAR Filer Manual

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (the Commission) is adopting revisions to the Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) Filer Manual to reflect updates to the EDGAR system. The revisions are being made primarily to support the electronic filing of Form N–MFP (Monthly Schedule of Portfolio Holdings of Money Market Funds) and any amendments to the form. The EDGAR system is scheduled to be upgraded to support this functionality on August 30, 2010.

The revisions to the Filer Manual reflect changes within Volume II entitled EDGAR Filer Manual, Volume II: "EDGAR Filing," Version 15 (August 2010). The updated manual will be incorporated by reference into the Code of Federal Regulations.

DATES: *Effective Date:* September 15, 2010. The incorporation by reference of the EDGAR Filer Manual is approved by the Director of the Federal Register as of September 15, 2010.

FOR FURTHER INFORMATION CONTACT: In the Division of Investment Management, for questions concerning Form N–MFP (Monthly Schedule of Portfolio Holdings of Money Market Funds) contact Adam Glazer, Senior Counsel, or C. Hunter Jones, Assistant Director of the Office of Regulatory Policy, at (202) 551–6792, for questions concerning Series and Class status, contact Ruth Armfield Sanders, Senior Special Counsel, Office of Legal and Disclosure, at (202) 551–6989; in the Office of Information Technology, contact Rick Heroux, at (202) 551–8800.

SUPPLEMENTARY INFORMATION: We are adopting an updated EDGAR Filer Manual, Volume II. The Filer Manual describes the technical formatting requirements for the preparation and submission of electronic filings through the EDGAR system.[1] It also describes the requirements for filing using EDGARLink[2] and the Online Forms/XML Web site.

The Filer Manual contains all the technical specifications for filers to submit filings using the EDGAR system. Filers must comply with the applicable provisions of the Filer Manual in order to assure the timely acceptance and processing of filings made in electronic format.[3] Filers may consult the Filer Manual in conjunction with our rules governing mandated electronic filing when preparing documents for electronic submission.[4]

In support of the adoption of new rule 30b1–7 under the Investment Company Act of 1940 and new Form N–MFP, which were included in the

[1] We originally adopted the Filer Manual on April 1, 1993, with an effective date of April 26, 1993. Release No. 33–6986 (April 1, 1993) [58 FR 18638]. We implemented the most recent update to the Filer Manual on April 08, 2010. *See* Release No. 33–9115 (April 1, 2010) [75 FR 17853].

[2] This is the filer assistance software we provide filers filing on the EDGAR system.

[3] *See* Rule 301 of Regulation S–T (17 CFR 232.301).

[4] *See* Release No. 33–9115 (April 1, 2010) [75 FR 17853] in which we implemented EDGAR Release 10.1. For a complete history of Filer Manual rules, please see the cites therein.

Commission's recent money market fund reform package,[5] the EDGAR system will be upgraded to Release 10.3 on August 30, 2010. EDGAR Release 10.3 will deploy new submission types N–MFP and N–MFP/A to facilitate the electronic filing of the new form. Filers must follow the Form N–MFP XML Technical Specification, available at the "Information for EDGAR Filers" web page on the Commission's public Web site (*http://www.sec.gov/info/edgar.shtml*), to construct their Form N–MFP and Form N–MFP/A submissions via the EDGAR Filing Web site (*https://edgarfiling.sec.gov*) or by clicking the "Are you an EDGARLink filer or would you like to create a new Asset-Backed Securities Issuing Entity?" link from the EDGAR Portal Web site (*http://www.portal.edgarfiling.sec.gov*).

Also being implemented in EDGAR Release 10.3, EDGAR will begin to automatically change the status of a Series or Class to "Inactive" if it has not been updated by filers or referenced in a filing in the past 375 calendar days.

In addition, the EDGAR Filing Web site, EDGAR Filer Management Web site and EDGAR OnlineForms Web site Login pages now will display a message warning the filers that they are about to enter a federal computer Web site.

The filer manual is also being revised to address a change made previously in EDGAR to disseminate the co-registrant information for all investment company notices and orders issued in connection with 1940 Act applications. Prior to this change, only the primary registrant information was disseminated.

Along with adoption of the Filer Manual, we are amending Rule 301 of Regulation S–T to provide for the incorporation by reference into the Code of Federal Regulations of today's revisions. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51.

You may obtain paper copies of the updated Filer Manual at the following address: Public Reference Room, U.S. Securities and Exchange Commission, 100 F Street, NE., Room 1543, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. We will post electronic format copies on the Commission's Web site; the address for the Filer Manual is *http://www.sec.gov/info/edgar.shtml.*

Since the Filer Manual relates solely to agency procedures or practice, publication for notice and comment is not required under the Administrative Procedure Act (APA).[6] It follows that the requirements of the Regulatory Flexibility Act[7] do not apply.

The effective date for the updated Filer Manual and the rule amendments is September 15, 2010. In accordance with the APA,[8] we find that there is good cause to establish an effective date less than 30 days after publication of these rules. The EDGAR system upgrade to Release 10.3 is scheduled to become available on August 30, 2010. The Commission believes that establishing an effective date less than 30 days after publication of these rules is necessary to coordinate the effectiveness of the updated Filer Manual with the system upgrade.

Statutory Basis

We are adopting the amendments to Regulation S–T under Sections 6, 7, 8, 10, and 19(a) of the Securities Act of 1933,[9] Sections 3, 12, 13, 14, 15, 23, and 35A of the Securities Exchange Act of 1934,[10] Section 319 of the Trust Indenture Act of 1939,[11] and Sections 8, 30, 31, and 38 of the Investment Company Act of 1940.[12]

List of Subjects in 17 CFR Part 232

Incorporation by reference, Reporting and recordkeeping requirements, Securities.

Text of the Amendment

■ In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 1. The authority citation for Part 232 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78*l,* 78m, 78n, 78o(d), 78w(a), 78*ll,* 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, and 7201 *et seq.;* and 18 U.S.C. 1350.

* * * * *

■ 2. Section 232.301 is revised to read as follows:

§ 232.301 EDGAR Filer Manual.

Filers must prepare electronic filings in the manner prescribed by the EDGAR Filer Manual, promulgated by the Commission, which sets out the technical formatting requirements for electronic submissions. The requirements for becoming an EDGAR Filer and updating company data are set forth in the updated EDGAR Filer Manual, Volume I: "General Information," Version 8 (October 2009). The requirements for filing on EDGAR are set forth in the updated EDGAR Filer Manual, Volume II: "EDGAR Filing," Version 15 (August 2010). Additional provisions applicable to Form N–SAR filers are set forth in the EDGAR Filer Manual, Volume III: "N–SAR Supplement," Version 1 (September 2005). All of these provisions have been incorporated by reference into the Code of Federal Regulations, which action was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. You must comply with these requirements in order for documents to be timely received and accepted. You can obtain paper copies of the EDGAR Filer Manual from the following address: Public Reference Room, U.S. Securities and Exchange Commission, 100 F Street, NE., Room 1543, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Electronic copies are available on the Commission's Web site. The address for the Filer Manual is *http://www.sec.gov/info/edgar.shtml.* You can also inspect the document at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Dated: September 9, 2010.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–22983 Filed 9–14–10; 8:45 am]

BILLING CODE P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 4022 and 4044

Allocation of Assets in Single-Employer Plans; Benefits Payable in Terminated Single-Employer Plans; Interest Assumptions for Valuing and Paying Benefits

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: Pension Benefit Guaranty Corporation's regulations on Allocation of Assets in Single-Employer Plans and Benefits Payable in Terminated Single-Employer Plans prescribe interest assumptions for valuing and paying

[5] *See* Release No. IC–29132 [75 FR 10060].

[6] 5 U.S.C. 553(b).

[7] 5 U.S.C. 601–612.

[8] 5 U.S.C. 553(d)(3).

[9] 15 U.S.C. 77f, 77g, 77h, 77j, and 77s(a).

[10] 15 U.S.C. 78c, 78*l,* 78m, 78n, 78o, 78w, and 78*ll.*

[11] 15 U.S.C. 77sss.

[12] 15 U.S.C. 80a–8, 80a–29, 80a–30, and 80a–37.

certain benefits under terminating single-employer plans. This final rule amends the asset allocation regulation to adopt interest assumptions for plans with valuation dates in the fourth quarter of 2010 and amends the benefit payments regulation to adopt interest assumptions for plans with valuation dates in October 2010. Interest assumptions are also published on PBGC's Web site (*http://www.pbgc.gov*).

DATES: Effective October 1, 2010.

FOR FURTHER INFORMATION CONTACT: Catherine B. Klion, Manager, Regulatory and Policy Division, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005, 202–326–4024. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: PBGC's regulations prescribe actuarial assumptions—including interest assumptions—for valuing and paying plan benefits of terminating single-employer plans covered by title IV of the Employee Retirement Income Security Act of 1974. The interest assumptions are intended to reflect current conditions in the financial and annuity markets.

These interest assumptions are found in two PBGC regulations: the regulation on Allocation of Assets in Single-Employer Plans (29 CFR Part 4044) and the regulation on Benefits Payable in Terminated Single-Employer Plans (29 CFR Part 4022). Assumptions under the asset allocation regulation are updated quarterly; assumptions under the benefit payments regulation are updated monthly. This final rule updates the assumptions under the asset allocation regulation for the fourth quarter (October through December) of 2010 and updates the assumptions under the benefit payments regulation for October 2010.

The interest assumptions prescribed under the asset allocation regulation (found in Appendix B to Part 4044) are used for the valuation of benefits for allocation purposes under ERISA section 4044. Two sets of interest assumptions are prescribed under the benefit payments regulation: (1) A set for PBGC to use to determine whether a benefit is payable as a lump sum and to determine lump-sum amounts to be paid by PBGC (found in Appendix B to Part 4022), and (2) a set for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using PBGC's historical methodology (found in Appendix C to Part 4022).

This amendment (1) adds to Appendix B to Part 4044 the interest assumptions for valuing benefits for allocation purposes in plans with valuation dates during the fourth quarter (October through December) of 2010, (2) adds to Appendix B to Part 4022 the interest assumptions for PBGC to use for its own lump-sum payments in plans with valuation dates during October 2010, and (3) adds to Appendix C to Part 4022 the interest assumptions for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using PBGC's historical methodology for valuation dates during October 2010.

The interest assumptions that PBGC will use for valuing benefits for allocation purposes (set forth in Appendix B to part 4044) will be 4.48 percent for the first 25 years following the valuation date and 4.51 percent thereafter. In comparison with the interest assumptions in effect for the third quarter of 2010, these interest assumptions represent an increase of 5 years in the select period (the period during which the select rate (the initial rate) applies), a decrease of 0.45 percent in the select rate, and a decrease of 0.15 percent in the ultimate rate (the final rate).

The interest assumptions that PBGC will use for its own lump-sum payments (set forth in Appendix B to part 4022) will be 1.75 percent for the period during which a benefit is in pay status and 4.00 percent during any years preceding the benefit's placement in pay status. In comparison with the interest assumptions in effect for September 2010, these interest assumptions represent a decrease of 0.50 percent in the immediate annuity rate and are otherwise unchanged. For private-sector payments, the interest assumptions (set forth in Appendix C to part 4022) will be the same as those used by PBGC for determining and paying lump sums (set forth in Appendix B to part 4022).

PBGC has determined that notice and public comment on this amendment are impracticable and contrary to the public interest. This finding is based on the need to determine and issue new interest assumptions promptly so that the assumptions can reflect current market conditions as accurately as possible.

Because of the need to provide immediate guidance for the valuation and payment of benefits in plans with valuation dates during October 2010, PBGC finds that good cause exists for making the assumptions set forth in this amendment effective less than 30 days after publication.

PBGC has determined that this action is not a "significant regulatory action" under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply. *See* 5 U.S.C. 601(2).

List of Subjects

29 CFR Part 4022

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 4044

Employee benefit plans, Pension insurance, Pensions.

■ In consideration of the foregoing, 29 CFR parts 4022 and 4044 are amended as follows:

PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE–EMPLOYER PLANS

■ 1. The authority citation for part 4022 continues to read as follows:

Authority: 29 U.S.C. 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

■ 2. In appendix B to part 4022, Rate Set 204, as set forth below, is added to the table.

Appendix B to Part 4022—Lump Sum Interest Rates for PBGC Payments

* * * * *

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
*	*	*	*	*	*	*	*	
204	10–1–10	11–1–10	1.75	4.00	4.00	4.00	7	8

■ 3. In appendix C to part 4022, Rate Set 204, as set forth below, is added to the table.

Appendix C to Part 4022—Lump Sum Interest Rates For Private-Sector Payments

* * * * *

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
*	*	*	*	*	*	*	*	
204	10–1–10	11–1–10	1.75	4.00	4.00	4.00	7	8

PART 4044—ALLOCATION OF ASSETS IN SINGLE-EMPLOYER PLANS

■ 4. The authority citation for part 4044 continues to read as follows:

Authority: 29 U.S.C. 1301(a), 1302(b)(3), 1341, 1344, 1362.

■ 5. In appendix B to part 4044, a new entry for October–December 2010, as set forth below, is added to the table.

Appendix B to Part 4044—Interest Rates Used to Value Benefits

* * * * *

For valuation dates occurring in the months—	The values of i_t are:					
	i_t	for t =	i_t	for t =	i_t	for t =
* * *	*	*	*	*		
October–December 2010	0.0448	1–25	0.0451	>25	N/A	N/A

Issued in Washington, DC, on this 9th day of September 2010.

Vincent K. Snowbarger,

Deputy Director for Operations, Pension Benefit Guaranty Corporation.

[FR Doc. 2010–22953 Filed 9–14–10; 8:45 am]

BILLING CODE 7709–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2010–0518]

RIN 1625–AA08

Special Local Regulations, Sabine River; Orange, TX

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary Special Local Regulation in the Port Arthur Captain of the Port Zone on the Sabine River, Orange, Texas. This Special Local Regulation is intended to restrict vessels from portions of the Sabine River during the Thunder on the Sabine boat races. This Special Local Regulation is necessary to protect spectators and vessels from the hazards associated with powerboat races.

DATES: This rule is effective from 8 a.m. on September 25, 2010, to 6 p.m. on September 26, 2010. This regulation will be enforced daily from 8 a.m. until 6 p.m. on September 25 and 26, 2010.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2010–0518 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–0518 in the "Keyword" box, and then clicking "Search." This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Mr. Scott Whalen, Marine Safety Unit Port Arthur, TX, Coast Guard; telephone 409–719–5086, e-mail *scott.k.whalen@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On July 15, 2010 we published a notice of proposed rulemaking (NPRM) entitled Special Local Regulations; Sabine River, Orange, TX in the **Federal Register** (75 FR 41119). We received no comments on the proposed rule. No

public meetings were requested and none were held.

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** because delaying its effective date would be impracticable based on the dates the event is scheduled. This rule is needed to protect spectators and vessels from the hazards associated with powerboat races, which cannot practically be re-scheduled. Additionally, notice of the Coast Guard's intent to create this regulation was provided by the NPRM, published more than 60 days before the scheduled event. The fact that no comments were received supports the conclusion that this temporary special local regulation is of minimal concern and will have minimal impact on the public.

Basis and Purpose

This temporary special local regulation is necessary to ensure the safety of vessels and spectators from hazards associated with a powerboat race. The Captain of the Port has determined that powerboat races in close proximity to watercraft and infrastructure pose significant risk to public safety and property. The likely combination of large numbers of recreation vessels, powerboats traveling at high speeds, and large numbers of spectators in close proximity to the water could easily result in serious injuries or fatalities. Establishing a special local regulation around the location of the race course will help ensure the safety of persons and property at these events and help minimize the associated risks. This special local regulation will be effective only for September 25th and 26th, 2010, and will be enforced only between 8 a.m. and 6 p.m. on those days.

Discussion of Comments and Changes

No comments were received concerning this rule and the text of this rule remains as published in 75 FR 41119.

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.

We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation is unnecessary. The basis of this finding is that the safety zone will only be in effect for 10 hours each day and notifications to the marine community will be made through broadcast notice to mariners and Marine Safety Information Bulletin. During non-enforcement hours all vessels will be allowed to transit through the safety zone without permission of the Captain of the Port, Port Arthur or a designated representative. Additionally, scheduled breaks will be provided to allow waiting vessels to transit safely through the regulated area.

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 not have a significant economic impact on a substantial number of small entities for the following reasons: (1) This rule will only be enforced from 8 a.m. until 6 p.m. each day that it is effective; (2) during non-enforcement hours all vessels will be allowed to transit through the safety zone without having to obtain permission from the Captain of the Port, Port Arthur or a designated representative; and (3) vessels will be allowed to pass through the zone with permission of the Coast Guard Patrol Commander during scheduled break periods between races and at other times when permitted by the Coast Guard Patrol Commander.

Assistance for Small Entities

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or Tribal government, in the aggregate, or by the private sector of $100,000,000 or more (adjusted for inflation) in any one year. Though this rule will not result in such 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 which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(h), of the Instruction. This rule involves the establishment of a special local regulation. Based on our preliminary determination, there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, we believe that this rule should be categorically excluded from further environmental analysis.

Under figure 2–1, paragraph (34)(h), of the Instruction, an environmental analysis checklist and a categorical exclusion determination are not required for this rule.

List of Subjects in 33 CFR Part 100

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

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

■ 2. Add a new temporary § 100.T08–2010–0518 to read as follows:

§ 100.T08–2010–0518 Safety Zone; Sabine River, Orange, TX.

(a) *Definitions.* As used in this section "Participant Vessel" means all vessels officially registered with event officials to race or work in the event. These vessels include race boats, rescue boats, tow boats, and picket boats associated with the race.

(b) Location. The following area is a safety zone: all waters of the Sabine River, shoreline to shoreline, adjacent to the Naval Reserve Unit and the Orange public boat ramps located in Orange, TX. The northern boundary is from the end of Navy Pier One at 30°05′45″ N 93°43′24″ W then easterly to the rivers eastern shore. The southern boundary is a line shoreline to shoreline at latitude 30°05′33″ N.

(c) *Enforcement.* This regulation will be enforced daily from 8 a.m. until 6 p.m. on September 25 and 26, 2010.

(d) *Regulations.*

(1) In accordance with the general regulations in § 100.35 of this part, entry into this zone is prohibited to all vessels except participant vessels and those vessels specifically authorized by the Captain of the Port, Port Arthur or a designated representative.

(2) Persons or vessels requiring entry into or passage through must request permission from the Captain of the Port, Port Arthur, or a designated representative. They may be contacted on VHF Channel 13 or 16, or by telephone at (409) 723–6500.

(3) All persons and vessels shall comply with the instructions of the Captain of the Port, Port Arthur, designated representatives and designated on-scene U.S. Coast Guard patrol personnel. On-scene U.S. Coast Guard patrol personnel include commissioned, warrant, and petty officers of the U.S. Coast Guard.

Dated: August 17, 2010.

Z.H. Pickett,

Commander, U.S. Coast Guard, Acting, Captain of the Port, Port Arthur.

[FR Doc. 2010–22933 Filed 9–14–10; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 147

[Docket No. USCG–2010–0857]

RIN 1625–AA00

Safety Zone; VERMILION 380A at Block 380 Outer Continental Shelf Fixed Platform in the Gulf of Mexico

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a safety zone around VERMILION 380A, a fixed platform, at Block 380 in the Outer Continental Shelf, approximately 90 miles south of Vermilion Bay, Louisiana. The fixed platform is on fire and the safety zone is needed to protect first responders attending to the fire and platform. Placing a safety zone around the platform will significantly reduce the threat of collisions, allisions, oil spills, and releases of natural gas, and thereby protect the safety of life, property, and the environment.

DATES: This rule is effective in the CFR on September 15, 2010 through November 10, 2010. This rule is effective with actual notice for purposes of enforcement on September 2, 2010. This rule will remain in effect through November 10, 2010.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2010–0857 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–0857 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 Dr. Madeleine

McNamara, U.S. Coast Guard, District Eight Waterways Management Coordinator; telephone 504–671–2103, *madeleine.w.mcnamara @uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

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 impracticable. The platform is on fire and immediate action is necessary to protect first responders and to prevent entry into the area that is most impacted by the fire.

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**. Good cause exists because the platform is on fire and immediate action is necessary to protect first responders and to prevent entry into the area that is most impacted by the fire.

Basis and Purpose

The Coast Guard is responding to an emergency at the VERMILION 380A, a fixed platform, at Block 380 in the Outer Continental Shelf, approximately 90 miles south of Vermilion Bay, Louisiana. The fixed platform is on fire and the safety zone is needed to protect first responders attending to the fire and platform.

Discussion of Rule

The Coast Guard is establishing a safety zone of 500 meters around the center of the fixed platform at 28°3′0.601″ N, 92°16′0.272″ W. The regulation is effected to reduce significantly the threat of collisions, allisions, oil spills, and releases of natural gas and increase the safety of life, property, and the environment in the Gulf of Mexico by prohibiting entry into the zone unless specifically authorized by the Commander, Eighth Coast Guard District. Entry into this zone is prohibited unless specifically authorized by the Commander, Eighth Coast Guard District or a designated representative. They may be contacted on VHF–FM Channel 13 or 16 or by telephone at 504–589–6225.

The safety zone established by this regulation is in or near the deepwater area of the Gulf of Mexico in Block 380. For the purposes of this regulation, a deepwater area is considered to be waters of 304.8 meters (1,000 feet) or greater depth extending to the limits of the Exclusive Economic Zone (EEZ) contiguous to the territorial sea of the United States and extending to a distance up to 200 nautical miles from the baseline from which the breadth of the sea is measured. Navigation in the vicinity of the safety zone consists of large commercial shipping vessels, fishing vessels, cruise ships, tugs with tows and the occasional recreational vessel. The deepwater area also includes an extensive system of fairways.

The Coast Guard is establishing a safety zone around the VERMILION 380A which is a fixed platform for operational use in production. The safety zone is established due to safety concerns for both first responders and the environment. In evaluating this request, the Coast Guard explored relevant safety factors and considered several criteria, including but not limited to, (1) the level of shipping activity around the facility, (2) safety concerns for personnel aboard the facility, (3) concerns for the environment, (4) the likeliness that an allision would result in a catastrophic event based on proximity to shipping fairways, offloading operations, production levels, and size of the crew, (5) the volume of traffic in the vicinity of the proposed area, (6) the types of vessels navigating in the vicinity of the proposed area, and (7) the structural configuration of the facility.

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 due to the location of the VERMILION 380A—on the Outer Continental Shelf—and its distance from both land and safety fairways. Vessels traversing waters near the proposed safety zone will be able to safely travel around the zone without incurring additional costs.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This proposed rule would affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in or around Vermilion Block 380 in the Gulf of Mexico.

This safety zone will not have a significant economic impact or a substantial number of small entities for the following reasons: This rule will enforce a safety zone around a fixed platform that is in an area of the Gulf of Mexico not frequented by vessel traffic and is not in close proximity to a safety fairway. Further, vessel traffic can pass safely around the safety zone without incurring additional costs.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (*see* **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

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.

Due to the emergency nature of this regulation, an environmental analysis checklist and a categorical exclusion determination will be available in the docket where indicated under **ADDRESSES.**

List of Subjects

Continental shelf, Marine safety, Navigation (water).

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

PART 147—SAFETY ZONES

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

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

■ 2. Add § T147.857 to read as follows:

§ T147.857 VERMILION 380A Fixed Platform Safety Zone.

(a) *Description.* The *VERMILION 380A,* a *Fixed Platform,* is in the deepwater area of the Gulf of Mexico at Vermilion Block 380. The area within 500 meters (1640.4 feet) around a center point at 28°3′0.601″ N, 92°16′0.272″ W is a safety zone.

(b) *Effective Date and Enforcement.* This rule is effective from September 2, 2010 through November 10, 2010. This rule is effective with actual notice for purposes of enforcement on September 2, 2010 and will remain in effect through November 10, 2010.

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

(1) An attending or first response vessel;

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

(3) A vessel authorized by the Commander, Eighth Coast Guard District or a designated representative.

Dated: September 2, 2010.

David Nichols,

Captain, U.S. Coast Guard, Acting Commander, Eighth Coast Guard District.

[FR Doc. 2010–23008 Filed 9–14–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 155

[USCG–1998–3417]

RIN 1625–AA19

Salvage and Marine Firefighting Requirements; Vessel Response Plans for Oil

AGENCY: Coast Guard, DHS.

ACTION: Rule; information collection approval; clarification.

SUMMARY: On September 3, 2010, the Coast Guard announced the Office of Management and Budget (OMB) approval of the information collection associated with the vessel response plan salvage and marine firefighting requirements for tank vessels carrying oil. That announcement indicated that the collection of information requirements would be enforced beginning September 3, 2010. This document clarifies that although OMB has approved the information collection, the compliance date for updates to vessel response plans required by the Salvage and Marine Firefighting final rule remains February 22, 2011.

DATES: The collection of information approved under OMB Control Number 1625–0066 became enforceable beginning September 3, 2010. The compliance date for updates to vessel response plans required by the Salvage and Marine Firefighting final rule remains February 22, 2011.

FOR FURTHER INFORMATION CONTACT: If you have questions on this document contact Lieutenant Commander Ryan Allain at 202–372–1226 or *Ryan.D.Allain@uscg.mil.* If you have questions on viewing the docket (USCG–1998–3417), call Ms. Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: On December 31, 2008, the Coast Guard published a final rule entitled "Salvage and Marine Firefighting Requirements; Vessel Response Plans for Oil" (73 FR 80618). The final rule amended the vessel response plan salvage and marine firefighting requirements for tank vessels carrying oil. The final rule included information collection requirements affecting OMB Control Number 1625–0066 that could not be enforced without approval by OMB. In the final rule the Coast Guard stated that it would publish notice in the **Federal Register** announcing OMB's decision to approve, modify, or disapprove the collection.

On August 31, 2009, the Coast Guard published another final rule concerning vessel response plans, "Vessel and Facility Response Plans for Oil: 2003 Removal Equipment Requirements and Alternative Technology Revisions" (74 FR 45004). One of the effects of this rule was to defer the compliance date for the salvage and marine firefighting requirements from June 1, 2010, to February 22, 2011.

The information collection associated with OMB Control Number 1625–0066 affects a variety of vessel response plans, not just salvage and marine firefighting requirements. On August 20, 2010, OMB approved the Coast Guard's requested revisions to OMB Control Number 1625–0066, and on September 3, 2010, the Coast Guard published a notice announcing this approval (75 FR 54026). OMB approval of this information collection does not alter the existing compliance date for vessel response plan salvage and marine firefighting requirements for tank vessels carrying oil.

Dated: September 9, 2010.

Kathryn Sinniger,

Acting Chief, Office of Regulations and Administrative Law.

[FR Doc. 2010–22932 Filed 9–14–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2010–0786]

RIN 1625–AA00

Safety Zone; Illinois River, Mile 000.5 to 001.5

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for all waters of the Illinois River, Mile 000.5 to 001.5, extending the entire width of the river. This safety zone is needed to protect persons and vessels from safety hazards associated with a land based firework display occurring on the Illinois River. Entry into this zone will be prohibited unless specifically authorized by the Captain of the Port Upper Mississippi River or a designated representative.

DATES: This rule is effective from 9 p.m. until 10 p.m. on September 18, 2010.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2010–0786 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–0786 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 Lieutenant (LT) Rob McCaskey, Sector Upper Mississippi River Response Department at telephone 314–269–2541, e-mail *Rob.E.McCaskey@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." The Coast Guard finds that it would be impracticable to publish a notice of proposed rulemaking (NPRM) with respect to this rule because the event would occur before the rulemaking process could be completed.

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.** Publishing a NPRM and delaying its effective date would be impracticable because immediate action is needed to protect vessels and mariners from the safety hazards associated with a land based fireworks display.

Basis and Purpose

On September 18, 2010 the City of Grafton will be conducting a land based fireworks display at mile 001.0 on the Illinois River. This event presents safety hazards to the navigation of vessels between mile 000.5 and mile 001.5, extending the entire width of the river. A safety zone around the launch site is

necessary to protect spectators, vessels, and other property from the hazards associated with the fireworks. The Captain of the Port Upper Mississippi River will inform the public of all safety zone changes through broadcast notice to mariners.

Discussion of Rule

The Coast Guard is establishing a safety zone for all waters of the Illinois River, Mile 000.5 to 001.5, extending the entire width of the river. Entry into this zone will be prohibited to all vessels and persons except participants and those persons and vessels specifically authorized by the Captain of the Port Upper Mississippi River. This rule will be effective from 9 p.m. until 10 p.m. CDT on September 18, 2010. The Captain of the Port Upper Mississippi River will inform the public through broadcast notice to mariners of all safety zone changes and enforcement periods.

Regulatory Analyses

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

Regulatory Planning and Review

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

Although this rule restricts access to the waters encompassed by the safety zone, the effect of this rule will not be significant because of the very brief duration of the effective period of the zone. Furthermore, the local waterway users will be notified via public Broadcast Notice to Mariners to ensure the safety zone will result in minimum impact.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities for the following reasons: (1) This rule will only be in effect for a limited period of time; and (2) the local waterway users will be notified via public Broadcast Notice to Mariners.

Assistance for Small Entities

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

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (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, disestablishing, or changing Regulated Navigation Areas and security or safety zones.

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(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T08–0786 to read as follows:

§ 165.T08–0786 Safety Zone; Illnois River, Mile 000.5 to 001.5.

(a) *Location.* The following area is a safety zone: all waters of the Illinois River, Mile 000.5 to 001.5 extending the entire width of the waterway.

(b) *Effective date.* This rule is effective from 9 p.m. until 10 p.m. CDT on September 18, 2010.

(c) *Periods of Enforcement.* This rule will be enforced from 9 p.m. until 10 p.m. CDT on September 18, 2010. The Captain of the Port Upper Mississippi River will inform the public through broadcast notice to mariners of all safety zone changes and enforcement periods.

(d) *Regulations.* (1) In accordance with the general regulations in § 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port Upper Mississippi River or a designated representative.

(2) Persons or vessels requiring entry into or passage through the zone must request permission from the Captain of the Port Upper Mississippi River or a designated representative. The Captain of the Port Upper Mississippi River representative may be contacted at 314–269–2332.

(3) All persons and vessels shall comply with the instructions of the Captain of the Port Upper Mississippi River or their designated representative. Designated Captain of the Port representatives include United States Coast Guard commissioned, warrant, and petty officers of the U.S. Coast Guard.

Dated: August 23, 2010.

S.L. Hudson,

Captain, U.S. Coast Guard, Captain of the Port Upper Mississippi River.

[FR Doc. 2010–23007 Filed 9–14–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2010–0462]

RIN 1625–AA00

Safety Zone; San Diego Harbor Shark Fest Swim; San Diego Bay, San Diego, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone upon the navigable waters of the San Diego Bay, San Diego, CA, in support of a bay swim in San Diego Harbor. This temporary safety zone is necessary to provide for the safety of the participants, crew, spectators, participating vessels, and other vessels and users of the waterway. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or designated representative.

DATES: This rule is effective from 8:30 a.m. to 10:30 a.m. on September 19, 2010.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2010–0462 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–0462 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 Petty Officer Corey McDonald, Waterways Management, U.S. Coast Guard Sector San Diego, Coast Guard; telephone 619–278–7262, e-mail *Corey.R.McDonald@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 publishing an NPRM is impractical as the Coast Guard did not receive notification of the logistical details of the San Diego Bay swim in sufficient time to issue an NPRM without delaying this rulemaking. A delay or cancellation of the event in order to allow for a notice and comment period is contrary to the public interest because it is necessary to protect participants, crew, spectators, sponsor vessels, and other users of the waterway during the event.

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**. Delaying the effective date would be contrary to the public interest, since immediate action is needed to ensure public safety.

Basis and Purpose

Enviro-Sports Production is sponsoring the San Diego Harbor Shark Fest Swim, consisting of 600 swimmers swimming a predetermined course. The sponsor will provide 26 safety vessels for this event. This temporary safety zone is necessary to provide for the safety of the participants, crew, spectators, sponsor vessels, and other users of the waterway.

Discussion of Rule

The Coast Guard is establishing a temporary safety zone that will be enforced from 8:30 a.m. to 10:30 a.m. on September 19, 2010. This safety zone will encompass the navigable waters of the San Diego Bay bounded by the following coordinates:

32°42.17′ N, 117°09.83′ W;
32°41.66′ N, 117°09.88′ W;
along the shore line to 32°41.29′ N, 117°09.77′ W;
32°41.50′ N, 117°09.73′ W;
32°42.05′ N, 117°09.68′ W;
along the shore line to 32°42.17′ N, 117°09.83′ W.

This temporary safety zone is necessary to ensure non-authorized personnel and vessels remain safe by keeping clear of the hazardous area during the training activities. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, 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 determination is based on the size and location of the safety zone. Commercial vessels will not be hindered by the safety zone. Recreational vessels will not be allowed to transit through the designated safety zone during the specified times.

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 or anchor in the portion of the San Diego Bay from 8:30 a.m. to 10:30 a.m. on September 19, 2010.

This temporary 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 only 120 minutes early in the day when vessel traffic is low. Vessel traffic can pass safely around the zone. Before the effective period, the Coast Guard will issue broadcast notice to mariners (BNM) alerts via marine channel 16 VHF before the temporary safety zone is enforced.

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 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.T11–332 to read as follows:

§ 165.T11–332 Safety Zone; San Diego Harbor Shark Fest Swim; San Diego Bay, San Diego, CA.

(a) *Location.* The following area is a safety zone: All the navigable waters of the San Diego Bay bounded by the following coordinates:
32°42.17′ N, 117°09.83′ W;
32°41.66′ N, 117°09.88′ W;
along the shore line to 32°41.29′ N, 117°09.77′ W;
32°41.50′ N, 117°09.73′ W;
32°42.05′ N, 117°09.68′ W;
along the shore line to 32°42.17′ N, 117°09.83′ W.

(b) *Enforcement Period.* This section will be enforced from 8:30 a.m. to 10:30 a.m. on September 19, 2010. If the event concludes prior to the scheduled termination time, the Captain of the Port will cease enforcement of this safety zone and will announce that fact via Broadcast Notice to Mariners.

(c) *Definitions.* The following definition applies to this section: *Designated representative* means any commissioned, warrant, and petty officers of the Coast Guard on board Coast Guard, Coast Guard Auxiliary, and local, State, and Federal law enforcement vessels who have been authorized to act on the behalf of the Captain of the Port San Diego.

(d) *Regulations.* (1) Entry into, transit through or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port of San Diego or designated representative.

(2) Mariners requesting permission to transit through the safety zone may request authorization to do so from the Patrol Commander (PATCOM). The PATCOM may be contacted on VHF–FM Channel 16.

(3) All persons and vessels shall comply with the instructions of the Captain of the Port San Diego or designated representative.

(4) Upon being hailed by U.S. Coast Guard patrol personnel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed.

(5) The Coast Guard may be assisted by other Federal, State, or local agencies.

Dated: August 11, 2010.

T.H. Farris,

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

[FR Doc. 2010–23009 Filed 9–14–10; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2010–0666–201032; FRL–9202–1]

Adequacy Status of the Knoxville, TN 1997 8-Hour Ozone Maintenance Plan Motor Vehicle Emission Budgets for Transportation Conformity Purposes

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of adequacy.

SUMMARY: EPA is notifying the public that it has found that the motor vehicle emissions budgets (MVEBs) contained in the State Implementation Plan (SIP) revision for the Knoxville, Tennessee 1997 8-Hour Ozone Maintenance Plan are adequate for transportation conformity purposes. This revision was submitted on July 14, 2010, by the Tennessee Department of Environment and Conservation (TDEC). The Knoxville 1997 8-Hour ozone nonattainment area (hereafter referred to as "the Knoxville Area") for which MVEBs are established in today's notice is comprised of the entire counties of Anderson, Blount, Jefferson, Knox, Sevier, and Loudon as well as the portion of Cocke County that falls within the boundaries of the Great Smoky Mountains National Park. On March 2, 1999, the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) ruled that submitted SIPs cannot be used for transportation conformity determinations until EPA has affirmatively found them adequate. As a result of EPA's finding, the Knoxville Area must use the MVEBs for future conformity determinations for the 1997 8-hour ozone national ambient air quality standards (NAAQS).

DATES: These MVEBs are effective September 30, 2010.

FOR FURTHER INFORMATION CONTACT: Kelly Sheckler, U.S. Environmental Protection Agency, Region 4, Air Planning Branch, 61 Forsyth Street, SW., Atlanta, Georgia 30303. Ms. Sheckler can also be reached by telephone at (404) 562–9222, or via electronic mail at *sheckler.kelly@epa.gov.* The finding is available at EPA's conformity Web site:

http://www.epa.gov/otaq/stateresources/transconf/currsips.htm.

SUPPLEMENTARY INFORMATION: This notice is simply an announcement of a finding that EPA has already made. EPA, Region 4, sent a letter to TDEC on July 20, 2010, stating that the MVEBs identified for Knoxville in Tennessee's maintenance SIP revision, submitted on July 14, 2010, are adequate and must be used for transportation conformity determinations in the Knoxville Area. Originally, on June 11, 2010, TDEC submitted its maintenance plan for parallel processing which allowed EPA to initiate our public comment period for adequacy of the MVEBs contained in Tennessee's maintenance plan.

EPA posted the availability of the Knoxville Area MVEBs on EPA's Web site on June 14, 2010, as part of the adequacy process, for the purpose of soliciting comments. The adequacy comment period ran from June 15, 2010, through July 14, 2010. During EPA's adequacy comment period, no comments were received on the Knoxville Area MVEBs. Through this notice, EPA is informing the public that these MVEBs are adequate for transportation conformity. This finding has also been announced on EPA's conformity Web site: *http://www.epa.gov/otaq/stateresources/transconf/pastsips.htm.* The adequate MVEBs are provided in the following table:

KNOXVILLE, TENNESSEE 8-HOUR OZONE MVEBS

[Tons per day]

	2024
NO_X	36.32
VOC	25.19

Transportation conformity is required by section 176(c) of the Clean Air Act. EPA's conformity rule, 40 CFR Part 93, requires that transportation plans, programs and projects conform to state air quality implementation plans and establishes the criteria and procedures for determining whether or not they do so. Conformity to a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the NAAQS.

The criteria by which EPA determines whether a SIP's MVEBs are adequate for transportation conformity purposes are outlined in 40 CFR 93.118(e)(4). We have also described the process for determining the adequacy of submitted SIP budgets in our July 1, 2004, final rulemaking entitled, "Transportation Conformity Rule Amendments for the New 8-Hour Ozone and PM2.5 National Ambient Air Quality Standards and Miscellaneous Revisions for Existing Areas; Transportation Conformity Rule Amendments: Response to Court Decision and Additional Rule Changes" (69 FR 40004). Please note that an adequacy review is separate from EPA's completeness review, and it should not be used to prejudge EPA's ultimate approval of Tennessee's 1997 8-hour ozone SIP revision for the Knoxville Area. Even if EPA finds a budget adequate, the SIP revision could later be disapproved.

Within 24 months from the effective date of this notice, the transportation partners will need to demonstrate conformity to the new MVEBs, if the demonstration has not already been made, pursuant to 40 CFR 93.104(e). *See* 73 FR 4419 (January 24, 2008).

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

Dated: September 3, 2010.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 2010–22973 Filed 9–14–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2010–0620; FRL–9199–8]

Approval and Promulgation of Air Quality Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Prevention of Significant Deterioration (PSD)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action approving revisions to the Texas PSD State Implementation Plan (SIP). EPA is approving a SIP revision submitted February 1, 2006, as amended by a SIP revision submitted July 16, 2010. This action makes no substantive changes to the Texas PSD SIP; it merely approves reorganization and renumbering of the Texas PSD SIP rules. Further, the July 16, 2010 submission corrects certain deficiencies identified in EPA's September 23, 2009 proposed disapproval. The EPA is approving these revisions pursuant to section 110 and part C of the Federal Clean Air Act (Act or CAA).

DATES: This direct final rule will be effective on November 15, 2010 without further notice, unless EPA receives relevant adverse comments by October 15, 2010. If EPA receives such comments, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that this rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R06–OAR–2010–0620, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *U.S. EPA Region 6 "Contact Us" Web site: http://epa.gov/region6/r6coment.htm* Please click on "6PD" (Multimedia) and select "Air" before submitting comments.
- *E-mail:* Mr. Stanley M. Spruiell at *spruiell.stanley@epa.gov.* Please also cc the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.
- *Fax:* Mr. Stanley M. Spruiell, Air Permits Section (6PD–R), at fax number 214–665–7263.
- *Mail:* Mr. Stanley M. Spruiell, Air Permits Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.
- *Hand or Courier Delivery:* Mr. Stanley M. Spruiell, Air Permits Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Such deliveries are accepted only between the hours of 8 a.m. and 4 p.m. weekdays except for legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R06–OAR–2010–0620. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your

name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Permits Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at (214) 665–7253 to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittal is also available for public inspection at the State Air Agency listed below during official business hours by appointment:

Texas Commission on Environmental Quality, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Mr. Stanley M. Spruiell, Air Permits Section (6PD–R), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–7212; fax number 214–665–7263; e-mail address *spruiell.stanley@epa.gov.*

SUPPLEMENTARY INFORMATION:

Throughout this document wherever "we," "us," or "our" is used, we mean the EPA.

Outline

I. What action is EPA taking?
II. What did the State submit?
III. What is the background for this action?
IV. What comments did EPA receive on the proposed disapproval of the 2006 SIP revision submittal?
V. What are the grounds for approval?
VI. Final Action
VII. Statutory and Executive Order Reviews

I. What action is EPA taking?

EPA is approving the revisions to the Texas SIP PSD Program (Program) that amend Title 30 of the Texas Administrative Code (30 TAC) 116.160—Prevention of Significant Deterioration Requirements. This includes SIP revisions to the Program as follows: The revision which relates to the PSD Program that Texas submitted February 1, 2006 (as adopted by the Texas Commission on Environmental Quality (TCEQ) on January 11, 2006), and a revision submitted July 16, 2010 (as adopted by TCEQ on June 2, 2010) that amends the 2006 submittal. We are approving these revisions as meeting the Major NSR PSD SIP requirements.

Specifically, we are approving the nonsubstantive reorganizing and renumbering of 30 TAC 116.160 as submitted in 2006 and as revised in 2010. Our final action ensures that the Texas PSD SIP remains the same in substance with improvement in clarity.

II. What did the State submit?

On September 23, 2009, EPA proposed to disapprove the SIP revisions submittals relating to Prevention of Significant Deterioration (PSD); Nonattainment NSR (NNSR) for the 1-Hour Ozone Standard, NNSR for the 1997 8-Hour Ozone Standard, NSR Reform, and a Standard Permit (under Docket No. EPA–R06–OAR–2006–0133). *See* the proposal at 74 FR 48467, at 48472. We proposed to disapprove the submitted PSD revisions in 30 TAC 116.160 because:

- This 2006 SIP revision submittal removed from the State rules the incorporation by reference of the Federal PSD definition of "best available control technology (BACT)" as defined in 40 CFR 51.166(b)(12). The currently approved PSD SIP includes the Federal definition of PSD BACT. *See* 30 TAC 116.160(a); and
- The 2006 SIP submittal also removed from the State rules, the PSD SIP requirement at 40 CFR 52.21(r)(4) that the State previously had incorporated by reference. The currently approved PSD SIP mandates this requirement. *See* 30 TAC 116.160(a). This provision specifies that if a project becomes a major stationary source or major modification solely because of a relaxation of an enforceable limitation on the source or modification's capacity to emit a pollutant, then the source or modification is subject to PSD as if construction had not yet commenced. The State's action in eliminating that requirement means the State's rules will not regulate these types of major stationary sources or modifications as stringently as the Federal program or the current approved Texas PSD SIP.

The 2006 SIP revision submittal included a nonsubstantive reorganizing, and renumbering of the State's PSD rules but for the removal of the two requirements described above. The reorganization and renumbering of 30 TAC 116.160 (submitted in 2006) includes the following:

- A revision to 30 TAC 116.160(a);
- Deletion of the existing 30 TAC 116.160(b);
- Addition of a new 30 TAC 116.160(b);
- Deletion of the existing 30 TAC 116.160(c), including the removal of the two definitions of "building, structure, facility, or installation" and "secondary emissions" from 30 TAC 116.160(c), which had duplicated the definitions of those terms as currently defined in the SIP at 30 TAC 116.12(4) and (17), respectively;
- Portions of the existing 30 TAC 116.160(a) and (b) were reorganized into a new and revised 30 TAC 116.160(c)(1), (2), and (3);
- Moving the existing 30 TAC 116.160(d) into a new 30 TAC 116.160(c)(4); and
- Finally, moving the existing 30 TAC 116.160(e) into new 30 TAC 116.160(d).

EPA finds that these submitted changes are nonsubstantive and continue to meet the Act and EPA's PSD SIP regulations, with the exception of the removal of the incorporation of the PSD BACT definition in 40 CFR 52.21(b)(12) and the removal of the incorporation of the provisions in 40 CFR 52.21(r)(4) PSD SIP requirement.

On July 16, 2010, TCEQ submitted revisions to 30 TAC 116.160. These revisions revised the State's rules as follows:

- Incorporated by reference the federal PSD BACT definition in 40 CFR 52.21(b)(12). *See* 30 TAC 116.160(c)(1)(A). This corrects a deficiency identified in the 2009 proposal.
- Incorporated by reference the requirements of 40 CFR 52.21(r)(4). *See* 30 TAC 116.160(c)(2)(A). This corrects a deficiency identified in the 2009 proposal.
- Incorporated by reference the requirements of 40 CFR 52.21(j)—Control technology review. *See* 30 TAC 116.160(c)(2)(C). This provision identifies the circumstances under which PSD BACT must be required for

the construction of a major stationary source and a major modification that is subject to PSD.

TCEQ adopted and submitted for the first time, incorporation by reference of the Federal PSD requirement at 40 CFR 52.21(j) for approval by EPA into the Texas PSD SIP to ensure that it is clear that major stationary sources and major modifications in attainment/unclassifiable designated areas must meet the PSD requirement by performing a PSD BACT analysis. The Texas NSR SIP includes not only the federal PSD BACT definition but also a requirement for a source to perform a State BACT analysis. *See* 30 TAC 116.111(a)(2)(C). EPA relied upon this SIP provision in its 1992 original approval of the Texas PSD SIP as meeting the PSD requirement of 40 CFR 52.21(j). *See* 54 FR 52823, at 52824–52825, and 57 FR 28093, at 28096–28096. Both Texas and EPA interpreted this SIP provision to require either a Minor NSR BACT determination or a Major PSD BACT determination. Since EPA's approval of the Texas PSD SIP in 1992, there has been some confusion about the distinction between a State Minor NSR BACT definition and a PSD Major NSR BACT definition and the requirement that a source must perform the relevant PSD BACT analysis.[1] TCEQ's July 2010 submittal's inclusion of the PSD requirement of 40 CFR 52.21(j) is aimed at clarifying the Texas PSD SIP in this respect.

Based upon our review, we find that the 2010 SIP revision submittal corrects the deficiencies identified in the September 2009 proposed disapproval concerning the 2006 SIP revision submittal. Consequently, because Texas has corrected the deficiencies, we are now approving the PSD Program revisions submitted February 1, 2006 and as amended July 16, 2010. Our final action ensures that the substance of the Texas PSD SIP continues to remain the same and approval of the two SIP revision submittals improves the clarity of the Texas PSD SIP. *See* sections III through V of this preamble, the proposal FRN, and the technical support document (TSD) for further information on the basis for approving this submitted Texas PSD Program. Therefore, EPA is approving the amendments to 30 TAC 116.160, as submitted on February 1, 2006 and as amended on July 16, 2010.

III. What is the background for this Action?

Tables 1 and 2 below summarize the changes that are in the two SIP revision submittals. A summary of EPA's evaluation of each section and the basis for this direct final action is discussed in sections IV and V of this preamble. The TSD includes a detailed evaluation of the submittals.

TABLE 1—SUMMARY OF EACH SIP SUBMITTAL THAT IS AFFECTED BY THIS ACTION

Title of SIP submittal	Date submitted to EPA	Date of state adoption	Regulations affected
Federal New Source Review Permit Rules Reform.	2/1/2006	1/11/2006	30 TAC 116.160—Prevention of Significant Deterioration Requirements. • The Rule was changed to reorganize existing SIP-approved rule. • This change resulted in removal of cross-references to 40 CFR 52.21(b)(12) and 52.21(r)(4) which are critical to administration and enforcement of PSD requirements. • The change included the removal of definitions of "building, structure, facility, on installation" and "secondary emissions" in 30 TAC 116.160(c)(1)–(2), respectively. The removal of these definitions is nonsubstantive because these terms are currently defined with the same definitions in the Texas SIP at 30 TAC 116.12(4) and (17), respectively.
Best Available Control Technology (BACT) in Prevention of Significant Deterioration (PSD) Permitting.	7/16/2010	6/2/2010	30 TAC 116.160—Prevention of Significant Deterioration Requirements. • Re-instatement of cross-references to 40 CFR 52.21(b)(12) and 52.21(r)(4). • Added cross-reference to 40 CFR 52.21(j)—Control technology review.

TABLE 2—SUMMARY OF EACH REGULATION THAT IS AFFECTED BY THIS ACTION

Section	Title	Date submitted	Date of state adoption	Comments
Chapter 116—Control of Air Pollution by Permits New Construction or Modification Subchapter B—New Source Review Permits Division 6—Prevention of Significant Deterioration Review				
Section 116.160	Prevention of Significant Deterioration Requirements.	2/1/2006	1/11/2006	• Rule changed to reorganize existing SIP-approved rule.

[1] The January 1972 Texas NSR rules, as revised in July 1972, require a proposed new facility or modification to utilize "best available control technology, with consideration to the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility." This definition of BACT is from the Texas Clean Air Act. When EPA approved the Texas PSD program SIP revision submittals, including the State's incorporation by reference of the Federal definition of PSD BACT, in 1992, both EPA and Texas interpreted the use of the TCAA BACT definition to be for Minor NSR SIP permitting purposes only. EPA specifically found that the State's TCAA BACT definition did not meet the Federal PSD BACT definition. We required the use of the Federal PSD BACT definition for PSD SIP permitting purposes. See the proposal and final approval of the Texas PSD SIP at 54 FR 52823 (December 22, 1989) and 57 FR 28093 (June 24, 1992).

TABLE 2—SUMMARY OF EACH REGULATION THAT IS AFFECTED BY THIS ACTION—Continued

Section	Title	Date submitted	Date of state adoption	Comments
		7/16/2010	6/2/2010	• This change resulted in removal of cross-references to 40 CFR 52.21(b)(12) and 52.21(r)(4) which are critical to administration and enforcement of PSD requirements. • Re-instatement of cross-references to 40 CFR 52.21(b)(12) and 52.21(r)(4). • Added cross-reference to 40 CFR 52.21(j)—Control technology review.

IV. What comments did EPA receive on the proposed disapproval of the 2006 SIP revisions submittal?

In response to our September 23, 2009, proposed disapproval of the submitted revisions to Texas' PSD Program, we received comments from the following: Baker Botts, L.L.P., on behalf of BCCA Appeal Group (BCCA); Baker Botts, L.L.P., on behalf of Texas Industrial Project (TIP); Bracewell & Guiliani, L.L.P., on behalf of the Electric Reliability Coordinating Council (ERCC); Gulf Coast Lignite Coalition (GCLC); Texas Chemical Council (TCC); Texas Commission on Environmental Quality (TCEQ); Members of the Texas House of Representatives; University of Texas at Austin School of Law—Environmental Clinic (the Clinic) on behalf of: Environmental Integrity Project, Environmental Defense Fund, Galveston-Houston Association for Smog Prevention, Public Citizen, Citizens for Environmental Justice, Sierra Club Lone Star Chapter, Community-In-Power and Development Association, KIDS for Clean Air, Clean Air Institute of Texas, Sustainable Energy and Economic Development Coalition, Robertson County: Our Land, Our Lives, Texas Protecting Our Land, Water and Environment, Citizens for a Clean Environment, Multi-County Coalition, and Citizens Opposing Power Plants for Clean Air.

Below is a summary of the comments and our responses.

Comment 1: TCEQ commented on the lack of a specific definition of PSD BACT and the absence of a requirement contained in 40 CFR 52.21(r)(4). TCEQ noted that although these references are currently missing from 30 TAC 116.160, its permitting actions are implemented in a manner that does not circumvent Federal New Source Review (FNSR) requirements and does not allow a control technology review to be conducted that results in a technology that is less than PSD BACT as defined in the federal rule. TCEQ agrees that if a project becomes a major source or major modification through the relaxation of an enforceable limitation, PSD review is required, and TCEQ complies with that requirement in its permitting actions. The missing references are oversights, and TCEQ agreed to adopt revisions to 30 TAC 116.160 to include these provisions.

Response: EPA acknowledges TCEQ's description of how it implements the submitted Program. However, our evaluation considers whether a submitted SIP revision that removes a statutory requirement can still meet the requirements of the Act. In the proposal, EPA explained that the removal of a statutory requirement from a State's program renders a SIP revision unapprovable because the removal does not meet the requirements of the Act. PSD BACT is not only a defined statutory and regulatory term; it is also a central requirement of the Act. Accordingly, a state's submission of a revision that removes the requirement that all new major stationary sources or major modifications install, at a minimum, PSD BACT as defined by the Act creates a situation where the submitted SIP revision violates the Act and also would be a relaxation of the requirements of the SIP. In the July 16, 2010, SIP submittal, TCEQ revised 30 TAC 116.160 to incorporate into its PSD Program the federal PSD BACT definition in 40 CFR 52.21(b)(12) and the requirement contained in 40 CFR 52.21(r)(4). Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal.

Comment 2: The Clinic supported EPA's proposed positions. The Clinic further comments that instead of implementing the top-down approach consistent with EPA's PSD guidance, TCEQ uses its "three-tier" guidance, a process that does not always require a detailed analysis of the most effective emission control alternatives and is less stringent than the top-down procedure. The Clinic maintains that Texas's definition and implementation of BACT are insufficient. This results in Texas implementing BACT such that it fails to fulfill the technology forcing intent of the Act and results in weaker emission limitations—and thus more pollution. EPA must take immediate action to ensure that Texas is properly implementing the federal SIP-approved definition of BACT, including rejection of Texas's use of its current BACT guidance.

Response: In the July 16, 2010, SIP submittal TCEQ revised 30 TAC 116.160 to incorporate into its PSD Program the federal PSD BACT definition in 40 CFR 52.21(b)(12). *See* 30 TAC 116.160(c)(1)(A), submitted July 16, 2010. By re-instating the federal definition of PSD BACT into the State's rules, the PSD Program now meets EPA's PSD SIP requirements and is consistent with the approved Texas PSD SIP. This final rulemaking only addresses the approvability of the Texas PSD SIP revision submittals. Therefore, those comments related to other EPA actions and the State's implementation of the PSD SIP are outside the scope of this rulemaking action.

Comment 3: Members of the Texas House of Representatives commented that Texas is applying a definition of BACT, and using a BACT determination process that is significantly less stringent than required by federal law. Consequently, Texas industrial facilities emit more pollution than similar facilities in other states. They further comment that use of federal BACT alone will not be sufficient for the State to achieve and maintain attainment of the NAAQS and protect the health and welfare of facilities downwind of these new sources. They recommend that EPA adopt procedures necessary to ensure that TCEQ has explicit authority and direction to analyze individual and cumulative effects of emissions from proposed significant point sources on regional ozone levels when considering a permit application. Analysis of ozone effects should include photochemical modeling of impacts to downwind areas under typical high ozone conditions.

Response: The comments that (1) the use of federal PSD BACT alone will not

be sufficient for the State to achieve and maintain attainment of the NAAQS and protect the health and welfare of facilities downwind of these new sources, and (2) the suggestion that EPA conduct a rulemaking, are outside the scope of this rulemaking action. The issue of how TCEQ implements the Texas PSD SIP to make its PSD BACT determinations is not the subject of this rulemaking action and therefore outside the scope of this action. Based upon TCEQ's July 2010 SIP revision, which re-instates into the TCEQ rules the federal PSD BACT definition, its PSD BACT definition *is* EPA's PSD BACT definition.

Comment 4: BCCA, TIP, ERCC, GCLC and TCC commented that Texas submitted a revision to 30 TAC 116.160(a) and a new section 116.160(c)(1) and (2) on February 1, 2006, as a SIP revision to the Texas PSD SIP. This SIP revision reorganized the earlier SIP-approved rules. These commenters refer to TCEQ's plans to address this matter in rulemaking that should resolve EPA concerns regarding the Texas PSD program. *See* also *Hall* v. *United States EPA,* 273 F.3d 1146, 1160 (9th Cir. 2001) stating that EPA must consider anticipated revisions in determining whether the State will achieve attainment.

Response: EPA reviews a SIP revision submission for its compliance with the Act and EPA regulations. CAA 110(k)(3). *See* also *BCCA Appeal Group* v. *EPA,* 355 F 3d. 817, 822 (5th Cir. 2003); *Natural Resources Defense Council, Inc.* v. *Browner,* 57 F.3d 1122, 1123 (D.C. Cir. 1995). This includes an analysis of the submitted regulations for their legal interpretation. The Court of Appeals, in *Hall* v. *United States EPA,* stated that "the objective of EPA's analysis is to determine whether the ultimate effect of a state's choice of emission limitations is compliance with the NAAQS." [2] The court did not require EPA to consider anticipated revisions when evaluating particular revisions. The court only required that EPA must be able to conclude the "particular plan revision before it is consistent with the development of an overall plan." [3] At the time of EPA's proposal, the anticipated revisions had not been submitted to EPA for approval as a SIP revision and therefore could not be considered. In this action, EPA has considered the subsequent revision to Texas' PSD program submitted July 16, 2010. Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal.

Comment 5: BCCA and TIP commented that the term BACT has been defined by TCEQ in strict accordance with the statutory BACT requirement in the TCAA. Specifically, 30 TAC 116.10(3) defines BACT as "BACT with consideration given to the technical practicability and the economic reasonableness of reducing or eliminating emissions from the facility." ERCC commented that Texas has an adequate and legally defensible definition of BACT, which is allowable under case law, EPA guidance, and rulings from the Environmental Appeals Board. Contrary to EPA's statements in the proposed disapprovals, States have flexibility in their definition of BACT and implementation of BACT as long as the statutory factors in the BACT definition are present in the state's analysis. The commenters commented that EPA has made no finding that Texas' BACT definition is contrary to, or less stringent than, the Federal definition of BACT. Nonetheless, EPA is proposing the drastic action of disapproving the entire Texas PSD program. Such disapproval would also discard all the benefits of the 2002 NSR Reform Rules. They comment that EPA would place Texas permittees at a severe disadvantage to all other permittees throughout the country that have the benefit of the 2002 NSR reforms rules. GCLC commented that the Texas BACT assessment process is legally valid as it has been and continues to be in full compliance with FCAA requirements. Texas has a three-tiered BACT approach that has been previously approved by the EPA. This policy, as demonstrated in the TCEQ guidance document "Evaluating Best Avail able Control Technology (BACT) in Air Permit Applications" outlines BACT policy in the state. Drafted in April 2001 it has been the primary guidance document for both permittees and protestant for BACT assessment. It predates the Texas February 2006 submittal by almost five years and continues to be the primary guidance document regarding BACT after the submittals; BACT has been consistently applied by the TCEQ before and after the submitted changes to Chapter 116 of Title 30 of the TAC.

Response: EPA disagrees with the commenters about the term PSD BACT, the flexibility a state has in its definition of PSD BACT and that EPA has not made a finding that Texas' BACT definition is contrary or less stringent than the Federal definition of PSD BACT. As discussed in the September 23, 2009, proposed disapproval of the submitted 2006 SIP revisions to 30 TAC 116.160, EPA in its original approval of the Texas PSD SIP, specifically found that the BACT definition (derived from the TCAA) did not meet the federal PSD BACT definition. *See* 54 FR 52823 (December 22, 1989) and 57 FR 28093 (July 24, 1992). For proposed and final approval of the original Texas PSD SIP, Texas chose to incorporate by reference the Federal PSD BACT definition and submitted it for approval by EPA as part of the Texas PSD SIP. Upon EPA's original approval of the Texas PSD SIP, both EPA and Texas interpreted the TCAA BACT definition as being the Minor NSR BACT definition for Minor NSR permits.[4] *See* 74 FR 48467, at 48472, footnote 4, and footnote 1 in this action.

EPA's review was in accordance with the requirements of the CAA. EPA is not required to base its proposed disapproval on any determination that (a) depended on the definition as applied, and (b) yielded a determination less strict than would result from application of the "federal definition."

Under EPA's revised major NSR SIP regulations, as promulgated on December 31, 2002 (67 FR 80186) and reconsidered with minor changes on November 7, 2003 (68 FR 63021), to be approved as meeting the 2002 revised major NSR SIP requirements, a State submitting a customized major NSR SIP revision must demonstrate why its program and definitions are in fact at least as stringent as the major NSR revised base program. *See* 67 FR 80185, at 80241. Texas did not submit such a demonstration. Furthermore, in the July 16, 2010, SIP revision submittal, TCEQ revised 30 TAC 116.160 to incorporate into its PSD Program the federal PSD BACT definition in 40 CFR 52.21(b)(12). Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal. *See* response to comment 2 above for further information.

Comment 6: GCLC commented that TCEQ's three-tier approach to PSD BACT determinations meets the requirements of section 165 of the CAA, ensuring that facilities receiving PSD permits in the state are required to utilize PSD BACT.

[2] *Id.* at 1159.

[3] *Id.* at 1160.

[4] In a separate action published in today's **Federal Register**, EPA is disapproving the submitted regulatory definition for BACT (derived from the TCAA) in 30 TAC 116.10(3) because it is not clear that this BACT applies only for Minor NSR. *See* that notice for further information. We wish to note that TCEQ has proposed revisions to the definition to clarify its use is only for Minor NSR but has not submitted it yet to EPA for action as a SIP revision.

Response: The issue of how TCEQ implements the Texas PSD SIP to make its PSD BACT determinations is not the subject of this rulemaking action and therefore outside the scope of this action. The 2006 submitted revision, if approved, would have removed the PSD BACT definition (as defined by the Act) from the Texas PSD SIP. In the July 16, 2010, SIP submittal, however, TCEQ revised 30 TAC 116.160 to incorporate into its PSD Program the federal PSD BACT definition in 40 CFR 52.21(b)(12). Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal.

Comment 7: BCCA, TIP, ERCC, and TCC commented that the Texas regulations have continuously carved out 40 CFR 52.21(j), concerning control technology review, which is the federal BACT requirement, from the Texas PSD regulations. This is true from 1992 when EPA first granted authority to Texas to administer PSD permitting. As part of the 1992 approval, EPA explained why the federal control technology review requirement of Section 52.21(j) could be properly excluded by Texas under the federal Clean Air Act. *See* 54 FR 52824–52825 (Dec. 22, 1989). EPA then stated in the final rule approving the Texas PSD program that the federal control technology review requirement, which requires BACT for PSD applications, was "not necessary for approval of the Texas Program." *See* 57 FR 28093–28094 (June 24, 1992).

Response: The 2006 SIP revision submittal removed from the State rules the incorporation by reference of the Federal PSD definition of "best available control technology (BACT)" as defined in 52.21(b)(12). The currently approved Texas PSD SIP includes the Federal definition of BACT. *See* 30 TAC 116.160(a). This submitted SIP revision violates the Act and relaxes the requirements of the current Texas SIP. In the July 16, 2010, SIP submittal, however, TCEQ revised 30 TAC 116.160 to incorporate into its PSD Program the federal PSD BACT definition in 40 CFR 52.21(b)(12). TCEQ also incorporated by reference 40 CFR 52.21(j). TCEQ recognized that over the years since EPA's original approval of the Texas PSD SIP, there was confusion about the difference between the PSD BACT definition and the requirement to conduct a PSD BACT determination versus the State's BACT definition and the requirement to conduct a Minor NSR BACT determination. Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal and in addition addressed a potential ambiguity.

Comment 8: TCC commented that one can search the entire Texas Clean Air Act, which is the sole authority under which TCEQ can issue any permits, and find no mention of PSD at all; again, the governing law establishes the need for BACT for all permits, major or minor. And the governing statute does not define BACT beyond its own terms, leaving substantial degrees of freedom for TCEQ to compel the best available control technology. TCEQ's implementing rules also do not further define BACT at all, either, other than to emphasize the need for giving "consideration * * * to the technical practicability and the economic reasonableness of reducing or eliminating emissions from the facility."

Response: See responses to Comments 5 and 7.

Comment 9: TCC commented that Texas accomplishes the PSD reviews required by Part C of Subtitle I of the federal Clean Air Act by including various applicability provisions in its rules, but the only effect of "triggering" PSD review is to require an increment analysis (the "significant deterioration" review) for all preconstruction permits for PSD projects. Again, BACT reviews are universal, and do not depend on triggering PSD. (This is one of the great strengths of Texas's permitting program, not a weakness). The nature of the BACT review doesn't change depending on whether the application triggers PSD; TCEQ determines BACT using its 3-tiered process regardless of the size of project under review.

Response: EPA disagrees. *See* response to Comment 5. Furthermore, the implementation by TCEQ of the PSD SIP is outside the scope of this rulemaking action.

Comment 10: TCC commented that EPA may not condition approval of Texas's permitting programs on adherence to specific definitions. SIP approval of a PSD program is conditioned on accomplishing some very general statutory objectives, as outlined in Section 165(a) of the federal Clean Air Act, including mechanisms to ensure that each proposed major source or modification is subject to the best available control technology.[5] Congress expressly left the particulars to each state.[6] Not even EPA's rules describing its expectations for approvable SIPs mandate adoption of the exact definitions. Variations are allowed "if the State specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects" as those adopted by EPA.[7] TCEQ of course has made that demonstration in its various SIP submittals over the years, but mostly by decades of actual BACT determinations made pursuant to its definition. EPA has not identified even one TCEQ BACT determination that yielded an inadequate result because of the different definitions. In fact, EPA has agreed that the TCEQ BACT review process is perfectly adequate.

Response: EPA disagrees. *See* response to Comment 5. Furthermore, TCEQ's implementation of the PSD SIP is outside the scope of this rulemaking action.

Comment 11: ERCC commented that the proposed deficiencies fall far short of demonstrating an interference with achieving the national standard.

Response: As noted previously, EPA must evaluate the submitted Program based upon the content of the regulations and associated record that have been submitted and are currently before EPA for appropriate approval or disapproval action. Furthermore, Texas, as a state submitting a customized major NSR SIP revision, must demonstrate why its program and definitions are in fact at least as stringent as the major NSR revised base program. *See* 67 FR 80185, at 80241. Moreover, EPA lacks sufficient information to determine whether the 2006 submittal would not interfere with NAAQS attainment and RFP. *See* response to comment 5 above for further information. However, in the July 16, 2010, SIP submittal, TCEQ revised 30 TAC 116.160 to incorporate into its PSD Program the federal PSD BACT definition in 40 CFR 52.21(b)(12), the requirements of 40 CFR 52.21(r)(4), and the requirements of 40 CFR 52.21(j). Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal. *See* response to comment 2 above for further information.

Comment 12: ERCC commented that the mere removal of a reference to the federal definition of BACT does not create a permitting deficiency or interfere with attainment. The mere statement that the Texas BACT definition differs from the federal regulation fails to explain how it interferes with the state SIP. Many States have BACT definitions in their EPA-approved SIPs that do not conform, word for word, to the BACT statutory language. *See* Connecticut—CONN. AGENCIES REGS. § 22a-174–1 (EPA effective date, February 27, 2003);

[5] CAA § 165(a)(4): 42 U.S.C. 7475(a)(4).

[6] CAA § 101(a)(3); 42 U.S.C. 7401(a)(3).

[7] 40 CFR 51.166(b).

Maine—06–096 ME. CODE R. § 100–17 (EPA effective date, November 21, 2007); New Hampshire—N.H. CODE ADMIN. R. ANN. ENV–A: § 101.13 (EPA effective date, August 14, 1992); and Oklahoma—OKLA. ADMIN. CODE § 252:100–1–3 (EPA effective date, January 7, 2000).

Response: EPA disagrees. *See* responses to comments 5 and 11. Furthermore, in the July 16, 2010, SIP submittal, TCEQ revised 30 TAC 116.160 to incorporate into its PSD Program the federal PSD BACT definition in 40 CFR 52.21(b)(12). Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal.

Comment 13: ERCC commented that the both EPA's and Texas' BACT definitions require the consideration of technical limitations, such as energy and environmental concerns, as well as the economic reasonableness of the emissions limitation, in order to determine BACT. *Compare* 40 CFR 51.166(b)(12) *with* 30 TAC 116.111(2)(C). Further, both processes address the same fundamental concepts as expressed in the Clean Air Act. The key question is whether the "state permitting program provides a framework for adequate consideration of regulatory criteria and consistency within the PSD program." *In re ConocoPhillips Co.,* PSD Appeal 07–02 slip op. at 30 (EAB June 2, 2008) (quoting *In re Cardinal, FG Co,* 12 E.A.D. 153 at 161 (EAB 2005).

Response: See the response to comment 5. Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal.

Comment 14: ERCC commented that to the extent EPA is asserting that the TCEQ staff was required to follow the exact "top down" approach to BACT analysis, and that such an argument has already been disclaimed by EPA and the Environmental Appeals Board and rejected by the U.S. Supreme Court. As stated by EPA when it actually approved the Texas PSD program in 1992, EPA did require Texas to follow EPA's interpretations and guidance issued under the Act in the sense that those pronouncements have independent status as enforceable provisions of the Texas PSD SIP. *See* 57 FR 28095 (June 24, 1992). During this same approval promulgation, EPA expressly confirmed that the State of Texas is not required to follow the EPA "top down" approach to BACT. *Id.* at 28095–6. Likewise in the case of *Alaska Department of Environmental Conservation* v. *EPA,* 540 U.S. 461, 476 n. 7 (2004), the U.S. Supreme Court wrote: "Nothing in the act or its implementing regulations mandates top-down analysis." The ability to deviate from the top-down analysis is also supported by the Environmental Appeals Board, which has recognized in prior rulings the permitting authority's ability to vary from the NSR review manual as long as all regulatory criteria are considered and applied appropriately. *ConocoPhillips,* PSD Appeal 07–02 slip op. at 30 (EAB June 2, 2008) (citing *In re Knauf Fiber Glass GmbH,* 8 E.A.D. 121 at 129–30 n. 14, 135 n.25). Absent a showing from EPA that the Texas definition of BACT somehow inescapably leads to failure to consider and apply the appropriate regulatory criteria, or inexorably leads to the NAAQS not being protected, EPA must defer to the State's authority under the Clean Air Act to address air quality issues. Texas' BACT definition has resulted in some of the most stringent pollution control emission rates in the United States. EPA has not identified one instance where application of Texas' BACT definition resulted in less pollution control than if EPA's top down analysis was used. The issue that EPA has identified is non-substantive and solely one of semantics.

Response: EPA's proposed disapproval is not based on an evaluation of the Texas three-tier approach; it is based on an evaluation of the submitted revision. *See* our response to Comments 4, 5 and 11. The comments on the approaches and implementation of the PSD SIP by TCEQ are outside the scope of this rulemaking action. Furthermore, in the July 16, 2010, SIP submittal, TCEQ revised 30 TAC 116.160 to incorporate into its PSD Program the federal PSD BACT definition in 40 CFR 52.21(b)(12). Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal.

Comment 15: GCLC commented that furthermore, EPA has voiced its support for Texas three-tier approach during negotiations with TCEQ over these issues. While responding to TCEQ submittals, the EPA on October 27, 2008, stated that it "agreed with many" of the statements made by TCEQ defending their BACT program in a June 13, 2008, letter.[8] TCEQ statements included that, to its understanding, the three-tiered approach is an acceptable and approved approach by the EPA. If the EPA did have concerns with that assessment, the EPA had the opportunity to voice them at that time or since Texas (and other states) began using this type of three-tiered approach.

Response: Implementation by the State of its PSD SIP is outside the scope of this rulemaking action.

Comment 16: TCC commented that EPA's proposal to disapprove this rule is based in part on false distinctions between what it refers to as "PSD BACT" and "Minor NSR BACT." Assuming such distinctions, EPA concludes that the Texas rules fail to clearly apply the "PSD definition of BACT" to all actions subject to PSD, and conversely fails to delimit the minor NSR definition to activities triggering only minor NSR. But there are no distinctions, legal or practical, in Texas BACT reviews.

Response: EPA disagrees. *See* our response to Comment 5. Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal.

Comment 17: BCCA and TIP commented that the preamble to the 2006 revisions to 30 TAC 116.160 in which the incorporations by reference of 40 CFR 52.21 were changed, demonstrate a consistency with the approach taken by the State in the preceding years. The preamble explains the incorporation by reference of certain sections of 40 CFR 52.21 and further states, "[o]ther definitions used for the PSD program or visibility in Class I areas program are currently in [TCEQ's] rules."[9]

Response: The 2006 revisions to 30 TAC 116.160 did not just "change" the incorporations by reference of 40 CFR 52.21; they removed two of them entirely. The result is that the submitted 2006 revision did not meet the Act's PSD requirements and EPA's PSD SIP regulations. Moreover, the State did not provide the requisite demonstration to show how its customized Major NSR SIP revision was at least as stringent as EPA's PSD SIP requirements. Furthermore, in the July 16, 2010, SIP submittal, TCEQ revised 30 TAC 116.160 to incorporate into its PSD Program the federal PSD BACT definition in 40 CFR 52.21(b)(12) and the provisions of 40 CFR 52.21(r)(4). Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal. *See* response to comment 2 above for further information.

[8] Letter from Carl E. Edlund, Director, EPA Multimedia Planning and Permitting Division to Mark Vickery, Executive Director, Texas Commission on Environmental Quality. (Oct. 27, 2008) available at *http://www.tceq.state.tx.us/assets/public/permitting/air/Announcements/epa_response_10_27_08.pdf.*

[9] 31 *Tex. Reg.* 519 (Jan. 27, 2006).

Comment 18: BCCA and TIP commented that the appropriate BACT definition exists in Texas's rules, as demonstrated by EPA's past approval of those rules. All permits Texas has issued under the existing permitting program reflect the current TCEQ SIP-approved approach to BACT, and are valid and enforceable.

Response: EPA disagrees that the 2006 SIP revision submittal maintained the appropriate PSD BACT definition. *See* the response to Comment 5. Furthermore, in the July 16, 2010, SIP submittal, TCEQ revised 30 TAC 116.160 to incorporate into its PSD Program the federal PSD BACT definition in 40 CFR 52.21(b)(12). Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal. Comments on the implementation by the State of the PSD SIP are outside the scope of this rulemaking action.

Comment 19: TCC commented that Texas law does not create two different types of permits, one called a minor NSR permit and one called a PSD permit. There is only one kind of pre-construction permit described in the Texas Clean Air Act, a "preconstruction permit" under Texas Health & Safety Code § 382.05 18(b). The issuance of all such permits is conditioned on use of "best available control technology."

Response: EPA disagrees. *See* responses to comments 5 and 18. Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal.

Comment 20: TCC commented that the definitions do not determine stringency. The stringency of BACT determinations are not determined by definitions, anyway. Even the far wordier "federal definition" is but a litany of factors that go into what is inevitably a highly discretion-laden determination. A more "specific" definition, it may truly be argued, has the effect of being less stringent, because it limits the factors to be considered. Absent a definition of BACT beyond its own self-description, TCEQ is free to be even stricter than the wordier federal definition. Again, the proposed disapproval fails to identify even one determination that (a) depended on the definition applied, and (b) yielded a determination less strict than would resulted from application of the "federal definition."

Response: See response to comment 5.

Comment 21: TCC commented that EPA itself does not follow the "federal definition." EPA is in a difficult position to insist on word-for-word adoption when it does not itself follow the federal definition. The definition EPA would impose on the states is not the one that Congress prescribes. Which federal definition would EPA like Texas to follow, the one in its rule or the one in its governing statute? In what way does either "federal definition" necessarily require BACT determinations any more strict than the Texas definition?

Response: The differences between the regulatory definition of PSD BACT at 40 CFR 52.21(b)(12) and the statutory definition of that term in section 169(3) of the Act are not significant and the regulatory definition of PSD BACT is consistent with the statutory definition. We addressed the reasons why the federal BACT definition is more stringent than the Texas definition in the proposal at 74 FR 48467, at 48472. *Also see* our response to comment 5 above for further information. To the extent this comment relates to TCEQ's implementation of the PSD SIP, it is outside the scope of this rulemaking action. Finally, based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal.

Comment 22: TCC commented that the proposed disapproval draws on distinctions without differences. The definition is designed to identify relevant factors that go into what is ultimately a highly discretion-laden determination. No matter the definition, the objective is the same. And no matter the definitions, the resources consulted for each BACT determination are the same. In Texas, for example, all BACT determinations are made using its 3-tier process, which elaborates in detail how TCEQ makes the determinations. All reviews are based on consideration of national determinations codified in the RACT/BACT/LAER Clearinghouse; EPA has agreed that this process yields results equivalent to its top-down approach, which itself is not compelled by any definition. In both cases, responsible agencies make discretionary determinations based on aggressive efforts to ensure that new technologies are applied when they become available to new sources. Pharisaical parsing over definitions does not accomplish sound BACT determinations, which instead result from good faith efforts by responsible regulators.

Response: EPA disagrees. *See* responses to comments 5, 7, and 14. TCEQ's implementation of the PSD SIP is outside the scope of this rulemaking action. Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal.

Comment 23: TCC commented that to the very extent there were differences in a result based on the definition; EPA would be prohibited from disapproving the definition. EPA presumes without proof a difference in result arising out of TCEQ's BACT definition. But, regardless, EPA cannot elect to approve the broader reach of the Texas program (*e.g.,* application of BACT to all sources), but disapprove what it perceives to be a lesser definition of BACT. States are the primary architects of their implementation plans, and EPA is not free to change the state's choices by selective approvals of interrelated elements. Accordingly, the extent to which EPA would make any substantive changes in TCEQ's permitting program by selectively disapproving its BACT definition is the very extent to which it is forbidden to disapprove it. EPA must either accept the permit program or reject it in its entirety, and not cut it to pieces so that it looks like a ransom note.

Response: EPA disagrees. *See* response to Comments 5, 7, and 14. TCEQ's implementation of the PSD SIP is outside the scope of this rulemaking action. Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies identified in the proposal.

Comment 24: The Clinic commented (under Docket No. EPA–R06–OAR–2006–0133) on EPA's proposed disapproval of TCEQ's rules that removed a requirement under 40 CFR 52.21(r)(4) that provides that if a project becomes a major stationery source or major modification solely because or relaxation of an enforceable limitation on the source or modifications capacity to emit the pollutant, then the source or modification is subject to PSD as though construction had not commenced. This provision prohibits the use of "sham" operational limits that a source may take to avoid PSD and provides an extra deterrent to facilities that may take such limits that they know they cannot achieve in order to avoid federal permitting. Approval of this deletion also violates the anti-backsliding provisions in 42 U.S.C. 7515 and would render the Texas SIP less stringent that federal requirements and inadequate for preventing significant deterioration of air quality.

Response: EPA appreciates the Clinic's support for the proposal. In the July 16, 2010, SIP submittal, TCEQ revised 30 TAC 116.160 to incorporate into its PSD Program the federal requirements of 40 CFR 52.21(r)(4). Based upon our evaluation of the July 2010, SIP revision, we conclude that Texas has corrected the deficiencies

identified in the proposal. See response to comment 2 above for further information.

V. What are the grounds for approval?

A. Adoption of Cross-Reference to 40 CFR 52.21(b)(12), Which Is the Federal Definition of Best Available Control Technology (BACT), and the Cross-Reference of 40 CFR 52.21(j) Which Implements the Requirement for a PSD BACT Analysis

The February 1, 2006, submittal of revisions to 30 TAC 116.160 removed the reference to the definition of federal PSD BACT in 40 CFR 52.21(b)(12). On September 23, 2009, EPA proposed to disapprove the 2006 submittal due in part to its removal of this definition. EPA observed that under the PSD Program, PSD BACT is a central requirement of the Act and that the State's submission of a revision that removes the requirement that all new major stationary sources and modifications meet, at a minimum, PSD BACT as defined by the Act creates a situation where the submitted SIP revision would violate the Act and also be a relaxation of the requirements of the Texas PSD SIP. *See* the proposed disapproval at 74 FR 48467, at 48472. On July 16, 2010, Texas submitted a revision to 30 TAC 116.160 that reinstates the federal PSD BACT definition in 40 CFR 52.21(b)(12). *See* submitted 30 TAC 116.160(c)(1)(A). The revision also includes a reference to 40 CFR 52.21(j) which implements the BACT definition. See submitted 30 TAC 116.160(c)(2)(A).

The adoption of the reference to the federal definition of PSD BACT in 40 CFR 52.21(b)(12) corrects a deficiency in the 2006 submittal because it reinstates a requirement that is a central requirement of the Act. Approval of this 2010 revision maintains the Texas PSD SIP as what EPA first approved in 1992.

The TCEQ also submitted on July 16, 2010, a revision to 30 TACT 116.160 that adds a reference to 40 CFR 52.21(j)—Control technology review. This provision was not referenced in the Texas PSD SIP approved in 1992. Texas chose to reference 40 CFR 52.21(j) because of the confusion over the years about the PSD versus the Minor NSR BACT determination requirements. It complements the reinserted federal definition of PSD BACT. Accordingly, EPA is approving the reinstatement of the reference to federal PSD BACT in 40 CFR 52.21(b)(21) and the addition of a reference to 40 CFR 52.21(j).

B. Adoption of Cross-Reference to 40 CFR 52.21(r)(4), Which Relates to PSD Review for Projects That Become Major Stationary Sources or Major Modifications Solely Because of Relaxation of an Enforceable Limitation on the Source or Modification Capacity to Emit a Pollutant

The February 1, 2006, submittal of revisions to 30 TAC 116.160 also removed the reference to 40 CFR 52.21(r)(4) that the State had previously incorporated into its PSD SIP. This provision specifies that if a project becomes a major stationary source or major modification solely because of a relaxation of an enforceable limitation on the source's or modification's capacity to emit a pollutant, then the source or modification is subject to PSD as if construction had not yet commenced. The removal of this requirement meant that the State's rules would not regulate these types of major stationary sources or major modifications as stringently as the federal program. *See* the proposed disapproval at 74 FR 48467, at 48472. On July 16, 2010, Texas submitted a revision to 30 TAC 116.160 that reinstates the reference to 40 CFR 52.21(r)(4). *See* submitted 30 TAC 116.160(c)(2)(C).

The adoption of the reference to 40 CFR 52.21(r)(4) in the July 2010 submittal corrects a deficiency in the 2006 submittal because it reinstates a requirement that is mandated in the federal program. Approval of this 2010 revision maintains the Texas PSD SIP to its status when EPA first approved the SIP in 1992. Accordingly, EPA is approving the reinstatement of the reference to 40 CFR 52.21(r)(4).

C. How EPA's action does not affect the substance of the Texas PSD SIP originally approved in 1992?

The 2006 and 2010 SIP revisions to 30 TAC 116.160 reorganized the sections but made no substantive changes to the approved SIP except that the 2006 submittal omitted references to the definition of PSD BACT in 40 CFR 52.21(b)(12) and the requirements of 40 CFR 52.21(r)(4) which resulted in the 2006 revisions not meeting the federal requirements. *See* sections IV.A and B above. The 2010 SIP revision submittal reinstates these provisions into the State's rules and corrects the above-identified deficiencies. Texas also added a reference to 40 CFR 52.21(j)—Control technology review—which complements the implementation of the definition PSD BACT. The specific changes are described in section II of this notice. A detailed outline of the specific changes made to 30 TAC 116.160 by the 2006 and 2010 SIP revisions is available in the Technical Support Document which is in the docket for this action. Our evaluation of these changes demonstrates that the submitted changes to the Texas PSD Program are insignificant and with the changes submitted in 2010 essentially restore the Program to what it was in 1992. The 2006 revision also removed the definitions of "building, structure, facility, or installation" and "secondary emissions" in 30 TAC 116.160(c)(1) and (2), respectively. The removal of these definitions is not significant because these terms are also defined using the same definitions in the Texas SIP at 30 TAC 116.12(4) and (17), respectively, as approved at 74 FR 11851 (March 20, 2009).

For further information see:

- The 1989 proposed Texas PSD SIP approval at 54 FR 52823, at 52824–52825 (December 22, 1989);
- The final Texas PSD SIP approval at 57 FR 28093, at 28095–28096 (July 24, 1992);
- The proposed disapproval of the February 1, 2006, submitted revisions to 30 TAC 116.160 at 74 FR 48467, at 48472;
- The submitted SIP revisions to 30 TAC 116.160 dated July 16, 2010;
- The background for this action in section II of this preamble;
- The responses to comments 1 through 26 in section III of this preamble; and
- The technical support document for this action.

VI. Final Action

The EPA is approving certain revisions to the Texas PSD SIP, submitted February 1, 2006, and as amended July 16, 2010, which apply to 30 TAC Chapter 116—Control of Air Pollution by Permits for New Construction or Modification. EPA finds that the July 16, 2010, submittal corrects these deficiencies in the February 1, 2006, submission identified in the September 23, 2009, proposed disapproval of revisions to 30 TAC 116.160. These revisions submitted in 2006 were nonsubstantive except for the removal of the PSD BACT definition and the removal of the reference to 40 CFR 52.21(r)(4). With the restoration of the PSD BACT definition and the reference to 40 CFR 52.21(r)(4) and the addition of a reference to 40 CFR 52.21(j) in the Texas NSR Program, we find that the aspects of the submitted PSD Program covered in these submissions meet section 110 and part C of the Act.

EPA is publishing this rule without prior proposal because we view this as a noncontroversial amendment and anticipate no relevant adverse comments. However, in the proposed rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the SIP revision if relevant adverse comments are received. This rule will be effective on November 15, 2010 without further notice unless we receive relevant adverse comment by October 15, 2010. If we receive relevant adverse comments, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. We will address all public comments in a subsequent final rule based on the proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if we receive relevant adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

VII. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on Tribal governments or preempt Tribal law.

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 15, 2010. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon Monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen oxides, Ozone, Particulate matter, Sulfur oxides, Volatile organic compounds.

Dated: August 31, 2010.

Al Armendariz,

Regional Administrator, Region 6.

■ Accordingly, 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart SS—Texas

■ 2. The table in § 52.2270(c) entitled "EPA Approved Regulations in the Texas SIP" is amended under Chapter 116 (Reg 6)—Control of Air Pollution by Permits for New Construction or Modification, Subchapter B—New Source Review Permits, Division 6—Prevention of Significant Deterioration Review, by revising the entry for Section 116.160—Prevention of Significant Deterioration Review to read as follows:

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

EPA APPROVED REGULATIONS IN THE TEXAS SIP

State citation	Title/subject	State approval/submittal date	EPA approval date	Explanation
*	*	*	*	*
Chapter 116 (Reg 6)—Control of Air Pollution by Permits for New Construction or Modification				
*	*	*	*	*
Subchapter B—New Source Review Permits				
*	*	*	*	*
Division 6—Prevention of Significant Deterioration Review				
Section 116.160	Prevention of Significant Deterioration Requirements.	6/2/2010	9/15/2010 [Insert FR page number where document begins].	
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[FR Doc. 2010–22672 Filed 9–14–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2009–1014–201026; FRL–9201–1]

Approval and Promulgation of Implementation Plans; Commonwealth of Kentucky; Prevention of Significant Deterioration and Nonattainment New Source Review Rules: Nitrogen Oxide as Precursor to Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to approve a revision to the Commonwealth of Kentucky's State Implementation Plan (SIP), submitted to EPA by the Kentucky Energy and Environment Cabinet, through the Kentucky Division for Air Quality (KDAQ), on February 5, 2010. The revision modifies Kentucky's prevention of significant deterioration (PSD) and nonattainment new source review (NNSR) permitting regulations in Kentucky's SIP to address permit requirements promulgated in the 1997 8-Hour Ozone National Ambient Air Quality Standards (NAAQS) Implementation Rule—Phase II (hereafter referred to as the "Ozone Implementation NSR Update"). The Ozone Implementation NSR Update revised permit requirements relating to the implementation of the 1997 8-hour ozone NAAQS, specifically, incorporating nitrogen oxides (NO_X) as a precursor to ozone. EPA's approval of Kentucky's provisions to include NO_X as an ozone precursor into the Kentucky SIP is based on EPA's determination that Kentucky's SIP revision related to these provisions complies with Federal requirements. EPA is also addressing the general adverse comments received on EPA's proposal to approve NO_X as an ozone precursor for permitting purposes into the Kentucky SIP.

The February 5, 2010, SIP revision also included provisions to exclude facilities that produce ethanol through a natural fermentation process from the definition of "chemical process plants" in the NSR major source permitting program in the Kentucky SIP. EPA also received adverse comments for its proposal to approve these provisions. At this time, EPA is not taking final action on Kentucky's provisions to exclude facilities that produce ethanol through a natural fermentation process from the definition of "chemical process plants" in the NSR major source permitting program. EPA will consider the comments received regarding these provisions and take any final action for these provisions in a separate rulemaking.

DATES: *Effective Date:* This rule will be effective October 15, 2010.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2009–1014. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: For information regarding the Kentucky SIP, contact Ms. Twunjala Bradley, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Ms. Bradley can be reached via telephone at (404) 562–9352 and electronic mail at *bradley.twunjala@epa.gov.* For information regarding NSR, contact Ms. Yolanda Adams, Air Permits Section, at the same address above. Ms. Adams can be reached via telephone at (404) 562–9214 and electronic mail at *adams.yolanda@epa.gov.* For information regarding 8-hour ozone NAAQS, contact Ms. Jane Spann, Regulatory Development Section, at the

same address above. Ms. Spann can be reached via telephone at (404) 562–9029 and electronic mail at *spann.jane@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background
II. Today's Action
III. Comments and Responses
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I. Background

On February 5, 2010, the Commonwealth of Kentucky, through KDAQ, submitted a revision to the Kentucky SIP which relates to Kentucky's Air Quality Regulations, Chapter 51—401 Kentucky Administrative Regulation (KAR) 51:001 "Definitions for 401 KAR Chapter 51," 401 KAR 51:017 "Prevention of Significant Deterioration of Air Quality," and 401 KAR 51:052 "Review of New Sources in or Impacting upon Nonattainment Areas." The SIP revision addressed various issues.[1] This final action addresses only *one* component of the February 5, 2010, submittal—the Ozone Implementation NSR Update requirements, as contained in 40 Code of Federal Regulations (CFR) 51.165 and 51.166, and promulgated on November 29, 2005, as part of EPA's Ozone Implementation NSR Update.

On July 18, 1997, EPA promulgated a revised 8-hour ozone NAAQS of 0.08 parts per million—also referred to as the 1997 8-hour ozone NAAQS. On April 30, 2004, EPA designated areas as attainment, nonattainment and unclassifiable for the 1997 8-hour ozone NAAQS. As part of the 2004 designations, EPA also promulgated an implementation rule for the 1997 8-hour ozone NAAQS in two phases. Phase I of EPA's 1997 8-hour ozone implementation rule (Phase 1 Rule), published on April 30, 2004, and effective on June 15, 2004, provided the implementation requirements for designating areas under subpart 1 and subpart 2 of the CAA. *See* 69 FR 23857.

On November 29, 2005, EPA promulgated the second phase for implementation provisions related to the 1997 8-hour ozone NAAQS—also known as the Phase II Rule. *See* 70 FR 71612. The Phase II Rule addressed control and planning requirements as they applied to areas designated nonattainment for the 1997 8-hour ozone NAAQS which included NSR requirements. Specific to this rulemaking, the Phase II Rule made changes to Federal regulations 40 CFR 51.165 and 51.166, which govern the NNSR and PSD permitting programs. The revisions to the NSR permitting requirements in the Phase II Rule are also known as the Ozone Implementation NSR Update.

Specifically, the Phase II Rule requirements included, among other changes, a new provision stating that NO_X is an ozone precursor. See 70 FR 71612, (page 71679) (November 29, 2005). In the Phase II Rule, EPA stated as follows:

> "The EPA has recognized NO_X as an ozone precursor in several national rules because of its contribution to ozone transport and the ozone nonattainment problem. The EPA's recognition of NO_X as an ozone precursor is supported by scientific studies, which have long recognized the role of NO_X in ozone formation and transport. Such formation and transport is not limited to nonattainment areas. Therefore, we believe NO_X should be treated consistently as an ozone precursor in both our PSD and nonattainment NSR regulations. For these reasons we have promulgated final regulations providing that NO_X is an ozone precursor * * *"

In the Phase II Rule, EPA established that states must submit SIPs incorporating required changes (including the addition of NO_X as a precursor for ozone) no later than June 15, 2007. *See* 70 FR 71612 (page 71683).

On February 5, 2010, Kentucky submitted a revision to include NO_X as a precursor for ozone for PSD and NNSR permitting purposes in order to comply with the Phase II Rule.

II. Today's Action

EPA has determined that Kentucky's February 5, 2010, SIP revision revising Kentucky's PSD and NNSR permit programs is consistent with changes to the Federal NSR requirements (40 CFR 51.165 and 51.166, and the Phase II Rule) relating to the incorporation of NO_X as an ozone precursor. The revision, which became state-effective on February 5, 2010, is included in Kentucky's PSD and NNSR programs and meets the requirements of the Phase II Rule by identifying NO_X as a precursor for ozone.[2]

EPA received comments on its proposal to approve the Kentucky SIP revision to incorporate NO_X as a precursor for ozone, on April 29, 2010, from the Law Office of Robert Ukeiley on behalf of the Sierra Club and Valley Watch, Incorporated. The comments opposed approval of the SIP revision. EPA's responses to these comments can be found in Section III of this rulemaking.

III. Comments and Responses

On April 29, 2010, EPA received a letter providing comments on EPA's proposal to approve Kentucky's February 5, 2010, SIP revision to include NO_X as a precursor for ozone for PSD and NNSR purposes. Below is a summary of the comments and EPA's response.

Comments:[3] The comments acknowledged that "[t]his revision is long overdue;" however, the comments further stated that, "EPA should not approve Kentucky's revision just because it is "line-by-line" consistent with the federal rules."

The comments expressed concerns regarding Kentucky's implementation of modeling requirements for ozone, particularly in reference to certain coal-fired utilities in Kentucky (that were specifically identified in the letter), and for those reasons, the Commenter appears to oppose the SIP revision. The Commenter explains that "[t]his proposed rulemaking is EPA's opportunity to provide Kentucky with much-needed direction on how to ensure air quality does not further degrade." One basis for the Commenter's concerns appears to be his position on Kentucky's attainment status for the ozone NAAQS as well as some permitting activities. The Commenter explains his position on Kentucky's alleged noncompliance with ozone requirements particularly with regard to issuing permits for major new sources of air pollution. The concerns seemed focused on ozone related modeling and monitoring. Further, the Commenter explains his concerns regarding ozone preconstruction monitoring at certain stationary sources.

The Commenter concludes by explaining that "[t]he proposed SIP

[1] Kentucky's February 5, 2010, SIP revision also included provisions for excluding facilities that produce ethanol through a natural fermentation process from the definition of "chemical process plants" in the NSR major source permitting program. In an action published on April 1, 2010 (75 FR 16388), EPA proposed to approve the aforementioned revisions into the Kentucky SIP. At this time, EPA is not taking action on the ethanol provisions. On a separate, unrelated issue, the rule revisions provided in Kentucky's February 5, 2010, submittal also requested the removal of certain provisions for clean units (CU) and pollution control projects (PCP), which were vacated by the United States Court of Appeals for the District of Columbia Circuit. EPA has not previously taken action to approve that portion of Kentucky's submittal (regarding the vacated rules) and EPA is not now taking action on those provisions.

[2] The Kentucky rules were formatted to conform to Kentucky rule drafting standards (KRS Chapter 13A), but in substantive content the rules are the same as the Federal rules.

[3] A full text of the comments is available in the Docket for this action. Electronic docket information can be found in the "Addresses" portion of this notice. The comments are summarized in this document; however, EPA considered all the comments expressed in the letter.

revision is EPA's opportunity to work with the state of Kentucky to design a program that will help Kentucky achieve present and future attainment with ozone standards." The Commenter requests that EPA (1) not approve the SIP revision until Kentucky agrees to make serious efforts at attaining and assuring continuing attainment with the ozone standards; and (2) use its powers under CAA Section 167 to prevent construction of three major sources of ozone precursor pollution (identified in the letter).

Response: EPA's Phase II Rule required states to add NO_X as a precursor for ozone to their SIPs. EPA explained the basis for that decision in the Phase II Rule, which is part of the CAA program to improve air quality and reduce ground-level ozone. The air quality benefits were the primary basis for EPA's final action in the Phase II Rule requiring states to incorporate NO_X as a precursor for ozone in their SIPs. See 68 FR 32802 (proposal); 70 FR 71612, 71674, 71679 (final Phase II Rule). The Commenter acknowledges that this action is "overdue" and recognizes that NO_X is in fact a precursor for ozone. While the comments are adverse in the sense that they request that EPA not approve the SIP revision, the comments provide no scientific or legal basis for EPA to disapprove Kentucky's February 5, 2010, SIP revision. The comments are focused on concerns about Kentucky's major source air program, and include no specific information explaining why adding NO_X as a precursor to ozone in Kentucky's PSD and NNSR programs is contrary to the CAA or its implementing regulations.

Notably, the Commenter has raised similar concerns in response to other actions (*e.g.,* permit revisions and other SIP revisions), including a lawsuit against EPA seeking EPA to use Clean Air Act Section 167 at certain coal-fired utilities in Kentucky. In a letter dated April 17, 2009 (which was resubmitted on January 20, 2010), the Commenter provided adverse comments to EPA regarding a separate (and unrelated) proposed approval actions for four Kentucky 110(a)(1) maintenance plans, stating

> "the Kentucky PSD program only requires that sources conduct ambient monitoring and impact analysis when a source is over 100 tons per year of [volatile organic compounds]. See 401 KAR 51:017 § 7(5)(a). The Kentucky PSD program illegally leaves out major sources of NO_X. Id."

In that separate action, the Commenter supported disapproval based on NO_X not being listed as an ozone precursor in the Kentucky SIP. Nonetheless, in this action to incorporate NO_X as a precursor for ozone, the same Commenter is opposing the action. Commenter appears to be trying to achieve changes not directly related to the SIP revision at issue, but more specifically focused on certain major stationary sources identified in the letter. These other actions have their own independent regulatory processes wherein Commenter has other opportunities to raise concerns and seek changes.

EPA's action to approve NO_X as a precursor for ozone in Kentucky supports the improvement of air quality in Kentucky, in part because of the associated modeling and monitoring requirements. EPA's approval of this SIP revision ensures that Kentucky's PSD and NNSR permit programs are consistent with the Federal NSR permit requirements (40 CFR 51.165 and 51.166) relating to the incorporation of NO_X as an ozone precursor set forth in the Phase II Rule.

IV. Final Action

Pursuant to Section 110 of the CAA, EPA is taking final action to approve Kentucky's SIP revision submitted February 5, 2010, which incorporates NO_X as an ozone precursor for PSD and NNSR purposes into the Kentucky SIP. The revision included in Kentucky's PSD and NNSR programs is equivalent to the provision in the Ozone Implementation NSR Update. EPA is approving these revisions into the Kentucky SIP because they are consistent with the CAA and its implementing regulations.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 15, 2010. Filing a petition for reconsideration by the

Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Ozone, Volatile organic compounds.

Dated: September 1, 2010.

Beverly H. Banister,

Acting Regional Administrator, Region 4.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart S—Kentucky

■ 2. Section 52.920(c) Table 1 is amended by revising the entries for "401 KAR 51:001," "401 KAR 51:017," and "401 KAR 51:052" to read as follows:

§ 52.920 Identification of plan.

* * * * *

(c) * * *

TABLE 1—EPA-APPROVED KENTUCKY APPROVED KENTUCKY REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Explanation
* *	*	*	*	* *
Chapter 51 Attainment and Maintenance of the National Ambient Air Quality Standards				
401 KAR 51:001	Definitions for 401 KAR Chapter 51.	2/5/2010	9/15/2010 [Insert citation of publication].	Except the phrase "except ethanol production facilities producing ethanol by natural fermentation under the North American Industry Classification System (NAICS) codes 325193 or 312140," in 401 KAR 51:001 Section 1 (118)(1)(b)(i) and the phrase "except ethanol production facilities producing ethanol by natural fermentation under NAICS codes 325193 or 312140," in 401 KAR 51:001 Section 1(118) (2)(c)(20).
* *	*	*	*	* *
401 KAR 51:017	Prevention of significant deterioration of air quality.	2/5/2010	9/15/2010 [Insert citation of publication].	Except the phrase "except ethanol production facilities producing ethanol by natural fermentation under the North American Industry Classification System (NAICS) codes 325193 or 312140;" in 401 KAR 51:017 Section 7(1)(c)20.
401 KAR 51:052	Review of new sources in or impacting upon non-attainment areas.	2/5/2010	9/15/2010 [Insert citation of publication].	Except the phrase "except ethanol production facilities producing ethanol by natural fermentation under the North American Industry Classification System (NAICS) codes 325193 or 312140," in 401 KAR 51:052 Section 2 (3)(t).
* *	*	*	*	* *

* * * * *

[FR Doc. 2010–22856 Filed 9–14–10; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2006–0121; FRL–8839–3]

Ammonium Formate; 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 ammonium formate (CAS Reg. No. 540–69–2) when used as an inert ingredient (complexing or fixing agent with copper compounds) in pesticide formulations for certain preharvest uses. Phyton Corporation 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 ammonium formate.

DATES: This regulation is effective September 15, 2010. Objections and requests for hearings must be received on or before November 15, 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–2006–0121. 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: Alganesh Debesai, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8353; e-mail address: *debesai.alganesh@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 cite at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. 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–2006–121 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 15, 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 that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit your copies, identified by docket ID number EPA–HQ–OPP–2006–0121, 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 April 21, 2006 (71 FR 20671) (FRL–8067–3), EPA issued a notice pursuant to section 408 of FFDCA, 21 U.S.C. 346a, announcing the filing of a pesticide petition (PP 6E7028) by Phyton Corporation, 7449 Cahill Rd., Edina, MN 55439. The petition requested that 40 CFR 180.920 be amended by establishing an exemption from the requirement of a tolerance for residues of ammonium formate (CAS Reg. No. 540–69–2) when used as an inert ingredient (complexing or fixing agent) with the active ingredient copper in pesticide formulations applied to growing crops. That notice referenced a summary of the petition 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 not restrict to use with the active ingredient copper. No limitations are necessary because no hazard was identified.

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 ammonium formate including exposure resulting from the exemption established by this action. EPA's assessment of exposures and risks associated with ammonium formate 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 ammonium formate are discussed in this unit.

The following provides a brief summary of the risk assessment and conclusions for the Agency's review of ammonium formate. The Agency's full decision document for this action can be found at *http://www.regulations.gov* in the document: Ammonium Formate. Human Health Risk Assessment and Ecological Effects Summary to Support Proposed Exemption from the Requirement of a Tolerance When Used as an Inert Ingredient in Pesticide Formulations Applied Pre-harvest in docket ID number EPA–HQ–OPP–2006–0121.

Ammonium formate breaks down into ammonium and formate ions. Ammonium ions are a toxic waste product of the metabolism in animals; they are ubiquitous in the natural environment and can be considered as having little toxicity or hazard risk. In fish and aquatic invertebrates, it is excreted directly into the water. In mammals, sharks, and amphibians, it is converted in the urea cycle to urea, because urea is less toxic and can be stored more efficiently. In birds, reptiles, and terrestrial snails, metabolic ammonium is converted into uric acid, which is solid, and can therefore be excreted with minimal water. Formic acid is readily metabolized and eliminated by the body; it slowly decomposes to carbon monoxide and water.

The toxicological database for ammonium formate is limited. There is available data on formic acid and related formate compounds (such as calcium and sodium formate), which can serve as suitable surrogates for ammonium formate. Studies conducted with methanol are also applicable to formate compounds, since methanol is metabolized into formic acid.

Acute oral toxicity of ammonium formate in mice is reported to be moderate via oral route (LD_{50} 2,250 milligrams/kilogram (mg/kg)). Acute oral toxicity studies have been performed with formic acid, calcium formate and sodium formate; they all have relatively low toxicity via this route of exposure.

A subchronic inhalation (13–week) study was performed by the NTP with formic acid in mice and rats at concentrations of 0.015, 0.030, 0.061, 0.122, or 0.244 milligrams/liter (mg/L) equal to (8, 16, 32, 64, or 128 parts per million (ppm)) for 13 weeks. Body weight gains were significantly decreased in mice exposed to 64 and 128 ppm formic acid. Changes in organ weights in mice were limited largely to increases in relative weights in animals in the 128 ppm groups. This was primarily a reflection of the lower body weights of these animals compared to controls, and of the greater relative weight of organs in smaller animals. In mice, there were no exposure-related gross lesions; microscopic changes attributed to toxicity of formic acid were limited to degeneration of the olfactory epithelium of the nose in a few mice from the 64 and 128 ppm exposure groups. In rats, hematologic changes observed were all minimal and, generally, were consistent with hemoconcentration. Therefore, they were not considered as toxicologically relevant. Few and slight changes of the biochemical serum parameters were observed but not considered as adverse. No unusual gross lesions were observed. In rats, absolute liver weights were increased in the males of all test groups while the relative liver weights were increased in the three highest dose groups. Absolute and relative lung weights were reduced in female rats in all dose groups; in males, the relative lung weights were reduced in all exposure groups and absolute lung weights were reduced in the two highest dose groups. However, these changes in liver weights and lungs were not considered as adverse because they seem without histopathological correlation. Histopathological changes at the respiratory and olfactory nasal epithelia were restricted to the highest dose groups. The no observed adverse effect level (NOAEL) is 0.061 mg/L (32 ppm) in mice based on a decrease in body weight gains seen at the lowest observed adverse effect level (LOAEL) of 0.122 mg/L (64 ppm). The NOAEL in rats is 0.122 mg/L equal to (64 ppm) based on a decrease in body weight gains in mice and histopathological changes seen in the respiratory and olfactory epithelia at the LOAEL of 0.244 mg/L (124 ppm). Lifetime and repeat dose drinking water studies were conducted in rats with calcium formate and sodium formate, respectively. Toxicity was not observed during either study at doses up to 200 mg/kg/day and 100 mg/kg/day for calcium format and sodium formate, respectively.

In a reproduction study in rats and mice with formic acid via inhalation route, no effects on sperm motility, sperm concentration, testicular and epididymal weight or on the duration of estrous cycles were observed. In mice, formic acid showed no effects on the testicular and epididymal weight or on the duration of the estrous cycles. In a three generation reproduction study in rats via drinking water, no treatment related effects were observed in the parental animals and off springs at doses up to 200 mg/kg/day.

In an *in vitro* incubation in whole embryo culture study in rats with formic acid, incubations showed significant and concentration-dependent reduction of yolk sac diameter, crown-rump length, head length, somite number, and developmental score after 24–hours and of crown-rump length, head length, somite number and developmental score after 48–hours. Embryo lethality was

significantly increased in the highest concentration after 24–hours and in the two highest concentrations after 48–hours. Protein and DNA concentrations showed significant and concentration dependent decreased in both cases. The number of anomalies (open anterior and posterior neuropores, rotatory defects and enlarged maxillary process) showed a significant increase only at the highest doses after 48–hours. Considering the results of *in vivo* reproduction study in mice and rats with formic acid and 3–generation reproduction study in rats via drinking water at doses up to and including 200 mg/kg/day, there is less confidence in the results of *in vitro* study. In addition, no developmental toxicity was seen in several developmental toxicity studies in mice and rats with calcium and sodium formate described below.

In developmental toxicity studies with calcium and sodium formate in rats and mice, respectively, there were no statistical differences in organ and bone abnormalities and growth of treated offspring to controls were similar. There was no reduction of fertility, maternal toxicity, embryotoxic or teratogenic effects observed. The NOAEL for the maternal and developmental toxicity in rats with calcium formate via drinking water was 200 mg/kg/day (the highest dose tested; HDT). The NOAEL for the maternal and developmental toxicity in mice with sodium formate via gavage was 750 mg/kg/day (HDT).

In mutagenicity studies with calcium, sodium and methyl formate, results of the test were negative for all chemicals. The weight-of-evidence suggested that inorganic formates are not mutagenic.

In a non-Good Laboratory Practice (GLP) lifelong (2–3 years) drinking water study with Wistar rats, test animals were exposed to calcium formate at concentrations of 0.2% and 0.4% (150–200 mg/kg/day). No neoplasias were observed. In a separate non-GLP study with Wistar rats, test animals were exposed to sodium formate at a concentration of 1% (274 mg/kg/day) for 18 months. No neoplasias were observed. Based on lack of mutagenicity and no evidence of carcinogenicity on surrogate chemicals, EPA concluded that the ammonium formate is not expected to be carcinogenic.

Ammonium formate breaks down into ammonium and formate ions. Ammonium ions are ubiquitous in the natural environment and can be considered as having little toxicity or hazard risk. Formate, as noted in the above toxicity discussion, is not excessively toxic. Formate ions are readily converted to carbon dioxide in the environment by biodegradation or photo oxidation.

B. Toxicological Points of Departure/Levels of Concern

No toxicological endpoints of concern were identified based on available toxicity studies on surrogate chemicals. Most of these studies were not conducted up to the limit dose. The highest dose of 200 mg/kg/day in a lifelong study in rats via drinking water did not produce any systemic toxicity. Therefore, a conservative risk assessment was conducted using a NOAEL of 200 mg/kg/day for chronic dietary and short- and intermediate-term dermal exposure risk estimates. An uncertainty/safety factor of 100X (10X for interspecies variability and 10X for interspecies extrapolation) was used. The Food Quality Protection Act (FQPA) factor of 10X was reduced to 1X; therefore, the chronic Reference Dose (cRfD) is equal to chronic Population Adjusted Dose (cPAD). A 100% dermal absorption is assumed for converting oral to dermal equivalent dose in the absence of dermal toxicity or dermal absorption studies. For short- and intermediate-term inhalation exposure, the route-specific study was used. The NOAEL of 0.62 (32 ppm) was observed in a 90–day inhalation toxicity study in rats. The uncertainty factor is 100X (10X for interspecies variability and 10X for interspecies extrapolation). The FQPA factor of 10X was reduced to 1X.

C. Exposure Assessment

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

i. *Acute exposure.* No adverse effect attributable to a single exposure of ammonium formate was seen in the toxicity databases. Therefore, no acute risk from exposure to ammonium formate is expected and an acute exposure assessment is not needed.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment, EPA used food consumption information from the United States Department of Agriculture (USDA) (1994–1996 and 1998) Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, no residue data were submitted for ammonium formate. In the absence of specific residue data, EPA has developed an approach which uses surrogate information to derive upper bound exposure estimates for the subject inert ingredient. Upper bound exposure estimates are based on the highest tolerance for a given commodity from a list of high-use insecticides, herbicides, and fungicides. A complete description of the general approach taken to assess inert ingredient risks in the absence of residue data is contained in the memorandum entitled "Alkyl Amines Polyalkoxylates (Cluster 4): Acute and Chronic Aggregate (Food and Drinking Water) Dietary Exposure and Risk Assessments for the Inerts." (DP Barcode: 361707, S. Piper, 2/25/2009) and can be found at *http://www.regulations.gov* in docket ID number EPA–HQ–OPP–2008–0738.

In the dietary exposure assessment, the Agency assumed that the residue level of the inert ingredient would be no higher than the highest tolerance for a given commodity. Implicit in this assumption is that there would be similar rates of degradation (if any) between the active and inert ingredient and that the concentration of inert ingredient in the scenarios leading to these highest of tolerances would be no higher than the concentration of the active ingredient.

The Agency believes the assumptions used to estimate dietary exposures lead to an extremely conservative assessment of dietary risk due to a series of compounded conservatisms. First, assuming that the level of residue for an inert ingredient is equal to the level of residue for the active ingredient will overstate exposure. The concentration of active ingredient in agricultural products is generally at least 50% of the product and often can be much higher. Further, pesticide products rarely have a single inert ingredient; rather there is generally a combination of different inert ingredients used which additionally reduces the concentration of any single inert ingredient in the pesticide product in relation to that of the active ingredient.

Second, the conservatism of this methodology is compounded by EPA's decision to assume that, for each commodity, the active ingredient which will serve as a guide to the potential level of inert ingredient residues is the active ingredient with the highest tolerance level. This assumption overstates residue values because it would be highly unlikely, given the high number of inert ingredients, that a single inert ingredient or class of ingredients would be present at the level of the active ingredient in the highest tolerance for every commodity. Finally, a third compounding conservatism is EPA's assumption that all foods contain the inert ingredient at

the highest tolerance level. In other words, EPA assumed 100% of all foods are treated with the inert ingredient at the rate and manner necessary to produce the highest residue legally possible for an active ingredient. In summary, EPA chose a very conservative method for estimating what level of inert residue could be on food, and then used this methodology to choose the highest possible residue that could be found on food and assumed that all food contained this residue. No consideration was given to potential degradation between harvest and consumption even though monitoring data show that tolerance level residues are typically one to two orders of magnitude higher than actual residues in food when distributed in commerce.

Accordingly, although sufficient information to quantify actual residue levels in food is not available, the compounding of these conservative assumptions will lead to a significant exaggeration of actual exposures. EPA does not believe that this approach underestimates exposure in the absence of residue data.

iii. *Cancer*. Ammonium formate is not expected to be carcinogenic, since there was no evidence of carcinogenicity in the available studies. The Persistent, Bioaccumulative, and Toxic (PBT) profiler, a component of the Agency's P2 Framework did not raise any cancer concerns. Since the Agency has not identified any concerns for carcinogenicity relating to ammonium formate, a cancer dietary exposure assessment is not necessary to assess cancer risk.

2. *Dietary exposure from drinking water*. For the purpose of the screening level dietary risk assessment to support this request for an exemption from the requirement of a tolerance for ammonium formate, a conservative drinking water concentration value of 100 parts per billion (ppb) based on screening level modeling was used to assess the contribution to drinking water for the chronic dietary risk assessments for parent compound. These values were directly entered into the dietary exposure model. The Agency considers the value of 100 ppb to be a high end, conservative assumption that is not likely to underestimate drinking water risks.

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).

There are no known or anticipated residential uses and therefore, residential exposure is not expected.

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 ammonium formate to share a common mechanism of toxicity with any other substances, and ammonium formate does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that ammonium formate 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

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 pre-natal and post-natal 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.

EPA concluded that the FQPA safety factor could be removed for ammonium formate for the following reasons:

i. No toxicological studies were identified for ammonium formate in the publically available databases. However, ammonium formate breaks down into ammonium and formate ions. Ammonium ions are ubiquitous in the natural environment and can be considered as having little toxicity or hazard risk. There is available data on formic acid and related formate compounds (such as calcium, sodium and methyl formate), which can serve as suitable surrogates for ammonium formate. Studies conducted with methanol are also applicable to formate compounds, since methanol is metabolized into formic acid. Therefore, the database is considered adequate for FQPA assessment.

ii. There is no evidence of increased susceptibility of infants and children in the available reproduction and developmental toxicity studies with calcium formate and/or sodium formate. No developmental or maternal systemic toxicity was observed in rats at doses up to 200 mg/kg/day when calcium formate was administered via drinking water. No developmental or maternal toxicity was observed in mice at doses up to 750 mg/kg gavage dose of sodium formate on gestation day 8. No evidence of increased susceptibility was observed following pre- and post-natal exposure to calcium formate. In a multi-generation reproduction study (3 to 5 generations), no parental, reproductive or offspring toxicity was observed at doses up to 200 mg/kg/day.

iii. No neurotoxicity studies are available in the database. However, there is no evidence of clinical signs of neurotoxicity in the database, nor evidence of susceptibility in the young in the database. Therefore, EPA concluded that the developmental neurotoxicity study is not required. There is no evidence of immunotoxicity in the available database.

iv. The dietary food exposure assessment utilizes highly conservative default assumptions that would not underestimate the dietary risk to all populations. For the purpose of the screening level dietary risk assessment to support this request for an exemption from the requirement of a tolerance for ammonium formate, a value of 100 ppb for drinking water based on screening level modeling was used for the chronic dietary risk assessment. The value of 100 ppb is considered to be a high end, conservative assumption that is not likely to underestimate drinking water risks.

Taking into consideration the available information, EPA concludes the additional 10X FQPA safety factor can be reduced to 1X.

E. Aggregate Risks and Determination of Safety

Determination of safety section. 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 aggregate (food and drinking water) risk*. No adverse effect attributable to a single exposure of ammonium formate was seen in the toxicity databases. Therefore, ammonium formate is not expected to pose an acute risk.

2. *Chronic aggregate (food and drinking water) risk*. A chronic aggregate risk assessment takes into account exposure estimates from chronic dietary consumption of food and drinking water. Using the exposure assumptions discussed in this unit for chronic exposure, the chronic dietary exposure from food and water to ammonium formate is 9.6% of the cPAD for the U.S. population and 31.2% of the cPAD for children 1–2 years old, the most highly exposed population subgroup. The chronic dietary exposure estimates for food and drinking water are below the Agency's level of concern (<100% cPAD) for the U.S. population and all population subgroups. There are no residential uses known or proposed, and therefore, no residential exposure is expected.

3. *Aggregate cancer risk for U.S. population*. The Agency has not identified any concerns for carcinogenicity relating to ammonium formate.

4. *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 ammonium formate residues.

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

The Agency is not aware of any country requiring a tolerance for nor have any CODEX Maximum Residue Levels (MRLs) been established for any food crops at this time.

VI. Conclusions

Therefore, an exemption from the requirement of a tolerance is established under 40 CFR 180.920 for ammonium formate (CAS Reg. No. 540–69–2) when used as an inert ingredient (complexing or fixing agent) in pesticide formulations applied to growing crops.

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: September 7, 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. In § 180.920, the table is amended by adding alphabetically the following inert ingredient to read as follows:

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

* * * * *

Inert ingredients	Limits	Uses
* *	* * *	
Ammonium formate (CAS Reg. No. 540–69–2)		Complexing or fixing agent
* *	* * *	

[FR Doc. 2010–22976 Filed 9–14–10; 8:45 am]
BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0347; FRL–8843–7]

40 CFR Part 180

Carbaryl; Order Denying NRDC's Objections and Requests for Hearing

AGENCY: Environmental Protection Agency (EPA).

ACTION: Order.

SUMMARY: In this order, the Environmental Protection Agency (EPA) denies objections, and requests for hearing on those objections, to a prior order denying a petition requesting that EPA revoke all pesticide tolerances for carbaryl under section 408(d) of the Federal Food, Drug, and Cosmetic Act. The objections and hearing requests were filed on December 29, 2008, by the Natural Resources Defense Council (NRDC). The original petition was also filed by NRDC.

FOR FURTHER INFORMATION CONTACT: Jacqueline Guerry, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (215) 814–2184; e-mail address: *guerry.jacqueline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

In this document, EPA denies objections, and requests for hearing on those objections, submitted by NRDC in response to a prior order denying NRDC's petition requesting that EPA revoke all pesticide tolerances for carbaryl. In addition to NRDC, and others interested in food safety issues generally, this action may be of interest to agricultural producers, food manufacturers, or pesticide manufacturers. Potentially affected entities may include, but are not limited to those engaged in the following activities:

• Crop production (NAICS code 111), e.g., agricultural workers; greenhouse, nursery, and floriculture workers; farmers.

• Animal production (NAICS code 112), e.g., cattle ranchers and farmers, dairy cattle farmers, livestock farmers.

• Food manufacturing (NAICS code 311), e.g., agricultural workers; farmers; greenhouse, nursery, and floriculture workers; ranchers; pesticide applicators.

• Pesticide manufacturing (NAICS code 32532), e.g., agricultural workers; commercial applicators; farmers; greenhouse, nursery, and floriculture workers; residential users.

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 Copies of this Document and Other Related Information?

EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0347. 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. Introduction

A. What Action Is the Agency Taking?

In this order, EPA denies objections, and requests for a hearing on those objections, to an earlier EPA Order, (73 FR 64229), denying a petition to revoke all tolerances established for the pesticide, carbaryl, under the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, (Refs. 1 and 2). Both the objections and hearing requests, as well as the petition, were filed with EPA by NRDC.

NRDC's original petition, dated January 10, 2005, submitted to the carbaryl public docket during the public comment period for the 2004 Amended Interim Reregistration Eligibility Decision (IRED) for Carbaryl, and filed pursuant to FFDCA section 408(d)(1), asserted a number of grounds why carbaryl tolerances allegedly fail to meet the FFDCA's safety standard. The main arguments raised in the petition concerned EPA's drinking water assessment and EPA's decision on the statutory safety factor to protect infants and children that supported the 2004 IRED decision. NRDC also petitioned the Agency to cancel all carbaryl uses pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) 7 U.S.C. 136(bb) and 136a, and argued unreasonable risks on the environment. Subsequently, on November 26, 2007, NRDC petitioned EPA to cancel all carbaryl pet collar uses under FIFRA. (Ref. 3). EPA consolidated this latter petition with the 2005 FFDCA petition because NRDC argued in it that exposure to carbaryl pet collars make the risks presented by carbaryl unsafe within the meaning of FFDCA section 408.

On October 29, 2008, EPA responded to both the 2005 petition to revoke all carbaryl tolerances and the 2007 petition to cancel all pet collar uses, denying them in their entirety. (73 FR 64229, October 29, 2008) (Ref. 4).

NRDC then filed objections to EPA's denial of NRDC's petition to revoke all carbaryl tolerances and requested a hearing on its objections. These objections and hearing requests were filed pursuant to the procedures in the FFDCA, section 408(g)(2). (21 U.S.C. 346a(g)(2)). The objections narrowed NRDC's claims to two main topics – that EPA lacks reliable data to reduce the Food Quality Protection Act (FQPA) Children's Safety Factor and that EPA's exposure assessment for carbaryl is flawed and underestimates the exposure to children from pet collar uses. After carefully reviewing the objections and hearing requests, EPA has determined that NRDC's hearing requests do not satisfy the regulatory requirements for such requests and that its substantive objections are without merit. Therefore, EPA, in this final order, denies NRDC's

objections and its requests for a hearing on those objections.

B. What is the Agency's Authority for Taking This Action?

NRDC petitioned to revoke the carbaryl tolerances pursuant to the petition procedures in FFDCA section 408(d)(1). (21 U.S.C. 346a(d)(1)). Under section 408(d), EPA may respond to such a petition by either issuing a final or proposed rule modifying or revoking the tolerances or issuing an order denying the petition. (21 U.S.C. 346a(d)(4)). Here, EPA responded by issuing an order under section 408(d)(4)(iii) denying the petition. (73 FR 64229, October 29, 2008).

Orders issued under section 408(d)(4)(iii) are subject to a statutorily-created administrative review process. (21 U.S.C. 346a(g)(2)). Any person may file objections to a section 408(d)(4)(iii) order with EPA and request a hearing on those objections. (Id.). EPA is required by section 408(g)(2)(C) to issue a final order resolving the objections to the section 408(d)(4)(iii) order. (21 U.S.C. 346a(g)(2)(C)).

III. Statutory and Regulatory Background

In this Unit, EPA provides background on the relevant statutes and regulations governing NRDC's objections and requests for hearing as well as on pertinent Agency policies and practices. As noted, NRDC's objections and requests for hearing raise two main claims: (1) that EPA has unlawfully failed to retain the full tenfold FQPA safety factor for the protection of infants and children and failed to apply an additional threefold factor due to a deficiency in a critical study; and (2) that EPA underestimated the exposure to children from pet collar uses. The first claim is based on assertions that additional safety factors are needed because of effects observed in a developmental neurotoxicity (DNT) study with carbaryl. The pet collar claim is primarily based upon allegations that EPA does not have sufficient or reliable data with which to assess pet collar exposures and that the assumptions made by EPA underestimate exposure to children. Background information on each of these topics is included in this Unit.

Unit III.A. summarizes the requirements and procedures in section 408 of the FFDCA and applicable regulations pertaining to pesticide tolerances, including the procedures for petitioning for revocation of tolerances and challenging the denial of such petitions and the substantive standards for evaluating the safety of pesticide tolerances. This unit also discusses the closely-related statute under which EPA regulates the sale, distribution, and use of pesticides, FIFRA, (7 U.S.C. 136 *et seq.*).

Unit III.B. provides an overview of EPA's risk assessment process. It contains an explanation of how EPA identifies the hazards posed by pesticides, how EPA determines the level of exposure to pesticides that pose a concern (level of concern), how EPA measures human exposure to pesticides, and how hazard, level of concern conclusions, and human exposure estimates are combined to evaluate risk. Further, this unit presents background information on Agency policies with particular relevance to this action.

A. FFDCA/FIFRA and Applicable Regulations

1. *In general.* EPA establishes maximum residue limits, or "tolerances," for pesticide residues in food under section 408 of the FFDCA. (21 U.S.C. 346a). Without such a tolerance or an exemption from the requirement of a tolerance, a food containing a pesticide residue is "adulterated" under section 402 of the FFDCA and may not be legally moved in interstate commerce. (21 U.S.C. 331, 342). Monitoring and enforcement of pesticide tolerances are carried out by the U.S. Food and Drug Administration (FDA) and the U.S. Department of Agriculture (USDA). Section 408 was substantially rewritten by the Food Quality Protection Act of 1996 (FQPA), which added the provisions discussed below establishing a detailed safety standard for pesticides, additional protections for infants and children, and the estrogenic substances screening program. (Public Law 104–170, 110 Stat. 1489 (1996)).

EPA also regulates pesticides under FIFRA, (7 U.S.C. 136 et seq). While the FFDCA authorizes the establishment of legal limits for pesticide residues in food, FIFRA requires the approval of pesticides prior to their sale and distribution, (7 U.S.C. 136a(a)), and establishes a registration regime for regulating the use of pesticides. FIFRA regulates pesticide use in conjunction with its registration scheme by requiring EPA review and approval of pesticide labels and specifying that use of a pesticide inconsistent with its label is a violation of Federal law. (7 U.S.C. 136j(a)(2)(G)). In the FQPA, Congress integrated action under the two statutes by requiring that the safety standard under the FFDCA be used as a criterion in FIFRA registration actions as to pesticide uses which result in dietary risk from residues in or on food, (7 U.S.C. 136(bb)), and directing that EPA coordinate, to the extent practicable, revocations of tolerances with pesticide cancellations under FIFRA. (21 U.S.C. 346a(l)(1)).

2. *Safety standard for pesticide tolerances.* A pesticide tolerance may only be promulgated by EPA if the tolerance is "safe." (21 U.S.C. 346a(b)(2)(A)(i)). "Safe" is defined by the statute 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." (21 U.S.C. 346a(b)(2)(A)(ii)). Section 408(b)(2)(D) directs EPA, in making a safety determination, to:

> consider, among other relevant factors- ...
> (v) available information concerning the cumulative effects of such residues and other substances that have a common mechanism of toxicity;
> (vi) available information concerning the aggregate exposure levels of consumers (and major identifiable subgroups of consumers) to the pesticide chemical residue and to other related substances, including dietary exposure under the tolerance and all other tolerances in effect for the pesticide chemical residue, and exposure from other non-occupational sources;
> (viii) such information as the Administrator may require on whether the pesticide chemical may have an effect in humans that is similar to an effect produced by a naturally occurring estrogen or other endocrine effects. ... EPA must also consider, in evaluating the safety of tolerances, "safety factors which . . . are generally recognized as appropriate for the use of animal experimentation data."

(21 U.S.C. 346a(b)(2)(D)(ix).

Risks to infants and children are given special consideration. Specifically, section 408(b)(2)(C) states that EPA:

> shall assess the risk of the pesticide chemical based on— ...
> (II) available information concerning the special susceptibility of infants and children to the pesticide chemical residues, including neurological differences between infants and children and adults, and effects of in utero exposure to pesticide chemicals; and
> (III) available information concerning the cumulative effects

on infants and children of such residues and other substances that have a common mechanism of toxicity. ...

This provision also creates a presumptive additional safety factor for the protection of infants and children. Specifically, it directs that "[i]n the case of threshold effects, ... an additional tenfold margin of safety for the pesticide chemical residue and other sources of exposure shall be applied for infants and children to take into account potential pre- and post-natal toxicity and completeness of the data with respect to exposure and toxicity to infants and children." (21 U.S.C. 346a(b)(2)(C)). EPA is permitted to "use a different margin of safety for the pesticide chemical residue only if, on the basis of reliable data, such margin will be safe for infants and children." (Id.). The additional safety margin for infants and children is referred to throughout this order as the "children's safety factor."

3. *Procedures for establishing, amending, or revoking tolerances.* Tolerances are established, amended, or revoked by rulemaking under the unique procedural framework set forth in the FFDCA. Generally, a tolerance rulemaking is initiated by the party seeking to establish, amend, or revoke a tolerance by means of filing a petition with EPA. (See 21 U.S.C. 346a(d)(1)). EPA publishes in the **Federal Register** a notice of the petition filing and requests public comment. (21 U.S.C. 346a(d)(3)). After reviewing the petition, and any comments received on it, EPA may issue a final rule establishing, amending, or revoking the tolerance, issue a proposed rule to do the same, or deny the petition. (21 U.S.C. 346a(d)(4)).

Once EPA takes final action on the petition by either establishing, amending, or revoking the tolerance or denying the petition, any person may file objections with EPA and seek an evidentiary hearing on those objections. (21 U.S.C. 346a(g)(2)). Objections and hearing requests must be filed within 60 days. (Id.). The statute provides that EPA shall "hold a public evidentiary hearing if and to the extent the Administrator determines that such a public hearing is necessary to receive factual evidence relevant to material issues of fact raised by the objections." (21 U.S.C. 346a(g)(2)(B). EPA regulations make clear that hearings will only be granted where it is shown that there is "a genuine and substantial issue of fact," the requestor has identified evidence "which, if established, resolve one or more of such issues in favor of the requestor," and the issue is "determinative" with regard to the relief requested. (40 CFR 178.32(b)). In addition, EPA regulations prescribe the form and manner of submissions for objections and for an evidentiary hearing. (40 CFR 178.25 and 178.27). EPA's final order on the objections is subject to judicial review. (21 U.S.C. 346a(h)(1)).

4. *Tolerance reassessment and FIFRA reregistration.* The FQPA required that EPA reassess the safety of all pesticide tolerances existing at the time of its enactment. (21 U.S.C. 346a(q)). EPA was given 10 years to reassess the approximately 10,000 tolerances in existence in 1996. In this reassessment, EPA was required to review existing pesticide tolerances under the new "reasonable certainty that no harm will result" standard set forth in section 408(b)(2)(A)(i). (21 U.S.C. 346a(b)(2)(A)(i)). This reassessment was substantially completed by the August 3, 2006 deadline. Tolerance reassessment was generally handled in conjunction with a similar program involving reregistration of pesticides under FIFRA. (7 U.S.C. 136a-1). Reassessment and reregistration decisions were generally combined in a document labeled a Reregistration Eligibility Decision (RED).

B. EPA Risk Assessment for Tolerances—Policy and Practice

1. *The safety determination - risk assessment.* To assess risk of a pesticide tolerance, EPA combines information on pesticide toxicity with information regarding the route, magnitude, and duration of exposure to the pesticide. The risk assessment process involves four distinct steps:

- Identification of the toxicological hazards posed by a pesticide;
- Determination of the dose-response analysis in test animals and "level of concern" with respect to human exposure to the pesticide;
- Estimation of human exposure to the pesticide; and
- Characterization of risk posed to humans by the pesticide based on comparison of human exposure to the level of concern.

a. *Hazard identification.* In evaluating toxicity or hazard, EPA reviews toxicity studies, primarily in laboratory animals, to identify any adverse effects on the test subjects. Animal studies typically involve investigating a broad range of effects including gross and microscopic effects on organs and tissues, functional effects on bodily organs and systems, effects on blood parameters (such as red blood cell count, hemoglobin concentration, hematocrit, and a measure of clotting potential), effects on the concentrations of normal blood chemicals (including glucose, total cholesterol, urea nitrogen, creatinine, total protein, total bilirubin, albumin, hormones, and enzymes such as alkaline phosphatase, alanine aminotransfersase and cholinesterase), and behavioral or other gross effects identified through clinical observation and measurement. EPA examines whether adverse effects are caused by different durations of exposure ranging from short-term (e.g., acute) to longer-term (e.g., chronic) pesticide exposure, and different routes of exposure (oral, dermal, inhalation). EPA also evaluates potential adverse effects in different age groups. EPA requires testing for different durations and routes of exposure and different age groups in multiple species of laboratory animals (e.g., rat, mouse, dog, rabbit).

EPA also considers whether the adverse effect has a threshold - a level below which exposure has no appreciable chance of causing the adverse effect. For non-threshold effects, EPA assumes that any exposure to the substance increases the risk that the adverse effect may occur. At present, EPA only considers one adverse effect, the chronic effect of cancer, to potentially be a non-threshold effect. (Ref. 5 at 8–9). Because this matter involves a pesticide with threshold effects, assessment of non-threshold effects is not further discussed. Moreover, the toxic effects of carbaryl are short in duration (1 day or less) and, as such, long-term, chronic threshold effects are not discussed further here.

b. *Level of concern/dose-response analysis.* Once a pesticide's potential hazards are identified, EPA determines a toxicological level of concern for evaluating the risk posed by human exposure to the pesticide. In this step of the risk assessment process, EPA essentially evaluates the levels of exposure to the pesticide at which effects might occur. An important aspect of this determination is assessing the relationship between exposure (dose) and response (often referred to as the dose-response analysis).

In examining the dose-response relationship for a pesticide's threshold effects, EPA evaluates an array of toxicity studies on the pesticide. In each of these studies, EPA attempts to identify the lowest observed adverse effect level (LOAEL) and the next lower dose at which there are no observed adverse affect levels (NOAEL). Often, EPA will use the lowest NOAEL from the relevant available studies — for the duration and route for which risk is being assessed, as a starting point (called the Point of Departure (POD)) in estimating the level of concern for

humans. (Ref. 5 at 9 (The POD is simply the "dose that serves as the starting point in extrapolating a risk to the human population.")). At times, however, EPA will use a LOAEL from a study on the most sensitive endpoint as the POD when no NOAEL is identified in that study. Alternatively, in the absence of a NOAEL for the most sensitive adverse effect, EPA will use the LOAEL as the risk assessment POD, and determine an extrapolated NOAEL by dividing the LOAEL by an uncertainty factor.

EPA is increasingly using modeling to ascertain what is referred to as a Benchmark Dose (BMD) as a substitute for a NOAEL in selecting a POD. In its revised assessment of carbaryl, EPA used a BMD approach for deriving the POD from the available rat toxicity studies. (Ref. 8). A benchmark dose, or BMD, is a point estimate along a dose-response curve that corresponds to a specific response level. For example, a BMD_{10} represents a 10% change from the background level (the background level is typically derived from the control group). Generically, the direction of change from background can be an increase or a decrease depending on the biological parameter and the chemical of interest. In the case of carbaryl, a reduction in acetylcholinesterase (AChE) activity (referred to as "inhibition" of AChE) is the toxic effect of concern. In addition to a BMD, a "confidence limit" may also be calculated. Confidence limits express the uncertainty in a BMD that may be due to sampling and/or experimental error. The lower confidence limit on the dose used as the BMD is termed the BMDL, which the Agency uses as the POD. Use of the BMDL for deriving the POD rewards better experimental design and procedures that provide more precise estimates of the BMD, resulting in tighter confidence intervals. Use of the BMDL also helps ensure with high confidence (e.g., 95% confidence) that the selected percentage of AChE inhibition is not exceeded.

Numerous scientific peer review panels over the last decade have supported the Agency's application of the BMD approach as a scientifically supportable method for deriving PODs in human health risk assessment, and as an improvement over the historically applied approach of using NOAELs or LOAELs. The NOAEL/LOAEL approach does not account for the variability and uncertainty in the experimental results, which are due to characteristics of the study design, such as dose selection, dose spacing, and sample size. With the BMD approach, all the dose response data are used to derive a POD. Moreover, the response level used for setting regulatory limits can vary based on the chemical and/or type of toxic effect (Refs. 6, 7 and 8).

The POD is, in turn, used in choosing a level of concern. EPA will make separate determinations as to the Points of Departure, and correspondingly levels of concern, for both short and long exposure periods as well as for the different routes of exposure (oral, dermal, and inhalation). In estimating and describing the level of concern, the POD is at times used differently depending on whether the risk assessment addresses dietary or non-dietary exposures. For dietary risks, EPA uses the POD to calculate an acceptable level of exposure or safe dose. This safe dose has been traditionally referred to as the reference dose (RfD). The RfD is defined as the risk assessment POD divided by all uncertainty/safety factors (UF/SFs) except those specific to FQPA. The Population Adjusted Dose (PAD), on the other hand, is defined as the POD divided by all UF/SFs, including those specific to FQPA. In cases where there are no UF/SFs specific to FQPA, the RfD and PAD are numerically identical. Typically, EPA uses a baseline safety/uncertainty factor equal to 100. These factors include a factor of 10 (10X) where EPA is using data from laboratory animals (inter-species factor) to reflect potentially greater sensitivity in humans than laboratory animals and a factor of 10X to account for potential variations in sensitivity among members of the human population (intra-species factor) as well as other unknowns. Additional uncertainty factors may be added to address data deficiencies or concerns raised by the existing data. Under the FQPA, a safety factor of 10X is presumptively applied to protect infants and children, unless reliable data support selection of a different factor. This FQPA safety factor largely replaces pre-FQPA EPA practice regarding additional safety factors. (Ref. 9 at 4–11).

c. *Estimating human exposure*. Risk is a function of both hazard and exposure. Thus, equally important to the risk assessment process as determining the hazards posed by a pesticide and the toxicological level of concern for those hazards is estimating human exposure. Under FFDCA section 408, EPA is concerned not only with exposure to pesticide residues in food but also exposure resulting from pesticide contamination of drinking water supplies and from use of pesticides in the home or other non-occupational settings. (See 21 U.S.C. 346a(b)(2)(D)(vi)). EPA considers multiple routes of exposure (oral, dermal, and inhalation) and aggregates these exposures where scientifically appropriate. Because EPA exposure estimates are not involved in EPA's determination of this matter, no further description of EPA exposure assessment practices is included.

d. *Risk characterization*. The final step in the risk assessment is risk characterization. In this step, EPA combines information from the first three steps (hazard identification, level of concern/dose-response analysis, and human exposure assessment) to quantitatively estimate the risks posed by a pesticide. Separate characterizations of risk are conducted for different durations of exposure. Additionally, where appropriate, EPA aggregates exposures across different routes in characterizing risk.

In estimating and describing the level of concern, the POD is at times used differently depending on whether the risk assessment addresses dietary or non-dietary exposures. For threshold risks, EPA estimates risk in one of two ways. Where EPA has calculated a RfD/PAD, risk is estimated by expressing human exposure as a percentage of the RfD/PAD. Exposures lower than 100 percent of the RfD/PAD are generally not of concern. Alternatively, EPA may express risk by comparing the Margin of Exposure (MOE) between estimated human exposure and the POD with the acceptable or target MOE. The acceptable or target MOE is the product of all applicable safety factors. To calculate the actual MOE for a pesticide, estimated human exposure to the pesticide is divided into the POD. In contrast to the RfD/PAD approach, the higher the MOE, the less risk posed by the pesticide. Accordingly, if the target MOE for a pesticide is 100, MOEs equal to or exceeding 100 would generally not be of concern.

As a conceptual matter, the RfD/PAD and MOE approaches are fundamentally equivalent. For a given risk and given exposure of a pesticide, if exposure to a pesticide were found to be acceptable under an RfD/PAD analysis it would also pass under the MOE approach, and vice-versa. However, for any specific pesticide, risk assessments for different exposure durations or routes may yield different results. This is a function not of the choice of the RfD/PAD or MOE approach but of the fact that the levels of concern and the levels of exposure may differ depending on the duration and route of exposure.

2. *EPA policy on the children's safety factor*. As the above brief summary of EPA's risk assessment practice indicates, the use of safety factors plays

a critical role in the process. This is true for traditional 10X safety factors to account for potential differences between animals and humans when relying on studies in animals (inter-species safety factor) and potential differences among humans (intra-species safety factor) as well as the FQPA 10X children's safety factor.

In applying the children's safety factor provision, EPA has interpreted it as imposing a presumption in favor of applying a 10X safety factor to the 10X inter-species and 10X intra-species safety factors. (Ref. 9 at 4, 11). Thus, EPA generally refers to the 10X children's safety factor as a presumptive or default 10X factor. EPA has also made clear, however, that this presumption or default in favor of the 10X children' safety is only a presumption. The presumption can be overcome if reliable data demonstrate that a different factor is safe for children. (Id.). In determining whether a different factor is safe for children, EPA focuses on the three factors listed in section 408(b)(2)(C) - the completeness of the toxicity database, the completeness of the exposure database, and potential pre- and post-natal toxicity. In examining these factors, EPA strives to make sure that its choice of a safety factor, based on a weight-of-the-evidence evaluation, does not understate the risk to children. (Id. at 24–25, 35).

3. *EPA policy on cholinesterase inhibition*. Carbaryl is a member of the *N*-methyl carbamate class of pesticides. Each member of this class shares the ability to inhibit the enzyme, acetylcholinesterase, leading to neurotoxicity. *N*-methyl carbamate neurotoxicity is characterized by the rapid onset (often 15–30 minutes) and rapid recovery (within hours). Cholinesterase inhibition is a disruption of the normal process in the body by which the nervous system chemically communicates with muscles and glands. Communication between nerve cells and a target cell (i.e., another nerve cell, a muscle fiber, or a gland) is facilitated by the chemical, acetylcholine. When a nerve cell is stimulated it releases acetylcholine into the synapse (or space) between the nerve cell and the target cell. The released acetylcholine binds to receptors in the target cell, stimulating the target cell in turn. As EPA has explained, "the end result of the stimulation of cholinergic pathway(s) includes, for example, the contraction of smooth (e.g., in the gastrointestinal tract) or skeletal muscle, changes in heart rate or glandular secretion (e.g., sweat glands) or communication between nerve cells in the brain or in the autonomic ganglia of the peripheral nervous system." (Ref. 10 at 10).

Acetylcholinesterase (AChE) is an enzyme that breaks down acetylcholine and terminates its stimulating action in the synapse between nerve cells and target cells. When AChE is inhibited, acetylcholine builds up, prolonging the stimulation of the target cell. This excessive stimulation potentially results in a broad range of adverse effects on many bodily functions including muscle cramping or paralysis, excessive glandular secretions, or effects on learning, memory, or other behavioral parameters. Depending on the degree of inhibition these effects can be serious, even fatal.

EPA's cholinesterase inhibition policy statement explains EPA's approach to evaluating the risks posed by cholinesterase-inhibiting pesticides such as carbaryl. (Ref. 10). The policy focuses on three types of effects associated with cholinesterase-inhibiting pesticides that may be assessed in animal and human toxicological studies: (1) physiological and behavioral/functional effects; (2) cholinesterase inhibition in the central and peripheral nervous system; and (3) cholinesterase inhibition in red blood cells and blood plasma. The policy discusses how such data should be integrated in deriving a POD for a cholinesterase-inhibiting pesticide.

EPA uses a weight-of-the-evidence approach to determine the toxic effect that will serve as the appropriate POD for a risk assessment for AChE inhibiting pesticides, such as carbaryl (Id). The neurotoxicity that is associated with these pesticides can occur in both the central (brain) and the peripheral nervous system. In its weight-of-the-evidence analysis, EPA reviews data, such as AChE inhibition data from the brain, peripheral tissues and blood (e.g., red blood cell (RBC) or plasma), in addition to data on clinical signs and other functional effects related to AChE inhibition. Based on these data, EPA selects the most appropriate effect on which to regulate; such effects can include clinical signs of AChE inhibition, central or peripheral nervous tissue measurements of AChE inhibition, or RBC AChE measures (Id). Although RBC AChE inhibition is not adverse in itself, it is a surrogate for inhibition in peripheral tissues when peripheral data are not available. As such, RBC AChE inhibition provides an indirect indication of adverse effects on the nervous system (Id.). Measures of AChE inhibition in the peripheral nervous system are very rare for *N*-methyl carbamate pesticides and no such peripheral data exists for carbaryl. For these reasons, other state and national agencies such as California, Washington, Canada, the European Union, as well as the World Health Organization (WHO), all use blood measures in human health risk assessment and/or worker safety monitoring programs.

4. *EPA policy on assessing risk from cumulative effects from pesticides with a common mechanism of toxicity*. Section 408(b)(2)(D) of the FFDCA directs EPA to consider available information on the cumulative effects on human health resulting from exposure to multiple pesticide chemicals that have a common mechanism of toxicity. EPA begins a cumulative risk assessment by identifying a group of pesticides, called a common mechanism group, that bring about the same toxic effect by a common mechanism of toxicity. Pesticides share a common mechanism of toxicity if they act the same way in the body; that is, if the same toxic effect occurs in the same organ or tissue by essentially the same sequence of major biochemical events.

There are many steps involved in quantitatively assessing the potential human health risk associated with exposure to the *N*-methyl carbamate pesticides. The complex series of evaluations involve hazard and dose-response analyses; assessments of food, drinking water, residential/non-occupational exposures; combining exposures to produce a cumulative risk estimate; and risk characterization. Given the complexity of the analyses, EPA's policy is to only conduct a cumulative assessment if each of the individual chemicals in the assessment has been determined to be "safe," based on aggregate exposures only to that individual chemical.

IV. Regulatory History of Carbaryl

A. In General

Carbaryl is a carbamate insecticide and molluscide that was first registered in 1959 for use on cotton. Carbaryl has many trade names, but is most commonly known as Sevin®. At the time carbaryl was assessed for purposes of reregistration, carbaryl was registered for use on over 400 agricultural and non-agricultural use sites, and there were more than 140 tolerances for carbaryl in the Code of Federal Regulations (40 CFR 180.169). The primary risk of concern from exposure to carbaryl is acute neurotoxic effects. Carbaryl is a member of the *N*-methyl carbamate class of pesticides. This group shares a common mechanism of toxicity; namely, the ability to inhibit

the enzyme acetylcholinesterase (AChE) through carbamylation of the active site. Pesticides included is this group, other than carbaryl, are aldicarb, carbofuran, formetanate hydrochloride, methiocarb, methomyl, oxamyl, pirimicarb, propoxur, and thiodicarb.

B. FFDCA Tolerance Reassessment and FIFRA Pesticide Reregistration

1. *Interim reregistration eligibility decision.* EPA completed an interim reregistration eligibility decision (IRED) for carbaryl on June 30, 2003 (2003 IRED). The decision on reregistration was treated as interim because of carbaryl's membership in the *N*-methyl carbamate cumulative group. When EPA determines that a pesticide shares a common mechanism of toxicity with other substances, EPA cannot complete either the assessment or reassessment of a tolerance or a registration or reregistration determination until it has assessed available information regarding exposures to the other substances. For these pesticides, EPA's practice is to issue an IRED pending completion of the tolerance reassessment activities. An IRED memorializes EPA's determination on a narrowly defined issue: Whether a given active ingredient alone is eligible for reregistration under FIFRA and tolerance reassessment under the FFDCA, pending a cumulative assessment for pesticides sharing a common mechanism of toxicity.

Although EPA found in the 2003 IRED that carbaryl dietary exposures from food and water were below the relevant safe doses (i.e., the acute PAD (aPAD) and chronic PAD (cPAD)), EPA concluded that numerous residential uses posed a risk of concern. Accordingly, the 2003 IRED specified various changes to the carbaryl registration to address these risks, including: Canceling liquid broadcast applications to home lawns pending EPA review of pharmacokinetic data to refine post-application risk estimates; repackaging home garden/ornamental dust products in ready-to-use shaker can containers, with no more than 0.05 lbs. active ingredient (ai) per container; canceling the following uses and application methods — all pet uses (dusts and liquids) except collars, aerosol products for various uses, belly grinder applications of granular and bait products for lawns, hand applications of granular, and bait products for ornamentals and gardens.

2. *Amended interim reregistration eligibility decision.* The Agency amended the 2003 IRED on October 22, 2004 (2004 Amended IRED), and published a formal Notice of Availability for the document, which provided for a 60–day public comment period. EPA received numerous comments on the carbaryl 2004 Amended IRED, including the NRDC petition requesting that EPA cancel all carbaryl registrations and revoke all tolerances. The mitigation detailed in the 2004 Amended IRED for residential uses included limiting applications of liquid formulations to residential turf areas to spot treatment only; requiring dust formulations to be packaged in a ready-to-use container containing no more than 0.05 lbs ai/container; and cancelation of all pet uses, except for carbaryl treated pet collars. On March 9, 2005, EPA issued a cancellation order for the liquid broadcast use of carbaryl on residential turf to address post-application risk to toddlers. (Ref. 11). In March 2005, EPA also issued generic and product-specific data call-ins (DCIs) for carbaryl. The carbaryl generic DCI required several studies of the active ingredient carbaryl, including additional toxicology, worker exposure monitoring, and environmental fate data. The product-specific DCI required acute toxicity and product chemistry data for all pesticide products containing carbaryl; these data are being used for product labeling. EPA has received numerous studies in response to these DCIs, and, where appropriate, these studies were considered in the tolerance reassessment.

In response to the DCIs, many carbaryl registrants chose to voluntarily cancel their carbaryl products, rather than revise their labels or conduct studies to support these products. EPA published a notice of receipt of these requests in the **Federal Register** on October 28, 2005 (70 FR 62112), followed by a cancellation order issued on July 3, 2006. One technical registrant, Burlington Scientific, chose to cancel their technical product, leaving Bayer CropScience (Bayer) as the sole technical registrant for carbaryl. Approximately two-thirds of all of the carbaryl products registered at the time of the 2003 IRED have been canceled through this process.

Bayer subsequently requested that all of their carbaryl registrations be amended to delete the following uses: carbaryl use in or on pea and bean, succulent shelled (subgroup 6B); millet; wheat; pre-plant root dip for sweet potato; pre-plant root dip/drench for nursery stocks, vegetable transplants, bedding plants, and foliage plants; use of granular formulations on leafy vegetables (except Brassica); ultra low volume (ULV) application for adult mosquito control; and dust applications in agriculture. EPA notified all affected registrants that these uses and application methods must be deleted from their carbaryl product labels. EPA identified 34 product labels from 14 registrants (other than Bayer) bearing these end uses. All of these registrants requested that their affected carbaryl product registrations be amended to delete these uses. EPA published Notices of receipt of these requests from Bayer and all 14 registrants in the **Federal Register** on August 20, 2008 and October 15, 2008. On March 18, 2009, the Agency published an order granting the requests to delete uses (74 FR 11553). Most recently, in a letter dated September 30, 2009, Wellmark International submitted a request to voluntarily cancel its pet collar registrations pursuant to section 6(f) of FIFRA (74 FR 54045, October 21, 2009). These are the only carbaryl pet collar registrations and the last remaining pet product registrations for carbaryl. EPA issued its final order cancelling carbaryl registrations for pet collar uses on December 16, 2009. (74 FR 66642, December 16, 2009).

3. *Reregistration eligibility decision.* As noted, the reregistration eligibility decision had to remain interim in nature until the *N*-methyl carbamate cumulative risk assessment was completed. That assessment was issued on September 26, 2007, and EPA concluded that the cumulative risks associated with the *N*-methyl carbamate pesticides meet the safety standard set forth in section 408(b)(2) of the FFDCA, provided that the mitigation specified in the *N*-methyl carbamate cumulative risk assessment is implemented, such as cancellation of all uses of carbofuran, termination of methomyl use on grapes, etc. EPA has therefore terminated the tolerance reassessment process under 408(q) of the FFDCA. (See Ref. 12 for additional information).

In conjunction with the *N*-methyl carbamate cumulative risk assessment, EPA completed a RED for carbaryl on September 24, 2007 (the RED was issued on October 17, 2007 with a formal Notice of Availability in the **Federal Register** (72 FR 58844)). (Ref. 12). In addition to relying on the *N*-methyl carbamate cumulative risk assessment to determine that the cumulative effects from exposure to all *N*-methyl carbamate residues, including carbaryl, was safe, the carbaryl RED relied upon the revised assessments and the mitigation that had already been implemented (e.g., cancellation of pet uses except for collars). Additionally, the RED included additional mitigation with respect to granular turf products for residential use; namely, that product labels direct users to water the product in immediately after application. EPA

subsequently completed an addendum to the carbaryl RED, dated August 25, 2008, which incorporated the results of a revised occupational risk assessment and modified mitigation measures for the protection of workers. The Agency issued a Notice of Availability for the RED addendum in the October 29, 2008 **Federal Register** (73 FR 64317).

4. *Risk assessment issues with the IRED and RED relevant to NRDC petition*—a. *selection of POD.* When deriving Points of Departure and assigning uncertainty/safety factors in risk assessment, EPA looks at all the appropriate data available at a given time. In cases when new data become available improving the quality of the overall toxicological database, it is typical practice to re-consider previous decisions of the most appropriate Point(s) of Departure and uncertainty factors. Specific to carbaryl, Points of Departures and uncertainty/safety factors have changed over time as new data have become available to fill data gaps, provide additional information on existing data, and describe the effects in juvenile animals.

For the 2003 IRED and 2004 Amended IRED, the POD for acute exposure was from a developmental neurotoxicity (DNT) study. The POD used for risk assessment was 1 milligrams/kilogram/day (mg/kg/day) based upon the results of the DNT study. In the DNT study the LOAEL was 10 mg/kg/day based upon functional observational changes (pinpoint pupils, tremors, and gait abnormalities). Also occurring in this study were morphometric changes in the brain with a LOAEL of 10 mg/kg/day: bilateral decrease in the size of the forebrain in adult males; a bilateral decrease in the length of the cerebella in female pups; and a bilateral increase in the length of the cerebella in female adults. A NOAEL for these effects was not identified in the study because a morphometric analysis was conducted in only the control and high-dose groups (10 mg/kg/day), but not in low-dose (0.1 mg/kg/day) or mid-dose (1.0 mg/kg/day) groups. Initially, upon review of the data, EPA had requested that morphometric analysis of the low-dose and mid-dose groups be conducted, but this was not possible because the brain tissues had dried during the preservation process. Nonetheless, EPA determined that the developmental NOAEL was likely 1 mg/kg/day. This conclusion was based on the finding that the morphometric changes, although statistically significant, were minimal in nature and, therefore, judged not likely to be present at the mid-dose of 1 mg/kg/day. (Refs. 13, 14, and 15).

Subsequently, in November of 2006, OPP received data from a carbaryl comparative cholinesterase assay study (CCA study) performed by EPA's Office of Research and Development. CCA studies are specially designed toxicity studies that evaluate comparative sensitivity in adult and juvenile rats with respect to inhibition of cholinesterase activity. In the case of the carbaryl CCA study, the juvenile rats were aged post-natal day 11 and 17 (PND11 and PND17).

In the carbaryl CCA, a time course study was first conducted to determine the time to peak ChE effects followed by a dose-response study where rats were dosed by oral gavage with corn oil or 3, 7.5, 15, or 30 mg carbaryl/kg body weight. All ages received the same dose so as to better compare the effects across ages. The dose was given at 2 ml/kg. Therefore, the dosing solutions were 0, 1.5, 3.75, 7.5, or 15 mg/ml. In 2007, EPA conducted a BMD analysis for the carbaryl CCA study, using the same modeling methodology used in the *N*-methyl carbamate cumulative risk assessment. This BMD analysis demonstrated sensitivity of PND11 and PND17 pups compared to adult ORD ChE data. Previously, in 2005 and in support of the *N*-methyl carbamate cumulative risk assessment, the Agency also conducted a BMD analysis of brain and RBC cholinesterase inhibition in rat oral toxicity studies for adults. (Ref. 16, see also Refs. 17 and 18). The BMD_{10} is the estimated benchmark doses that results in 10% cholinesterase inhibition (a level generally regarded as not an adverse effect), and the $BMDL_{10}$ is the lower 95% confidence interval on the BMD_{10}, for the data evaluated. Generally, the BMD_{10} is used to compare across compartments and across ages but the $BMDL_{10}$ is used as the POD. The results of the study are presented in the following table in terms of the BMD_{10} and $BMDL_{10}$:

Age	Brain (mg/kg)		RBC (mg/kg	
	BMD_{10}	$BMDL_{10}$	BMD	$BMDL_{10}$
PND11	1.46	1.14	1.11	0.78
PND17	3.00	2.37	1.41	1.05
Adults	2.63	2.03	0.96	0.73

As the table shows, juvenile 11–day old (PND11) pups were 1.8 times more sensitive to inhibition of brain cholinesterase than adult rats in terms of BMDs. The BMD analyses show that the brain BMD for pups is protective of adults since the pup BMD values are lower than adult values. For the red blood cell cholinesterase (RBC ChE) compartment, the RBC BMD_{10} in PND11 pups is similar to that in adults. Although the RBC $BMDL_{10}$ for PND11 pups is numerically lower (0.8 mg/kg) than the $BMDL_{10}$ for PND11 brain AChE inhibition (1.1 mg/kg), the magnitude of this difference is not biologically meaningful, particularly in light of the similarity in BMD_{10}s, and considering the higher variability typically seen in RBC measurements relative to brain. Brain represents the target tissue for the *N*-methyl carbamates as opposed to using a surrogate measure (RBC) and the brain $BMDL_{10}$ of 1.1 mg/kg would be protective of both central nervous system and peripheral nervous system effects. (Refs. 17 and 18).

For the carbaryl risk assessment, the $BMDL_{10}$ for inhibition of brain cholinesterase in PND11 juveniles from the CCA study was chosen as the most sensitive and appropriate POD for calculating a safe dose instead of using an extrapolated NOAEL from the DNT study. Several factors were critical to that determination. First, the CCA study is considered a sentinel study for the *N*-methyl carbamates as it evaluates the most sensitive endpoint (cholinesterase inhibition) in the most sensitive age group (PND11) at the time of peak effect. For each *N*-methyl carbamate with a valid CCA study, this study is being used in the risk assessment to inform the children's safety factor or the POD. EPA has high confidence in the quality of the data from the carbaryl study because it used a broad range of doses and used the radiometric method of measuring AChE inhibition. (Ref. 19). The radiometric method for assaying

ACHe inhibition provides the most appropriate method for measuring cholinesterase inhibition due to *N*-methyl carbamate exposure because factors (i.e., assay temperature, dilution, and incubation time) which promote reversibility are minimized.

Second, gavage studies, such as the CCA study, are the preferred and most sensitive studies for carbaryl. The toxicity profile of carbaryl and other *N*-methyl carbamates is characterized by a rapid onset of toxicity with a peak time of effect around 15 to 60 minutes and rapid recovery (typical half-lives in adult rats are 1 to 2 hours). This pattern of toxicity is shown in Figure 1 for carbaryl.

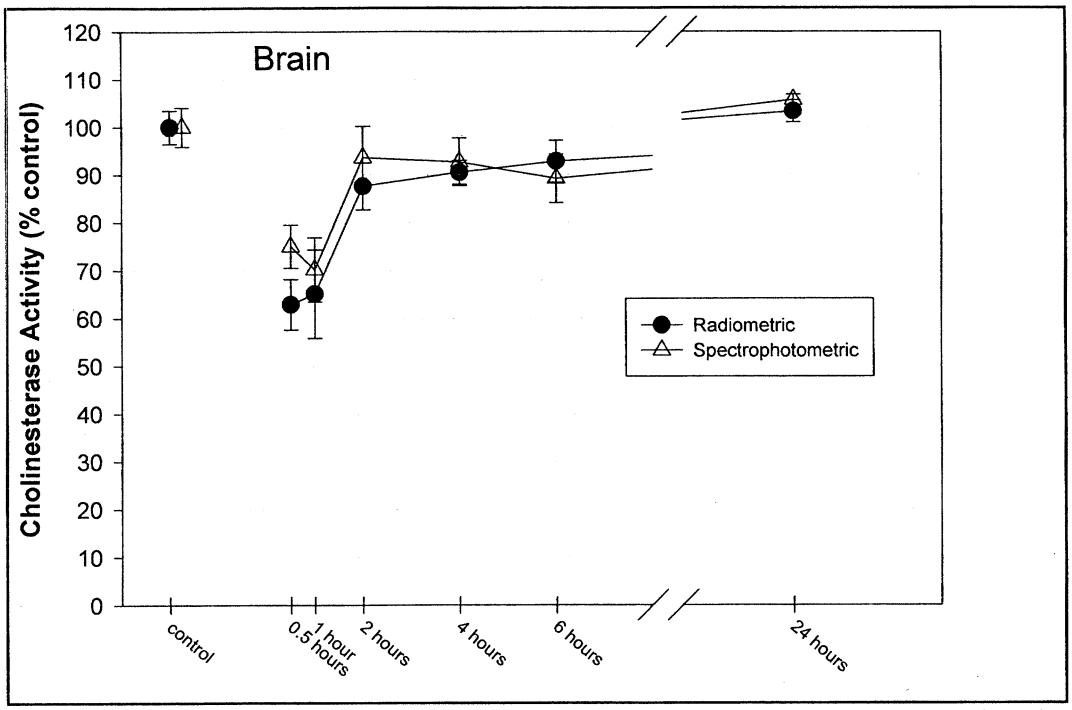

Figure 1. Time course of brain AChE inhibition in adult rats exposed to carbaryl

With *N*-methyl carbamates, due to rapid recovery, toxicity does not accumulate in juveniles or adults with repeated exposures. As such, EPA is most concerned about acute effects, particularly those which occur at the peak time of effect. The Agency has found for these pesticides that acute studies, particularly via gavage administration, provide the most sensitive effects (i.e., more health protective) for risk assessment. Specifically, acute gavage studies provide more sensitive effects than studies administered in the diet, even studies of much longer durations. For example, the NOAEL and LOAEL for RBC AChE inhibition in the carbaryl dietary 2–year rat chronic/carcinogenicity study are 10/12[1] mg/kg/day and 60.2/78.6 mg/kg/day in adult rats, whereas the BMD_{10}/$BMDL_{10}$ for RBC AChE inhibition in adult rats in acute gavage studies are 0.96 and 0.73 mg/kg. Based on this comparison, the acute gavage study provides toxicity values almost tenfold more sensitive than in the 2–year feeding study.

This pattern of toxicity is somewhat unique to this class of pesticides and can be attributed to the pharmacokinetic and pharmacodynamic properties of *N*-methyl carbamates, like carbaryl. The parent active ingredient, carbaryl, is the toxicologically active compound. As such, no metabolic activation is required; instead, metabolism results in detoxification of carbaryl. As evidenced by the rapid onset of toxicity, these pesticides are rapidly absorbed, distributed, and cleared from the body.

For this class of pesticides, neurotoxicity is correlated to peak concentrations of carbaryl. Specifically, brain tissue levels and inhibition of brain AChE at the time of peak effect are highly correlated. In dietary administration studies like the 2–year study and the DNT study, rats are exposed to carbaryl over several hours of feeding. This is in contrast to a bolus dose in gavage studies where the entire dose is given at one time. In the dietary studies, the total *administered dose* of carbaryl consumed may be equal or even higher than the gavage dose. However, it is the *internal dose* of carbaryl at the target tissues which is related to the magnitude to toxicity. In the dietary studies, due to the rapid metabolism and clearance, carbaryl does not reach a peak level like that in gavage studies at the target tissues and thus the degree of toxicity in dietary studies is far less than that for gavage studies. As a result, acute gavage studies tend to be far more sensitive than dietary studies for *N*-methyl carbamates. This is the case for carbaryl as shown by the high quality and sensitive data from the CCA study.

Finally, the changes in brain morphometrics (10 mg/kg) from the DNT study originally used in the POD derivation were determined to be a marginal effect not consistently seen in carbarmate pesticides. (See Unit IV.B.4.b. for a full discussion of EPA's review of the DNT study.) Although a 10X uncertainty factor was originally applied to the marginal brain morphometric endpoint, the real NOAEL is likely greater than 1 mg/kg and less than 10 mg/kg.

In any event, the extrapolated NOAEL from the DNT study is essentially

[1] Two values are provided for males/females.

equivalent to the $BMDL_{10}$ for PND11 juveniles in the CCA study (i.e., 1 mg/kg/day as compared to 1.1 mg/kg/day). As explained below, if the LOAEL from the DNT was used in calculating a safe dose, EPA would retain a children's safety factor of no greater than 10X due to the lack of a NOAEL in that study. Retention of a children's safety factor of 10X would make the extrapolated NOAEL for the DNT study essentially equivalent to the $BMDL_{10}$ for PND11 juveniles in the CCA study (i.e., 1 mg/kg/day as compared to 1.1 mg/kg/day).

b. *Children's safety factor.* With respect to the children's safety factor, in preliminary reviews undertaken in 1999 and 2001, EPA initially retained the full 10X safety factor for carbaryl. The reasons for retaining the 10X children's safety factor were that EPA was missing a two-generation reproduction study for carbaryl and the DNT study showed changes in brain morphometric measurements of the offspring which raised concerns. The data from the DNT study showed that for the first generation pups, there were *no* treatment-related effects on pup weight, pup survival indices, developmental landmarks (tooth eruption and eye opening), Functional Observational Battery (FOB) measurements or motor activity assessments. There were also *no* treatment related effects on brain weight and gross or microscopic pathology. There were, however, changes noted in brain morphometric measurements at the high dose (10 mg/kg/day): Bilateral decrease in the size of the forebrain in adult males; a bilateral decrease in the length of the cerebella in female pups; and a bilateral increase in the length of the cerebella in female adults. EPA requested that a morphometric analysis of the low-dose and mid-dose groups be conducted, but this was not possible because brain samples had not been prepared for measurement and the tissues had dried during the preservation process. At the time, EPA found these changes at the high dose to be significant. (See generally Refs. 20, 21, 22, 23, 24, 25 and 26).

When new information became available in 2002, EPA removed the 10X safety factor for acute dietary and short- and intermediate-term exposures. (Refs. 13, 14 and 15). Not only did EPA receive a new two-generation reproduction study (and therefore no longer had any data gaps) but EPA also obtained new brain morphometric measurements from the DNT study for the control and high-dose groups. The new measurements demonstrated that even at the high dose, the morphometric changes, although statistically significant, were minimal in nature. This is consistent with the DNT study results for other *N*-methyl carbamates (aldicarb and carbofuran), which did not show any changes in morphometrics. In addition, the DNTs available for all three *N*-methyl carbamates have not shown any long-term effects, including effects on behavior. The Agency is also not aware of any literature studies that have shown any changes in brain histopathology following *N*-methyl carbamate exposure to animals of any age. Based on this information, EPA concluded that the brain morphometic effects were not likely to be present at the mid-dose. (Refs. 13, 14 and 15). Because the developmental effects in the DNT were now well-characterized and the evidence strongly indicated that no brain morphometric changes would have been present at the mid-dose (1 mg/kg/day), EPA determined that the children's safety factor was not needed. In addition, there were no concerns or residual uncertainties for pre- and/or postnatal toxicity from other carbaryl development studies.

After EPA received the CCA study in 2006, it modified its decision on the children's safety factor slightly. As explained above, the $BMDL_{10}$ for PND11 juveniles from the CCA study was chosen for the POD in calculating a safe dose. Because (1) EPA had a complete data set for carbaryl including high quality data comparing the relative sensitivity of adults and the young, (2) the effects in the young had been well-characterized, and (3) the most sensitive effect in the young (the $BMDL_{10}$ from the CCA study) was being used to calculate the safe dose (i.e., the $BMDL_{10}$ was divided by inter- and intra-species safety factors), EPA determined that a children's safety factor was not needed for risk assessments based on the CCA study. Where carbaryl assessments relied on other data not involving the testing of juveniles, EPA retained a children's safety factor of 1.8X reflecting the degree of sensitivity of the young observed in the CCA study.

c. *Calculation of safe dose/aPAD for carbaryl.* For dietary risks, EPA calculated the aPAD by dividing the dietary POD (the $BMDL_{10}$ for PND11 juveniles in the CCA study) by the inter-species and intra-species safety factors (100X) to yield a value of 0.01 mg/kg. For dermal risks, instead of calculating an aPAD, EPA assessed risk under a MOE approach. The acceptable or target MOE was calculated using a POD of 86 mg/kg. The POD was obtained by multiplying the $BMDL_{10}$ of 30.56 mg/kg from the dermal toxicity study by 2.8, because in an *in vitro* dermal absorption study, rat skin was 2.8 times more permeable than human skin to carbaryl. The target MOE for risk assessment is 100 for adults because the inter-species and intra-species safety factors total 100X. The target MOE for risk assessment for infants and children is 180 because, in addition to the 100X, the children's safety factor is 1.8X.

V. NRDC Petitions Regarding Carbaryl

In the underlying petition, NRDC requested, among other things, that EPA cancel all carbaryl registrations and revoke all carbaryl tolerances. (Ref. 2). NRDC's January 10, 2005 petition was submitted in the form of comments on and requests for changes to the Carbaryl Interim Reregistration Eligibility Decision published in the **Federal Register** on October 27, 2004, 70 FR 62663. Nonetheless, in the introduction to the comments, NRDC included a statement that NRDC was also petitioning the Agency to revoke all carbaryl tolerances. Among other things, NRDC raised issues with the dietary assessment, and in particular, EPA's drinking water assessment that supported the 2004 IRED decision. NRDC also raised concerns about the data surrounding EPA's selection of a children's safety factor. NRDC raised other safety factor issues, particularly as they relate to EPA use of the DNT study. NRDC's petition also included generic disagreements with how EPA conducts its assessments.

Subsequently, as part of its comments on the *N*-methyl carbamate cumulative assessment dated November 26, 2007, NRDC requested that EPA cancel all carbaryl pet collar registrations. (Ref. 3). The basis for NRDC's petition to cancel all pet collar registrations rested on issues related to EPA's assessment of cumulative effects under the FFDCA. In addition, NRDC incorporated by reference its earlier petition to revoke all carbaryl tolerances. Accordingly, EPA addressed the exposure issues raised in the subsequent pet collar petition as part of its response to the earlier petition to revoke all carbaryl tolerances.

VI. EPA's Response to the Petitions to Revoke Carbaryl Tolerances

On October 29, 2008, EPA denied NRDC's petition to revoke all pesticide tolerances for carbaryl under section 408(d) of the FFDCA. (73 FR 64229). EPA's Order also constituted a response to NRDC's petition dated November 26, 2007, to cancel carbaryl pet collar registrations submitted as part of NRDC's comments on the *N*-methyl carbamate cumulative assessment. Again, EPA's response to NRDC's petition to cancel pet collar registrations was addressed in that Order because the

basis for the petition to cancel pet collars rested on issues related to EPA's assessment of cumulative effects under the FFDCA.

VII. NRDC's Objections and Requests for Hearing

On December 28, 2008, NRDC filed, pursuant to FFDCA section 408(g)(2), objections to EPA's denial of its tolerance revocation petition and requested a hearing on those objections. As indicated above, NRDC's objections and requests for hearing raise two main claims: (1) that EPA lacks reliable data to reduce the default tenfold safety factor and (2) that EPA's exposure assessment for carbaryl is flawed and underestimates the exposure to children from pet collar uses.

NRDC asserts that EPA failed to consider the available developmental neurotoxicity data and, therefore, unlawfully lowered the 10X children's safety factor. Specifically, NRDC argues that the DNT study showed adverse developmental abnormalities in juvenile test animals at doses that had no effect on adult test animals. According to NRDC, this finding alone supports a full 10X children's safety factor. In addition, NRDC asserts that the DNT study did not identify a no-effect level in juvenile animals, supporting a further 3X safety factor. Thus, NRDC argues that EPA should have applied a 30X safety factor (10X for age sensitivity and 3X for failure to identify a no-effect level) to the end-point from the DNT to establish a final POD. According to NRDC, to do otherwise is "arbitrary and capricious, and contrary to the law." (Ref. 1 at 8.)

NRDC also asserts that EPA's exposure assessment underestimates exposure to children from pet collar uses. NRDC further asserts that EPA relied on flawed studies and data, and, therefore, the Agency's determination that tolerances are safe is improper. Among other things, NRDC argues that at the time of EPA's determination, data on exposure from use of carbaryl in pet collars required by a 2005 DCI had not been submitted and that without the data EPA's decision is "arbitrary and capricious and contrary to law." (Ref. 1 at 9).

EPA regulations make clear that to be considered by the Administrator, a request for an evidentiary hearing must meet certain criteria. (40 CFR 178.27). One such criteria is that the request must include a copy of any report, article, survey, or other written document (or the pertinent pages thereof) upon which the objector relies to justify an evidentiary hearing, unless the document is an EPA document that is routinely available to any member of the public.

In support of its request for a hearing, NRDC submitted the following documents as evidence that a hearing is appropriate: (1) Poisons on Pets Health Hazards from Flea and Tick Products, David Wallinga, MD., MPA and Linda Greer, Ph.D (NRDC, November 2000); and (2) Opportunities to Improve Data Quality and Children's Health through the Food Quality Protection Act (EPA-OIG Evaluation Report; Report # 2006–P-00009) (January 10, 2006).

In addition, NRDC cited to the following EPA documents: (1) Amended Carbaryl Reregistration Eligibility Decision (RED) (August, 2008); (2) Carbaryl RED (September, 2007); (3) Carbaryl Interim RED (IRED) (June, 2003); Organophosphate Cumulative Risk Assessment (2006); and, Revised *N*-Methyl Carbamate Cumulative Risk Assessment [DRAFT] (2007).

VIII. Response to Objections and Requests for Hearing

A. Overview

EPA denies NRDC's objections as well as its hearing requests. NRDC's hearing requests fail to meet the statutory and regulatory requirements for holding a hearing. NRDC has failed to proffer evidence on its hearing requests which would, if established, resolve one or more issues in its favor. Most significant, however, is that NRDC's claims do not present genuine and substantial issues of fact. On the merits, NRDC's objections with respect to the use of particular studies to establish an appropriate POD as well as appropriate safety factors are denied on scientific, policy, and legal grounds. Finally, NRDC's objection with respect to EPA exposure assessment of pet collars is denied as moot because EPA has already issued a cancellation order under section 6(f) of FIFRA for the last remaining carbaryl pet collar product registration.

The remainder of this Unit is organized in the following manner. Unit VIII.B. describes in greater detail the requirements pertaining to when it is appropriate to grant a hearing request. Unit VIII.C. examines the evidence proffered by NRDC in support of its hearing requests. Unit VIII.D. provides EPA's response to the NRDC's objections and hearing requests.

B. The Standard for Granting an Evidentiary Hearing

EPA has established regulations governing objections to tolerance rulemakings and tolerance petition denials and requests for hearings on those objections. (40 CFR part 178; 55 FR 50291, December 5, 1990). Those regulations prescribe both the form and content of hearing requests and the standard under which EPA is to evaluate requests for an evidentiary hearing.

As a threshold matter, EPA's regulations limit the issues that can be raised in any hearing as well as in objections. In general, the provisions of FFDCA section 408(g) establish an informal rulemaking process that is governed by section 553 of the Administrative Procedure Act (APA) and the case law interpreting these requirements, except to the extent that section 408 provides otherwise. For example, section 408(d) allows the Agency to proceed to a final rule after publication of a submitted petition, rather than requiring publication of a proposal. In this regard, it is well established that the failure to raise factual or legal issues during the comment period of a rulemaking constitutes waiver of the issues in further proceedings. *See generally*, 74 FR 59608, 59624–59629, November 18, 2009.

The fact that FFDCA section 408 in certain limited circumstances supplements the informal rulemaking with a hearing does not fundamentally alter the requirements applicable to informal rulemakings. Nor does it convert this into a formal rulemaking, subject to the exception in section 553 of the APA. Section 408 of the FFDCA establishes a unique statutory structure with multiple procedural stages, and delegates to EPA the discretion to determine the implementation that best achieves the statutory objectives. Accordingly, EPA interprets the notice and comment rulemaking portion of the FFDCA section 408 process as an integral part of the FFDCA process, inextricably linked to the administrative hearing. The point of the rulemaking is to resolve the issues that can be resolved, and to identify and narrow any remaining issues for adjudication. Consequently, the administrative hearing does not represent an unlimited opportunity to supplement the record, particularly with information that was available during the comment period, but that commenters have chosen to withhold.

EPA has consistently interpreted FFDCA section 408 in this fashion since the 1996 amendments. For example, EPA previously ruled that a petitioner could not raise new issues in filing objections to EPA's denial of its original petition. (See 72 FR 39318, 39324, July 18, 2007.) (EPA's tolerance revocation procedures "are not some sort of 'game,'

whereby a party may petition to revoke a tolerance on one ground, and then, after the petition is denied, file objections to the denial based on an entirely new ground not relied upon by EPA in denying the petition."). EPA reasoned that new issues were not cognizable because they are "not an objection to the 'provisions of the ... order [denying the petition]' " (Id.). Similarly, EPA denied a request for a hearing because the requestor had failed in their original petition to raise the claim asserted in their objection. (73 FR 42683, 42696, July 23, 2008). EPA noted that although requestor did argue in its petition that EPA cannot make a safety finding without completing the endocrine screening program under FFDCA section 408(p), it did not assert claims regarding the endocrine data and the children's safety factor. Citing its previous decision, EPA denied the objections and hearing requests as to the children's safety factor. (Id.). In that same decision, EPA also denied a number of hearing requests on the ground that the requestor failed to proffer supporting evidence; EPA opined that a failure to offer evidence at an earlier stage of the administrative proceeding could not be cured by suddenly submitting such evidence with a hearing request. See 73 FR 42710 ("Presumably Congress created a multi-stage administrative process for resolution of tolerance petitions to give EPA the opportunity in the first stage of the proceedings to resolve factual issues, where possible, through a notice-and-comment process, prior to requiring EPA to hold a full evidentiary hearing, which can involve a substantial investment of resources by all parties taking part .... Accordingly, if a party were to withhold evidence from the first stage of a tolerance petition proceeding and only produce it as part of a request for a hearing on an objection, EPA might very likely determine that such an untimely submission of supporting evidence constituted an amendment to the original petition requiring a return to the first stage of the administrative proceeding (if, consideration of information that was previously available is appropriate at all")). Finally, in a recent decision, the United States Court of Appeals for the District of Columbia Circuit upheld this interpretation of section 408. *See Nat'l Corn Growers Assn. v. EPA*, No 09-1284, slip op. at 9-10 (C.A.D.C. July 23, 2010)("We agree with EPA....[T]he comment period would be redundant and superfluous is the same concerns could be raised at the objections stage.")

Nonetheless, EPA does not interpret the statute and regulations to preclude the submission of any new information as part of the objections phase. Such a position would in fact be inconsistent with EPA's own regulations and past practice, which require that in order to support a hearing request, a party submit more than "mere allegations or denials." (40 CFR 178.32(b)(2)). Rather, EPA's interpretation in this regard is analogous to the determination of whether a final rule is the logical outgrowth of the proposal and the comments. Ultimately, EPA's policy is merely that the objections phase does not present an opportunity for parties to begin the process entirely anew, by raising issues or information that could have been fairly presented as comments on the proposed rule or Notice of Filing of the pesticide petition. Nor is the statute's additional procedural step an excuse to withhold information that was clearly available at the time of the rulemaking.

As to the form and content of a hearing request, the regulations specify that a hearing request must include: (1) a statement of the factual issues on which a hearing is requested and the requestor's contentions on those issues; (2) a copy of any report, article, or other written document "upon which the objector relies to justify an evidentiary hearing;" and (3) a summary of any other evidence relied upon to justify a hearing. (40 CFR 178.27).

The standard for granting a hearing request is set forth in 40 CFR 178.32. That section provides that a hearing will be granted if EPA determines that the "material submitted" shows all of the following:

> (1) There is a genuine and substantial issue of fact for resolution at a hearing. An evidentiary hearing will not be granted on issues of policy or law.
> (2) There is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary. An evidentiary hearing will not be granted on the basis of mere allegations, denials, or general descriptions of positions and contentions, nor if the Administrator concludes that the data and information submitted, even if accurate, would be insufficient to justify the factual determination urged.
> (3) Resolution of the factual issue(s) in the manner sought by the person requesting the hearing would be adequate to justify the action requested. An evidentiary hearing will not be granted on factual issues that are not determinative with respect to the action requested. For example, a hearing will not be granted if the Administrator concludes that the action would be the same even if the factual issue were resolved in the manner sought.

(40 CFR 178.32(b)).

This provision essentially imposes four requirements upon a hearing requestor. First, the requestor must show it is raising a question of fact, not one of law or policy. Hearings are for resolving factual issues not for debating law or policy questions. Second, the requestor must demonstrate that there is a genuine dispute as to the issue of fact. If the facts are undisputed or the record is clear that no genuine dispute exists, there is no need for a hearing. Third, the requestor must show that the disputed factual question is material, i.e., that it is outcome determinative with regard to the relief requested in the objections. Finally, the requestor must make a sufficient evidentiary proffer to demonstrate that there is a reasonable possibility that the issue could be resolved in favor of the requestor. Hearings are for the purpose of providing objectors with an opportunity to present evidence supporting their objections; as the regulation states, hearings will not be granted on the basis of "mere allegations, denials, or general descriptions of positions or contentions." (40 CFR 178.32(b)(2)).

EPA's hearing request requirements are based heavily on FDA regulations establishing similar requirements for hearing requests filed under other provisions of the FFDCA. (53 FR 41126, 41129, October 19, 1988). FDA pioneered the use of summary judgment-type procedures to limit hearings to disputed material factual issues and thereby conserve agency resources. FDA's use of such procedures was upheld by the Supreme Court in 1972, (*Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973)), and, in 1975, FDA promulgated generic regulations establishing the standard for evaluating hearing requests. (40 FR 22950, May 27, 1975). It is these regulations upon which EPA relied in promulgating its hearing regulations in 1990.

Unlike EPA, FDA has had numerous occasions to apply its regulations on hearing requests. FDA's summary of the thrust of its regulations, which has been repeatedly published in the **Federal Register** in orders ruling on hearing requests over the last 26 years, is

instructive on the proper interpretation of the regulatory requirements. That summary states:

> A party seeking a hearing is required to meet a 'threshold burden of tendering evidence suggesting the need for a hearing.' [] An allegation that a hearing is necessary to sharpen the issues' or fully develop the facts' does not meet this test. If a hearing request fails to identify any evidence that would be the subject of a hearing, there is no point in holding one. A hearing request must not only contain evidence, but that evidence should raise a material issue of fact concerning which a meaningful hearing might be held. [] FDA need not grant a hearing in each case where an objection submits additional information or posits a novel interpretation of existing information. [] Stated another way, a hearing is justified only if the objections are made in good faith and if they "draw in question in a material way the underpinnings of the regulation at issue." Finally, courts have uniformly recognized that a hearing need not be held to resolve questions of law or policy.

(49 FR 6672, 6673, February 22, 1984; 72 FR 39557, 39558, July 19, 2007) (citations omitted)). EPA has been guided by FDA's application of its regulations in this proceeding. Congress confirmed EPA's authority to use summary judgment-type procedures with hearing requests when it amended FFDCA section 408 in 1996. Although the statute had been silent on this issue previously, the FQPA added language specifying that when a hearing is requested, EPA "shall..." hold a public evidentiary hearing if and to the extent the Administrator determines that such a public hearing is necessary to receive factual evidence relevant to material issues of fact raised by the objections." (21 U.S.C. 346a(g)(2)(B)). This language explicitly grants EPA broad discretion to deny a hearing. Specifically, the language in section 408 provides that EPA is to determine whether a hearing is "necessary to receive factual evidence" as well as whether the issues raised in objections are "material" issues of fact. Thus, even where evidence relevant to an issue of material fact is proffered (essentially the standard set forth in 40 CFR 178.32), EPA construes the statutory language as requiring it to hold a hearing only where EPA determines a hearing is necessary to receive proffered evidence. In other words, the statute grants EPA the discretion to determine that the issues could be resolved entirely on the basis of the existing written record. *See* 74 FR at 59627.

C. Evidentiary Proffer by NRDC

As noted above, the purpose for holding hearings is "to receive factual evidence." (21 U.S.C. 346a(g)(2)(B); 53 FR 41126, 41129, October 19, 1988 ("Hearings are for the purpose of gathering evidence on disputed factual issues . . . .")). A requestor must identify evidence relied upon to justify a hearing and either submit copies of that evidence or summarize it. (40 CFR 178.27). After reviewing the proffer, EPA must find that there is a reasonable possibility that the proffered evidence, if established, would resolve one or more genuinely-disputed, material factual issues in a requestor's favor. (40 CFR 178.32(b)). Because a substantial portion of NRDC's evidentiary proffer is deficient on its face, EPA finds it most efficient to preliminarily review the proffer before turning to the individual issues raised by NRDC.

NRDC identifies the following as "relevant documentation": Order denying NRDC's petition to revoke tolerances (October 29, 2008); Amended Carbaryl Registration Eligibility Decision (RED) (August 2008); Carbaryl RED (September 2007); and Carbaryl Interim RED (2003 IRED) (June 2003). NRDC also includes a reference to information on EPA's reregistration of carbaryl, available online at *http://www.epa.gov/pesticides/reregistration/carbaryl/*. EPA assumes that these are the documents NRDC intends to proffer as evidence in support of its request for a hearing.

In addition, throughout it objections and request for a hearing, NRDC includes footnotes with citations to additional documents. As a general matter, EPA assumes NRDC is doing so in the context of it supporting its objections, rather than as a proffer of evidence to justify a hearing. Indeed, merely citing to a document in a footnote does not constitute a proffer of evidence. Nevertheless, in an effort to address NRDC's hearing request as comprehensibly as possible, EPA will address these footnote citations as well. In the future, however, NRDC would be well advised to make clear exactly what evidence it is proffering as a justification for its hearing request.

The documents cited in footnotes generally fall into three categories. The first are EPA documents that can be grouped in the same category as the documents NRDC identified as "relevant documents." These documents are: EPA Fact Sheet for Carbaryl (revised on 10/22/04); EPA's Organophospate Cumulative Risk Assessment (USEPA 2006); EPA's Revised *N*-Methyl Carbamate Cumulative Risk Assessment [DRAFT] (USEPA 2007).

This group of EPA documents, combined with the other EPA documents identified by NRDC as "relevant documents" (including "[i]nformation on EPA's reregistration of carbaryl [] available online at *http://www.epa.gov/pesticides/reregistration/carbaryl/*") do not present evidence of a genuinely-disputed, material issue of fact. (73 FR 42694–95, July 23, 2008) (citing to EPA decision-making record is vague and fails to identify new evidence which, if established, would resolve an issue in petitioner's favor)). First, given that the purpose of a hearing is to gather or receive evidence, proffering evidence already considered and relied upon by EPA is not sufficient justification for holding a hearing. Second, as a matter of law, EPA does not understand how it can be argued that a proffer consisting of a general reference to the decision-making record—which EPA has found supports one result, could constitute evidence that if established would justify the opposite conclusion. Third, EPA concludes that the non-specific citation to numerous documents related to the multi-year process of conducting FIFRA reregistration and FFDCA tolerance reassessment is so vague a proffer as to not constitute a proffer at all. (Id.)

It should be noted, however, that in two cases, NRDC does offer a specific citation in the 2008 Amended Carbaryl RED. First, NRDC cites to a specific page as a reference for the largest uses of carbaryl (based upon pounds of active ingredient used per year): apples, asparagus, cherries, corn, grapefruit, grapes, hay, oranges, peaches, pecans, soybeans, and turf. While use information is relevant to EPA's overall reregistration decision, it is not material to NRDC's objections or its request for a hearing. As such it does not identify evidence that would justify holding a hearing.

Similarly, NRDC cites to a specific page in the 2008 Amended Carbaryl RED for the proposition that EPA issued a data call-in for data on exposure from the use of carbaryl in pet collars but that those results had not been submitted. NRDC objects to EPA's assessment of carbaryl tolerances in part because EPA did not have these data. However, EPA has since received the data. Moreover, while this issue may be relevant to NRDC's objection, arguing that EPA did not have sufficient data upon which to make a decision (without offering into evidence data EPA should have but did not consider) is not a basis upon which to grant a hearing. Again, a hearing is for

the purpose of gathering or receiving evidence and to resolve material factual disputes. It is undisputed that at the time, EPA had not received the data. It is also undisputed that the data has since been submitted. Thus, there is no issue in dispute over the submission of the data or evidence to suggest otherwise. In sum, EPA does not consider NRDC's citations to EPA's decision-making record a sufficient proffer of evidence to justify a hearing.

The second category of documents cited in footnotes consists of the following documents, loosely described as articles and reports: "Poisons on Pets. Health Hazards from Flea and Tick Products" NRDC November, 2000; NRDC's 2008 Green Paws report available at *http://www.greenpaws.org/better.php;* Opportunities to Improve Data Quality and Children's Health through the Food Quality Protection Act (FQPA) (EPA Inspector General Report No. 2006–P-00009 (January 10, 2006)); 2007/2008 American Pet Products Manufacturing Association (APPA) National Pet Owners Survey; and Kansas State University Press Release. "K-State Expert Says Fleas Can Be An Itchy Situation" (November 16, 1999). None of these documents proffer evidence of a genuinely-disputed, material issue of fact. EPA will address each in turn.

The NRDC publication "Poison on Pets" focuses on seven organophosphate insecticides used in flea and tick control products; namely, chlorpyrifos, dichlorvos, phosmet, naled, tetrachlorvinpos, diazinon, and malathion. As a preliminary matter, EPA need not determine whether the information in this publication raises a material issue of fact about which a meaningful hearing might be held because, as explained in Unit VIII.D.2, the cancellation of all carbaryl pet collar product registrations renders NRDC's hearing request moot. In addition, factually, the document's relevance to carbaryl is at most tangential. While the report does mention carbaryl, it does so primarily in the context of arguing against the use of carbamates. Specifically, on page 49 of 67, the report notes that carbaryl and propoxur are the two major carbamates used for flea control, combining for approximately 8% of all active ingredients used to treat pets and kennels. The report states that NRDC scientists believes that carbaryl is one of the most significant pesticide disrupters of the endocrine system, interfering with sperm structure and function as well as increasing the risk of miscarriage. The report concludes its paragraph on carbamates by noting that "[f]ortunately, use of pet products with carbaryl already has decreased." (Poisons on Pets at 50). In its objections, NRDC relies on the report to reiterate generally applicable arguments that NRDC made regarding organophosphate pesticides to argue why NRDC also believes EPA's exposure assessment of carbaryl is flawed. This document, however, adds no justification for a hearing not otherwise included in NRDC's objections. In short, the report does not proffer evidence of a genuinely-disputed, material issue of fact related specifically to carbaryl.

As best EPA can determine, NRDC's Green Paws report is a website page devoted to alternative, non-toxic methods of flea and tick control, such as using a flea comb and regular bathing. Again, EPA need not determine whether the information in this "report" raises a material issue of fact about which a meaningful hearing might be held because, as explained in Unit VIII.D.2, the cancellation of all carbaryl pet collar product registrations renders NRDC's hearing request moot. In addition, this "report" does not contain carbaryl-specific information and does not provide any evidence of a genuinely-disputed, material issue of fact related to NRDC's objections or request for a hearing. As such, it does not provide factual evidence justifying a hearing.

Similarly, NRDC generally relies on the EPA Inspector General Report to emphasize the importance of DNT test data. This report, however, does not contain carbaryl-specific information and does not provide any evidence of a genuinely-disputed, material issue of fact related to NRDC's objections or request for a hearing. At best, the report implies that registration decisions should not be made in the absence of a DNT study. However, EPA's assessment of carbaryl included the submission and review of a DNT study. In sum, the report does not identify factual evidence that would, if established, resolve an issue in NRDC's favor.

NRDC also cites to the 2007/2008 American Pet Product Association (APPA) National Pet Owners Survey for the proposition that "nearly two out of every three households owns a pet, which equates to 88.3 million cats and 74.8 million dogs." First, although NRDC asserts the survey is available at the APPA website on-line, as far as EPA is able to determine this is proprietary information. For non-members, the 2009/2010 survey (at the time of this writing) was available at a cost of $1,695. EPA did not purchase a copy for purposes of responding to NRDC's hearing request and, therefore, was unable to independently verify the survey results. Second, EPA need not determine whether the information in this survey raises a material issue of fact about which a meaningful hearing might be held because, as explained in Unit VIII.D.2, the cancellation of all carbaryl pet collar product registrations renders NRDC's hearing request moot. Third, a statement—even a factual one, as to the number of households that own a pet does not present evidence of a genuinely-disputed, material issue of fact related to NRDC's objections or request for a hearing. At best, this information implies that because there are so many pet owners, the probability that some owners use carbaryl pet collars and would be exposed is not insignificant. However, EPA's assessment of carbaryl pet collars assumes exposure, including exposure to children. Accordingly, even if the evidence here were established, it would not resolve the issue identified by NRDC in its favor; namely, that EPA underestimated the exposure of children that come into contact with pets wearing carbaryl pet collars. In sum, a survey on the number of households that have pets does not present evidence to justify a hearing regarding the assumptions EPA made regarding children's exposure to pets wearing carbaryl pet collars.

Finally, NRDC cites to a 1999 press release for the proposition that "[e]very year Americans spend over one billion dollars on products designed to kill fleas and ticks on our pets." First, EPA was unable to access a copy of the press release through the web link provided by NRDC. Thus, it is unclear that this document could even be introduced as evidence. Second, EPA need not determine whether the information in this press release raises a material issue of fact about which a meaningful hearing might be held because, as explained in Unit VIII.D.2, the cancellation of all carbaryl pet collar product registrations renders NRDC's hearing request moot. Third, a statement as to the sales of flea and tick control products generally does not present any factual evidence specific to carbaryl or information related to NRDC's objections or request for a hearing. Fourth, the reference is more than a decade old. Thus, even if it were relevant to a current genuinely-disputed, material issue of fact, this information is simply out-of-date. In sum, there can be no serious contention that the proffer of an outdated press release that generally refers to the amount Americans spend on pesticides to control fleas and ticks presents evidence to justify a hearing.

The third category consists of one document: Xue J, Zartarian V, Moya J,

Freeman N, Beamer P, Black K, Tulve N, Shalat S: A meta-analysis of children's hand-to-mouth frequency data for estimating nondietary ingestion exposure (Risk Anal. 2007 Apr.; 27(2): 411–20). The Xue, *et al.* 2007 paper collected hand-to-mouth frequency data from 9 available studies representing 429 subjects and more than 2,000 hours of behavior observation. A meta-analysis was conducted on these data to study differences in hand-to-mouth frequency based on study, age group, gender, and location (indoor vs. outdoor), to fit variability and uncertainty distributions that can be used in probabilistic exposure assessments, and to identify any data gaps. Results of this analysis indicate that age and location are important for hand-to-mouth frequency, but study and gender are not. This paper represents the first comprehensive effort to fit hand-to-mouth frequency variability and uncertainty distributions by indoor/outdoor location and by age groups, using the new standard set of age groups recommended by the U.S. Environmental Protection Agency for assessing childhood exposures.

This document is "proffered" in connection with NRDC's objections and request for a hearing on issues related to EPA exposure assessment of carbaryl pet collar products. EPA need not determine whether the information in this meta-analysis raises a material issue of fact about which a meaningful hearing might be held because, as explained in Unit VIII.D.2, the cancellation of all carbaryl pet collar product registrations renders NRDC's hearing request moot. Nonetheless, EPA notes that NRDC's proffer is improper. NRDC's original Petition did not address this information because it pre-dated the Xue paper. However, NRDC's subsequent petition, dated November 26, 2007, regarding pet collars, which in essence amended its previous petition, also did not reference or rely in any manner on this information. To the contrary, in its pet collar petition, NRDC generally takes issue with modifications EPA made to the assumptions underlying the carbaryl pet collar residential exposure component of the probabilistic risk assessment of the *N*-methyl carbamate cumulative assessment (as compared to the carbaryl, single chemical, determinative assessment). In so doing, NRDC generally asserted that the net result of these changes is that EPA underestimated the exposure of children to carbaryl from pet collars. It is only in its request for a hearing and objections that NRDC raises for the first time a host of specific issues based upon the analysis in the Xue paper related to the carbaryl pet collar residential exposure component of the *N*-methyl carbamate cumulative assessment. Thus, even if the issues concerning pet collars were not moot, it would be inappropriate to allow NRDC to now cure a poorly drafted petition by recasting its arguments or raising issues for the first time—and proffering evidence that was previously available in support of such arguments had they been raised earlier—at the hearing and objections stage of the process. *See Nat'l Corn Growers Assc. v. EPA*, No. 09–1284, slip op. at 8–9 (C.A.D.C. July 23, 2010) (upholding EPA's refusal to consider at the objections stage evidence and arguments that could have been but were not submitted during the comment period); *see also* 72 FR at 39324 (tolerance revocation procedures are not "game," whereby a party may file objections to denial based on entirely new ground(s) not relied upon in denying the petition.); 73 FR at 42710 (inappropriate to cure failure to offer evidence at an earlier stage of administrative proceeding by submitting such evidence with a hearing request).

In sum, NRDC has failed to identify factual evidence sufficient to justify a hearing. Specifically, NRDC has failed to proffer evidence that, if established, would resolve one or more genuinely-disputed, material factual issues in its favor. Accordingly, in addition to the reasons discussed below, NRDC's hearing request is denied.

D. Response to Specific Issues Raised in Objections and Hearing Requests

1. *Failure to apply a 10X children's safety factor and another 3X additional safety factor to the DNT study LOAEL in calculating a safe dose for carbaryl or to otherwise rely on the DNT study in assessing the risk of carbaryl.* In its objection to EPA's calculation of a safe dose for carbaryl, NRDC makes three, separate but related arguments: (1) it was unlawful for EPA to calculate the safe dose for carbaryl without applying a 10X children's safety factor (in addition to the inter- and intra-species safety factors) to the LOAEL from the DNT study; (2) it was unlawful for EPA to calculate the safe dose for carbaryl without applying an additional 3X safety factor (in addition to the inter- and intra-species and children's safety factors) to the LOAEL from the DNT study to account for the lack of a NOAEL in this study; and (3) "[e]ven if the DNT data were not used to derive a [safe dose], EPA's failure to incorporate the important information on age-sensitivity that is provided by the DNT is arbitrary and capricious, and contrary to law." (Ref. 1 at 8).

NRDC's arguments concerning the application of additional safety factors of 10X and 3X to the DNT study LOAEL is material to its request for the revocation of the carbaryl tolerances only if both arguments are accepted – i.e., it is determined that both additional safety factors should be used in assessing the safety of carbaryl. This is because there is already essentially a tenfold difference between the DNT study LOAEL (10 mg/kg/day) and the POD used in calculating the safe dose for carbaryl. That POD is the $BMDL_{10}$ of 1.1 mg/kg/day for brain cholinesterase inhibition in PND11 juveniles in the CCA study. Use of either the 10X safety factor or the 3X factor alone applied to the DNT study LOAEL would not produce a value lower than the existing POD, only a combined 30X would do that. For this reason, for NRDC to sustain on materiality grounds its objection and hearing request as to its first two arguments it must either show (1) it is entitled to a hearing on both arguments; (2) it is entitled to a hearing on one argument and, as to the other, even if it is not entitled to a hearing, its substantive argument is meritorious, or (3) if it is not entitled to a hearing on either argument, that both of its substantive arguments are meritorious. As explained below, NRDC has not made such a showing.

a. *Application of a 10X children's safety factor and a 3X safety factor for lack of a NOAEL to the DNT study.* NRDC states that it "provides a scientific and legal argument that EPA must apply a 30X adjustment factor, based on a 10X FQPA factor to account for evidence for permanent structural brain damage in juvenile animals in the DNT study ..., and a 3X factor for the failure of the DNT study to identify with confidence an observable no-effect level for juvenile animals exposed to carbaryl." (Obj. at 7). Its legal argument appears to be that the children's safety factor provision in FFDCA section 408(b)(2)(C) compels EPA to apply a 10X safety factor when a study reveals juveniles are more sensitive than adults. EPA bases this conclusion on three considerations: (1) the children's safety factor is a statutory requirement; (2) NRDC has phrased its argument regarding juvenile sensitivity and the 10X children's safety factor in mandatory terms (Ref. 2 at 4 ("Based on the reports available in the EPA documents demonstrating increased susceptibility in fetuses and newborn animals, the EPA is obligated to retain the FQPA 10X factor, in accordance with the law.")); and (3) there are not specific legal requirements in FFDCA

section 408 regarding a safety factor to address the lack of a NOAEL in a toxicity study.

Hearings are not granted on legal questions. (40 CFR 178.32(b)(1)). EPA has repeatedly concluded, and NRDC appears to have admitted, that its argument regarding retention of the children's safety factor to address juvenile sensitivity is a question of law. (73 FR 5439, 5445, January 30, 2008; 72 FR 52108, 52115–52117, September 12, 2007; 71 FR 43906, 43919, August 2, 2006). Accordingly, NRDC's hearing request on this issue is denied.

Turning to the merits of the objection—at least insofar as EPA is able to discern the basis for the objection, NRDC's objection, as well as its corresponding hearing request, is initially denied for a lack of particularity in the objection. EPA should not have to guess at the substance or basis for an objection. NRDC's objection is also being denied on the following separate grounds. EPA finds no basis for NRDC's interpretation of FFDCA section 408(b)(2)(C). EPA has on a number of occasions rejected the interpretation that the children's safety factor provision mandates that the absence of a particular study or a finding of pre- or post-natal toxicity or increased sensitivity in the young removes EPA's discretion to choose a different safety factor. (73 FR 5439, 5444, January 30, 2008; 72 FR 52108, 52115–52117, September 12, 2007; 71 FR 43906, 43919, August 2, 2006). EPA explained its rationale recently in responding to NRDC objections that made the same argument as in this case:

> The statute does direct EPA to consider "susceptibility of infants and children" to pesticides. (21 U.S.C. 346a(b)(2)(C)(i)(II)). It also states that an additional safety factor to protect infants and children shall be applied "to take into account potential pre- and post-natal toxicity . . . ." (21 U.S.C. 346a(b)(2)(C)). Nonetheless, in clear and unmistakable language, Congress decreed that, "[n]otwithstanding such requirement for an additional margin of safety" to take into account potential pre- and post-natal toxicity, EPA is authorized to choose a different safety factor if EPA has reliable data showing a different factor is safe. (Id.). Interpreting the statute as creating a rigid, per se rule that the identification of sensitivity in the young removes EPA's discretion to choose a different safety factor is inconsistent with this language and the flexibility granted to the Agency.

(72 FR at 52117; see also 73 FR at 5444). NRDC has raised no arguments in its current objections that convince EPA to vary from its long-held interpretation. Accordingly, EPA denies NRDC's objection with respect to retaining a 10X children's safety factor.

Even giving NRDC every benefit of the doubt, and assuming it did not intend its argument on the 10X children's safety factor to be only a legal question, NRDC is still not entitled to a hearing or relief on the merits. Perhaps NRDC was suggesting that (1) its assertion that the brain effects in the DNT were "severe and permanent" and (2) its claim that the DNT is a particularly important study due to its focus on cognitive effects, were sufficient factual reasons, when combined with the sensitivity finding, to compel EPA to retain the 10X children's safety factor even if EPA was not legally required to do so solely based on a finding of sensitivity in the young.

There are several reasons no hearing is required on this re-articulation of NRDC's claim. First, NRDC has proffered no evidence in support of its assertion on sensitivity and nature of the effects in the young. EPA reached quite different conclusions on the significance of the effects seen in the pups at the LOAEL in the DNT study. Nonetheless, NRDC has merely recycled its prior comments without acknowledging EPA's findings or attempting to assert that there is a disputed question of fact regarding how EPA has characterized the effects in the study. Critically, NRDC proffers no evidence (or even arguments) in support of its assertions. As such, NRDC's claims about sensitivity and the nature of the effects in pups in the DNT study are nothing more than "mere allegations" and hardly qualify as a relevant objection. Indeed, EPA's regulations specifically state that "[a]n evidentiary hearing will not be granted on the basis of mere allegations, denials, or general descriptions of positions and contentions . . . ." (40 CFR 178.32(b)(2)).

Second, NRDC's argument that, as between the carbaryl CCA and the DNT study, EPA failed to give proper consideration and weight to the DNT study does not present a genuine issue of material fact to be resolved at a hearing. *Nat'l Corn Growers Assc. v. EPA*, No. 09–1284, slip op. at 13 (C.A.D.C. July 23, 2010) ("there is no material issue of fact based upon '[m]ere differences in the weight or credence given to particular scientific studies.'"); (47 FR at 55474) ("[Objectors] assertion about this evidence is, at best, an argument that a different inference (i.e., that the pieces are not 'reasonably uniform' and 'cube shaped') should be drawn from established fact (the dimensions of the pieces) than the agency has drawn. No hearing is required in such circumstances."); C.f. Norvich, 773 F.2d 1363 ("differences in the weight or credence given to particular scientific studies ... are insufficient [to show a material issue of fact for a hearing]"). Here, all NRDC has done is point to a study already in the record that EPA has reviewed and considered numerous times. Thus, NRDC has failed to proffer any evidence to suggest that there is a factual, rather than an interpretive, matter to be resolved at a hearing. *See Nat'l Corn Growers Assc. v. EPA*, No. 09–1284, slip op. at 13 (a "dispute between experts" as to the weight or credence given a particular scientific study does not present a material issue of fact for a hearing).

Third, NRDC's claims regarding the unique endpoints examined in the DNT study and its importance in evaluating the safety of pesticides are not disputed facts. EPA does not contest these points. A hearing will only be granted if there is a "genuine and substantial issue of fact for resolution at a hearing." (40 CFR 178.32(b)(1)).

Finally, a hearing is also denied on this re-articulated claim because at bottom it calls for a policy determination. NRDC is claiming that based on certain facts an additional safety factor is needed. This is a policy judgment for EPA not a factual determination on which evidence could be submitted for adjudication. "An evidentiary hearing will not be granted on issues of policy or law." (Id.)

On the merits, this re-articulated claim fails as well. First, it is denied because it has not been made with the particularity required. The statute requires that objections "specif[y] with particularity the provisions of the regulation or order deemed objectionable and stating reasonable grounds therefore," and EPA's regulations make clear that for an objection to be properly presented it must explain "with particularity . . . [its] basis . . . ." (40 CFR 178.25(a)(2)); *see Nat'l Corn Growers Assc. v. EPA*, No. 09–1284, slip op. at 11. Second, EPA's conclusions on sensitivity and the nature of the effects on the pups in the DNT study differ significantly from NRDC's assertions and are well supported in the record. On the nature of the effects, EPA concluded that the changes in brain morphometrics for pups seen in the DNT were minimal. (See Unit IV.B.4.b). In addition, the data from the DNT study showed that for the

first generation pups, there were no treatment-related effects on pup weight, pup survival indices, developmental landmarks, FOB measurements, or motor activity assessments. These conclusions are found on a careful analysis of the DNT study. On the other hand, NRDC merely restates its previous comments and neither offers an explanation for its characterization of the DNT study results nor proffers any evidence in support of its allegation. (Id.) ("by simply resubmitting their Comments, without addressing the responses the EPA had made to them ... [petitioners] 'failed to lodge a relevant objection'"). On the sensitivity of the young, EPA concluded that the brain morphometric effects in the juvenile rats in the DNT study would not be present at 1 mg/kg/day. Thus, EPA has determined that the LOAELs and NOAELs for adults and juveniles in the DNT study were the same. NRDC has offered no reasons as to why EPA's findings on these points was in error. (Id.) Indeed, there is nothing to suggest that EPA's conclusion that these findings on sensitivity and the nature of the effects in the young did not require retention of a 10X factor was unreasonable. To the contrary, this conclusion is consistent with both EPA policy and practice. While on occasion EPA has applied an additional children's safety factor based solely on the nature of the effects seen in the young, such additional safety factors have only been utilized in situations involving significantly different factual circumstances. (See 74 FR 39545, 39549–39550, August 7, 2009) (for pesticide that showed sensitivity in the young, 3X children's safety factor retained due to very narrow dose range (3X) from NOAEL to fatal dose level). Third, as to the NRDC's assertions regarding the importance of the DNT study, EPA would note that there is a DNT study for carbaryl and it has been fully considered in assessing the risk of carbaryl. Importantly, in evaluating that study, EPA determined based on the effects seen in that study at what level a NOAEL for pup effects was likely to have been seen and that level is nearly identical to the level used as the POD for assessing carbaryl risks. For all of these reasons, this objection is denied.

Having denied NRDC's objection that a 10X children's safety factor is required due to the alleged identification of age sensitivity, NRDC's claim regarding a 3X factor due to the lack of a NOAEL in the DNT study becomes immaterial. As noted above, additional factors of 10X or below applied to the DNT study LOAEL for pups (along with the standard inter- and intra-species safety factors) will not result in a lower aPAD for carbaryl and thus granting NRDC's objection would not change EPA's safety determination. Because NRDC's objection on this issue is not outcome-determinative, it is denied on the basis of immateriality. *See Nat'l Corn Growers Assc. v. EPA*, No. 09–1284, slip op. at 13; 72 FR 39318, 39323–39324, July 18, 2007. In addition, there are no disputed facts with regard to the question of whether an additional safety factor is needed to address the lack of a NOAEL in the DNT study. NRDC asserts that an additional 3X safety factor should be applied to the DNT study LOAEL for pups because no NOAEL was identified for that test group. EPA agrees that if it were using the pup LOAEL from the DNT study as a POD, at least a 3X factor is needed to account for the lack of a NOAEL in that study. In fact, in its risk assessment, EPA essentially applied a safety factor of 10X to the DNT study's LOAEL (10 mg/kg/day) by its determination that no brain morphometric effects would be expected at the mid-dose (1 mg/kg/day). Thus, EPA does not disagree with NRDC's assertion that an additional safety factor is needed to address the lack of a NOAEL in the DNT study. In sum, because this objection is immaterial and there are no disputed material facts, NRDC's hearing request and objection on this issue are denied. (40 CFR 178.32(b)).

b. *Arbitrary and capricious.* NRDC argues that even if EPA uses the $BMDL_{10}$ for PND11 juveniles from the CCA study for the POD for calculating the carbaryl safe dose, it must "incorporate the important information on age-sensitivity that is provided by the DNT [study]" into its risk assessment and that EPA's failure to do so was arbitrary and capricious. (Ref. 1 at 8). The only hint that NRDC provides as to what it means by this vague allegation is a table appearing on page eight of its objections in which NRDC suggests that the additional 10X and 3X safety factors it argues are needed for the DNT study should be applied to the $BMDL_{10}$ for PND11 juveniles in the CCA study in computing the safe dose. NRDC advances no specific argument as to why this approach should be taken and proffers no evidence in support of it. As an initial matter, therefore, this objection and its corresponding hearing request is denied for a lack of particularity in the objection. EPA should not have to guess at the substance of an objection.

Even assuming the objection passes the particularity requirement, it is without merit. The predicate to this argument is that additional safety factors are needed as to the pup LOAEL in the DNT study. Thus, this objection and hearing request stand in the shoes of the objections and hearing requests regarding the alleged need for additional 10X and 3X safety factors on the pup LOAEL in the DNT study. As to the additional 10X children's safety factor, NRDC's objection and hearing request is denied for the identical reasons that EPA denied NRDC's direct claims regarding an additional 10X children's safety factor. As to the 3X safety factor, NRDC's assertion that a lack of a NOAEL in the DNT study necessitates the application of an additional safety factor to the POD in the CCA study does not warrant a hearing and is substantively meritless because it is nothing more than a mere allegation without any supporting basis. (40 CFR 178.32(b)(2)). NRDC offers no evidence as to why a LOAEL-to-NOAEL safety factor should be transferred from a study where it is needed (the DNT study) to a study where a clear NOAEL or its equivalent (a $BMDL_{10}$) is identified (the CCA study). Further, to the extent that NRDC intended to make some other point by its vague claim that it was arbitrary and capricious for EPA not to take the DNT study results into account in its carbaryl safety determination, its hearing request is denied as being no more than a "general description of [a] position[]," 40 CFR 178.32(b)(2), and the objection is denied on the ground that the record, on its face, shows that EPA carefully considered the results of the DNT study in making its safety determination on carbaryl. (See Unit IV.B.4.b).

2. *Improper reliance on flawed data for exposure assessment resulting in underestimation of exposure to children from pet collars.* NRDC makes several arguments as to why EPA's exposure assessment is flawed and, therefore, EPA cannot make its tolerance safety finding for carbaryl. NRDC first argues that EPA cannot make its safety finding because required transferable residue studies have not yet been submitted. NRDC further argues that the exposure studies that EPA did rely on are highly variable and unreliable and, therefore, EPA cannot be reasonably certain that children in the highly exposed tails of the exposure curve will be protected. NRDC also argues that EPA made several unfounded or faulty assumptions in it exposure assessment such that EPA cannot show that there is an unreasonable certainty of no harm from the aggregate exposures to carbaryl.

EPA denies both the hearing request and the objections as moot because all carbaryl pet collar registrations have

been cancelled. In a letter dated September 30, 2009, Wellmark International submitted a request to voluntarily cancel its pet collar registrations pursuant to section 6(f) of FIFRA. (74 FR 54045, October 21, 2009). These are the only carbaryl pet collar registrations and the last remaining pet product registration for carbaryl. EPA issued its final order cancelling carbaryl registrations for pet collar uses on December 16, 2009. (74 FR 66642).

E. Conclusion on Objections and Request for a Hearing

For the reasons stated above, all of the NRDC's objections as well as its request for a hearing are denied.

IX. Regulatory Assessment Requirements

As indicated previously, this action announces the Agency's final order regarding objections filed under section 408 of FFDCA. As such, this action is an adjudication and not a rule. The regulatory assessment requirements imposed on rulemaking do not, therefore, apply to this action.

X. Submission to Congress and the Comptroller General

The Congressional Review Act, (5 U.S.C. 801 *et seq.*), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule for purposes of 5 U.S.C. 804(3).

XI. References

1. Natural Resources Defense Council, "Objections to the Order Denying NRDC's Petition to Revoke All Tolerances for Carbaryl, and Request for Public Evidentiary Hearing" (December 29, 2008).

2. Natural Resources Defense Council, Petition to Revoke All Carbaryl Tolerances and Cancel All Carbaryl Registrations, (January 10, 2005).

3. Natural Resources Defense Council, Petition to Cancel Carbaryl and Propoxur for Pet Collar Uses, (November 26, 2007).

4. US EPA, Carbaryl; Order Denying NRDC's Petition to Revoke Tolerances, 73 FR 64229, October 29, 2008.

5. US EPA, "A User's Guide to Available EPA Information on Assessing Exposure to Pesticides in Food" (June 21, 2000).

6. FIFRA Science Advisory Panel. 2002. Methods Used to Conduct a Preliminary Cumulative Risk Assessment for Organophosphate Pesticides. Final Report from the FIFRA Scientific Advisory Panel Meeting of February 5–7, 2002 (Report dated March 19, 2002). FIFRA Scientific Advisory Panel, Office of Science Coordination and Policy, Office of Prevention, Pesticides and Toxic Substances, U.S. Environmental Protection Agency. Washington, DC. SAP Report 2002–01.

7. FIFRA Science Advisory Panel. 2005a. Final report on *N*-Methyl Carbamate Cumulative Risk Assessment: Pilot Cumulative Analysis. Final Report from the FIFRA Scientific Advisory Panel Meeting of February 2005 (Report dated September 2, 1998). Available at: *http://www.epa.gov/scipoly/sap/2005/february/minutes.pdf.*

8. FIFRA Science Advisory Panel. 2005b. Final report on Preliminary *N*-Methyl Carbamate Cumulative Risk Assessment. Final Report from the FIFRA Scientific Advisory Panel Meeting of July 29–30, 2005 (Report dated September -, 2005). Available at: *http://www.epa.gov/scipoly/sap/2005/august/minutes.pdf.*

9. Office of Pesticide Programs, US EPA, "Office of Pesticide Programs' Policy on the Determination of the Appropriate FQPA Safety Factor(s) For Use in the Tolerance Setting Process" (February 28, 2002).

10. US EPA Office of Pesticide Programs, "The Use of Data on Cholinesterase Inhibition for Risk Assessments of Organophosphorous and Carbamate Pesticides" (August 18, 2000).

11. US EPA Office of Pesticide Programs. March 9, 2005 letter to Peg Cherney, Bayer Crop Science, Final Cancellation Order for Carbaryl Liquid Broadcast Application to Lawns/Turf; EPA Registration Numbers 264–324, 264–325, and 264–328.

12. US EPA Office of Pesticide Programs. 2007. Office of Prevention, Pesticides and Toxic Substances, EPA, Reregistration Eligibility Decision for Carbaryl (September 24, 2007).

13. US EPA Office of Pesticide Programs. 2002. Hazard Identification Assessment Review Committee (HIARC) report (March 5, 2002).

14. US EPA Office of Pesticide Programs. 2002. FQPA SF Committee report (April 3, 2002).

15. US EPA Office of Pesticide Programs. 2002. HIARC report (May 9, 2002).

16. Moser, G. (2007) Report of Cholinesterase Comparative Sensitivity Study of Carbaryl. Unpublished study prepared by US EPA, ORD, NHEERL. (MRID 47143001).

17. US EPA Office of Pesticide Programs. 2007. Carbaryl: Updated Endpoint Selection for Single Chemical Risk Assessment (June 29, 2007).

18. US EPA Office of Pesticide Programs. 2007b. Carbaryl. HED Chapter of the Reregistration Eligibility Decision Document (RED). EPA–HQ–OPP–2007–0941–0003. PC Code: 056801, DP Barcode: D334770. (June 28, 2007).

19. Johnson, C.D. and Russell, R.L. (1975) A rapid, simple radiometric assay for cholinesterase, suitable for multiple determinations. Analytical Biochemistry. 64:229–238.

20. US EPA Office of Pesticide Programs. 1998. Hazard Identification Assessment Review Committee (HIARC) report (July 7, 1998).

21. US EPA Office of Pesticide Programs. 1998. FQPA SF Committee report (August 27, 1998).

22. US EPA Office of Pesticide Programs. 1999. HIARC report (April 27, 1999).

23. US EPA Office of Pesticide Programs. 1999. HIARC report (November 15, 1999).

24. US EPA Office of Pesticide Programs. 1999. FQPA SF Committee report (December 13, 1999).

25. US EPA Office of Pesticide Programs. 2001. HIARC report (April 5, 2001).

26. US EPA Office of Pesticide Programs. 2001. FQPA SF Committee report (April 30, 2001).

List of Subjects in 40 CFR Part 180

Environmental protection, Carbaryl, Pesticides and pests.

Dated: September 8, 2010.

Steven Bradbury,

Director, Office of Pesticide Programs

[FR Doc. 2010–22987 Filed 9–14–10; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2010–0756; FRL–8844–7]

Technical Amendments to Pesticide Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is issuing this technical amendment to change references in several sections of 40 CFR part 180. These changes are necessary because of a final rule which was issued in the **Federal Register** of June 8, 2005. That final rule made miscellaneous changes to 40 CFR part 180 to update generic provisions of EPA's procedural regulations relating to pesticide chemicals. The update was made necessary because of various changes made by the Food Quality Protection Act of 1996.

DATES: This final rule is effective September 15, 2010.

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2010–0756. 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: Kathryn Boyle, Field and External Affairs Division, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–6304; fax number: (703) 305–5884; e-mail address: *boyle.kathryn@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Does this Action Apply to Me?

You may be potentially affected by this action if you 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**.

II. Background

A. What Action is the Agency Taking?

EPA is issuing this technical amendment to change references in several sections of 40 CFR part 180. These changes are necessary because of a final rule which was issued in the **Federal Register** of June 8, 2005 (70 FR 33354) (FRL–7706–9). That final rule made miscellaneous changes to 40 CFR part 180 to update generic provisions of EPA's procedural regulations relating to pesticide chemicals. The update was made necessary because of various changes made by the Food Quality Protection Act of 1996.

Several amendments were made to § 180.1. One of the amendments removed § 180.1(d) while another amendment redesignated § 180.1(e) through § 180.1(p) as new § 180.1(d) through § 180.1(o). There are numerous references throughout 40 CFR part 180, subpart C to the definition of the term "regional registration." Before the redesignation, the definition for "regional registration" was codified in § 180.1(n); however, with the redesignation the definition was moved to § 180.1(m). At that time there were no conforming amendments to make the necessary adjustments to the references found in other sections in 40 CFR part 180, subpart c. Therefore, most of the references to the definition of "regional registration" still indicate that the term is codified in § 180.1(n) rather than indicating that the term is now codified in § 180.1(m). This technical amendment merely corrects the reference to the definition of the term "regional registration."

Additionally, § 180.40(b) references § 180.1(h) for a listing of commodities for which established tolerances may be applied to certain other related and similar commodities. With the redesignation that occurred, the listing is now in § 180.1(g). This technical amendment also corrects § 180.40(b).

B. What is the Agency's Authority for Taking this Action?

This technical amendment is being issued under authority of 21 U.S.C. 321(q), 346a and 371.

III. Statutory and Executive Order Reviews

These technical amendments merely change references in the EPA regulations governing pesticide tolerances. The amendments are procedural in nature and do not have any impact on regulated parties or the public. A complete statutory and Executive Order review was provided in the procedural regulation that was printed on June 8, 2005 (70 FR 33354) (FRL–7706–9).

IV. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pest.

Dated: September 7, 2010.

William R. Diamond,

Acting Director, Office of Pesticide Programs.

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

PART 180— [AMENDED]

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

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

Part 180 [Amended]

■ 2. In part 180 make the changes that appear in the following table:

In Section and paragraph	Revise the Reference	To Read
§ 180.40(b)	§ 180.1(h)	§ 180.1(g)
§ 180.106(c) introductory text	§ 180.1(n)	§ 180.1(m)
§ 180.123(c) introductory text	§ 180.1(n)	§ 180.1(m)
§ 180.145(c) introductory text	§ 180.1(n)	§ 180.1(m)
180.205(c) introductory text	§ 180.1(n)	§ 180.1(m)
180.222(c) introductory text	§ 180.1(n)	§ 180.1(m)
180.253(c) introductory text	§ 180.1(n)	§ 180.1(m)
180.254(c) introductory text	§ 180.1(n)	§ 180.1(m)
180.259(c) introductory text	§ 180.1(n)	§ 180.1(m)
180.261(c) introductory text	§ 180.1(n)	§ 180.1(m)
180.275(c) introductory text	§ 180.1(n)	§ 180.1(m)
180.284(c) introductory text	§ 180.1(n)	§ 180.1(m)
180.294(c) introductory text	§ 180.1(n)	§ 180.1(m)

In Section and paragraph	Revise the Reference	To Read
180.298(c) introductory text	§ 180.1(n)	§ 180.1(m)
180.300(c)	§ 180.1(n)	§ 180.1(m)
180.304(c) introductory text	§ 180.1(n)	§ 180.1(m)
180.315(b) introductory text	§ 180.1(n)	§ 180.1(m)
180.349(c) introductory text	§ 180.1(n)	§ 180.1(m)
180.355(c) introductory text	§ 180.1(n)	§ 180.1(m)
180.396(c) introductory text	§ 180.1(n)	§ 180.1(m)
180.399(c) introductory text	§ 180.1(n)	§ 180.1(m)
180.401(b) introductory text	§ 180.1(n)	§ 180.1(m)
180.408(c) introductory text	§ 180.1(n)	§ 180.1(m)
180.415(c) introductory text	§ 180.1(n)	§ 180.1(m)
180.432(c) introductory text	§ 180.1(n)	§ 180.1(m)
180.441(c) introductory text	§ 180.1(n)	§ 180.1(m)
180.447(c) introductory text	§ 180.1(n)	§ 180.1(m)
180.448(c) introductory text	40 CFR 180.1(n)	§ 180.1(m)
180.451(c) introductory text	§ 180.1(n)	§ 180.1(m)
180.494(c) introductory text	§ 180.1(n)	§ 180.1(m)
180.503(c) introductory text	§ 180.1(n)	§ 180.1(m)
180.573(c) introductory text	§ 180.1(n)	§ 180.1(m)
180.587(c) introductory text	Sec. 180.1(n)	§ 180.1(m)

[FR Doc. 2010–22855 Filed 9–14–09; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–R03–SFUND–2010–0436; FRL–9177–8]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List: Partial Deletion of the Letterkenny Army Depot Southeastern (SE) Area and Letterkenny Army Depot Property Disposal Office (PDO) Area Superfund Sites

Correction

In rule document 2010–17776 beginning on page 43082 in the issue of Friday, July 23, 2010 make the following correction:

Appendix B to Part 300 [Corrected]

On page 43088, in Appendix B to Part 300, in Table 2, in the entry in the fifth row, in the second column of the table, "Letterkenny Army Depot (SE Area)" should read "Letterkenny Army Depot (PDO Area)".

[FR Doc. C1–2010–17776 Filed 9–14–10; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 411

Exclusions from Medicare and Limitations on Medicare Payment

CFR Correction

In Title 42 of the Code of Federal Regulations, Parts 400 to 413, revised as of October 1, 2009, on page 475, in § 411.357, paragraph (a)(5)(ii) is revised and the second paragraph (a)(6) is removed.

The revised text is set forth to read as follows;

§ 411.357 Exceptions to the referral prohibition related to compensation arrangements.

* * * * *

(a) * * *

(5) * * *

(ii) Using a formula based on—

(A) A percentage of the revenue raised, earned, billed, collected, or otherwise attributable to the services performed or business generated in the office space; or

(B) Per-unit of service rental charges, to the extent that such charges reflect services provided to patients referred by the lessor to the lessee.

* * * * *

[FR Doc. 2010–23179 Filed 9–14–10; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Part 8

Vessel Inspection Alternatives

CFR Correction

In Title 46 of the Code of Federal Regulations, Parts 1 to 40, revised as of October 1, 2009, on page 88, in § 8.420, paragraph (c) is revised to read as follows:

§ 8.420 Classification society authorization to participate in the Alternate Compliance Program.

* * * * *

(c) A recognized classification society:

(1) Will be eligible to receive authorization to participate in the ACP only after the Coast Guard has delegated to it the authority to issue the following certificates:

(i) International Load Line Certificate;

(ii) International Tonnage Certificate;

(iii) Cargo Ship Safety Construction Certificate;

(iv) Cargo Ship Safety Equipment Certificate; and

(v) International Oil Pollution Prevention Certificate; and

(2) Must have performed a delegated function related to general vessel safety assessment, as defined in § 8.100 of this part, for a two-year period.

* * * * *

[FR Doc. 2010–23172 Filed 9–14–10; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 0907301205–0289–02]

RIN 0648–XZ00

Fisheries of the Northeastern United States; Atlantic Herring Fishery; Total Allowable Catch Harvested for Management Area 1B

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS announces that, effective 0001 hours, September 14, 2010, federally permitted vessels may not fish for, catch, possess, transfer, or land more than 2,000 lb (907.2 kg) of Atlantic herring in or from Management Area 1B (Area 1B) per trip or calendar day until January 1, 2011, when the 2011 total allowable catch (TAC) becomes available, except for transiting purposes as described in this notice. This action is based on the determination that 95 percent of the Atlantic herring TAC allocated to Area 1B for 2010 is projected to be harvested by September 14, 2010. Regulations governing the Atlantic herring fishery require publication of this notification to advise vessel permit holders that no TAC is available for the directed fishery for Atlantic herring harvested from Area 1B.

DATES: Effective 0001 hrs local time, September 14, 2010, through December 31, 2010.

FOR FURTHER INFORMATION CONTACT: Lindsey Feldman, Fishery Management Specialist, (978) 675–2179.

SUPPLEMENTARY INFORMATION: Regulations governing the Atlantic herring fishery are found at 50 CFR part 648. The regulations require annual specification of optimum yield, domestic and foreign fishing, domestic and joint venture processing, and management area TACs. The 2010 Domestic Annual Harvest is 91,200 mt; the 2010 TAC allocated to Area 1B (75 FR 48874, August 12, 2010) is 4,362 mt; 0 mt of the TAC is set aside for research, which leaves a TAC of 86,838 mt for the commercial fishery.

The regulations at § 648.201 require the Administrator, Northeast Region, NMFS (Regional Administrator), to monitor the Atlantic herring fishery in each of the four management areas designated in the Fishery Management Plan (FMP) for the Atlantic herring fishery and, based upon dealer reports, state data, and other available information, to determine when the harvest of Atlantic herring is projected to reach 95 percent of the TAC allocated. When such a determination is made, NMFS is required to publish notification in the **Federal Register** of this determination and prohibit Atlantic herring vessel permit holders from fishing for, catching, possessing, transferring, or landing more than 2,000 lb (907.2 kg) of herring per trip or calendar day in or from the specified management area for the remainder of the closure period. Transiting of Area 1B with more than 2,000 lb (907.2 kg) of herring on board is allowed under the conditions specified below.

The Regional Administrator has determined, based upon dealer reports and other available information that 95 percent of the total Atlantic herring TAC allocated to Area 1B for the 2010 fishing year is projected to be harvested. Therefore, effective 0001 hrs local time, September 14, 2010, federally permitted vessels may not fish for, catch, possess, transfer, or land more than 2,000 lb (907.2 kg) of Atlantic herring in or from Area 1B per trip or calendar day through December 31, 2010. Vessels transiting Area 1B with more than 2,000 lb (907.2 kg) of herring on board may land this amount provided such herring was not caught in Area 1B and provided all fishing gear is stowed and not available for immediate use as required by § 648.23(b). Effective September 14, 2010, federally permitted dealers are also advised that they may not purchase Atlantic herring from federally permitted Atlantic herring vessels that harvest more than 2,000 lb (907.2 kg) of Atlantic herring from Area 1B through 2400 hrs local time, December 31, 2010.

Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

The Assistant Administrator for Fisheries, NOAA (AA), finds good cause pursuant to 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment because it would be contrary to the public interest. This action closes the Atlantic herring fishery for Management Area 1B until January 1, 2011, under current regulations. The regulations at § 648.201(a) require such action to ensure that Atlantic herring vessels do not exceed the 2010 TAC. The Atlantic herring fishery opened for the 2010 fishing year at 0001 hours on January 1, 2010. Data indicating the Atlantic herring fleet will have landed at least 95 percent of the 2010 TAC have only recently become available. If implementation of this closure is delayed to solicit prior public comment, the quota for this fishing year will be exceeded, thereby undermining the conservation objectives of the FMP. The AA further finds, pursuant to 5 U.S.C 553(d)(3), good cause to waive the thirty (30) day delayed effectiveness period for the reasons stated above.

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

Dated: September 10, 2010

Emily H. Menashes,

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

[FR Doc. 2010–23018 Filed 9–10–10; 4:15 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 0910131362–0087–02]

RIN 0648–XZ05

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Vessels Catching Pacific Cod for Processing by the Inshore Component in the Central Regulatory Area 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 cod by vessels catching Pacific cod for processing by the inshore component in the Central Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2010 Pacific total allowable catch (TAC) apportioned to vessels catching Pacific cod for processing by the inshore component of the Central Regulatory Area of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), September 13, 2010, through 2400 hrs, A.l.t., December 31, 2010.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

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. Regulations governing sideboard protections for GOA groundfish fisheries appear at subpart B of 50 CFR part 680.

The 2010 Pacific cod TAC apportioned to vessels catching Pacific cod for processing by the inshore component of the Central Regulatory Area of the GOA is 33,104 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 Pacific cod TAC apportioned to vessels catching Pacific cod for processing by the inshore component of the Central Regulatory Area of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 31,604 mt, and is setting aside the remaining 1,500 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 cod by vessels catching Pacific cod for processing by the inshore component in the Central Regulatory Area of the GOA. This inseason action does not apply to vessels fishing under a cooperative quota permit in the cooperative fishery in the Rockfish Program for the Central 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 directed fishing closure of Pacific cod by vessels catching Pacific cod for processing by the inshore component in the Central Regulatory Area 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 September 9, 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: September 10, 2010.

Emily H. Menashes,

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

[FR Doc. 2010–23020 Filed 9–10–10; 4:15 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 0910131362–0087–02]

RIN 0648–XZ06

Fisheries of the Exclusive Economic Zone Off Alaska; Shallow-Water Species by Vessels Using Trawl Gear in the Gulf of Alaska

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

ACTION: Temporary rule; modification of a closure.

SUMMARY: NMFS is opening directed fishing for shallow-water species by vessels using trawl gear in the Gulf of Alaska (GOA). This action is necessary to fully use the fourth seasonal apportionment of the 2010 Pacific halibut bycatch allowance specified for the trawl shallow-water species fishery in of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), September 11, 2010, through 1200 hrs, A.l.t., October 1, 2010. Comments must be received at the following address no later than 4:30 p.m., A.l.t., September 27, 2010.

ADDRESSES: Send comments to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by RIN 0648–XZ06, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov*.
- Mail: P.O. Box 21668, Juneau, AK 99802.
- Fax: (907) 586–7557.
- Hand delivery to the Federal Building: 709 West 9th Street, Room 420A, Juneau, AK.

All comments received are a part of the public record. No comments will be posted to *http://www.regulations.gov* for public viewing until after the comment period has closed. Comment will generally be posted without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

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.

NMFS prohibited directed fishing for shallow-water species by vessels using trawl gear in the GOA under § 679.21(d)(7)(i) on September 3, 2010 (75 FR 54290, September 7, 2010).

NMFS has determined that approximately 132 mt remain in the fourth seasonal apportionment of the 2010 Pacific halibut bycatch allowance specified for the trawl shallow-water species fishery in the GOA. Therefore, in accordance with § 679.25(a)(1)(i), (a)(2)(i)(C) and (a)(2)(iii)(D), and to fully utilize the fourth seasonal apportionment of the 2010 Pacific halibut bycatch allowance specified for the trawl shallow-water species fishery in the GOA, NMFS is terminating the previous closure and is opening directed fishing for trawl shallow-water species by vessels using trawl gear in the GOA. This will enhance the socioeconomic well-being of harvesters

dependent upon shallow-water species in the GOA. The Regional Administrator considered the following factors in reaching this decision: (1) the current catch of shallow-water species in the GOA, (2) the current catch of 2010 Pacific halibut bycatch allowance specified for this fishery, and (3) the harvest capacity and stated intent on future harvesting patterns of vessels in participating in this fishery.

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 opening of directed fishing for trawl shallow-water species by vessels using trawl gear in the GOA. Immediate notification is necessary to allow for the orderly conduct and efficient operation of this fishery, to allow the industry to plan for the fishing season, and to avoid potential disruption to the fishing fleet and processors. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of September 9, 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.

Without this inseason adjustment, NMFS could not allow trawl shallow-water species to be harvested in an expedient manner and in accordance with the regulatory schedule. Under § 679.25(c)(2), interested persons are invited to submit written comments on this action to the above address until September 27, 2010.

This action is required by§ 679.21 and § 679.25 and is exempt from review under Executive Order 12866.

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

Dated: September 10, 2010.

Emily H. Menashes,

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

[FR Doc. 2010–23021 Filed 9–10–10; 4:15 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 0910131362–0087–02]

RIN 0648–XZ04

Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in Statistical Area 610 in 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 pollock in Statistical Area 610 in the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the C season allowance of the 2010 total allowable catch (TAC) of pollock for Statistical Area 610 in the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), September 10, 2010, through 1200 hrs, A.l.t., October 1, 2010.

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

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 C season allowance of the 2010 TAC of pollock in Statistical Area 610 of the GOA is 7,577 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(a)(5)(iv)(B) the Administrator, Alaska Region, NMFS (Regional Administrator), hereby increases the C season pollock allowance by 1,138 mt to reflect the total amount of pollock TAC that has been caught prior to the C season in Statistical Area 610. Therefore, the revised C season allowance of the pollock TAC in Statistical Area 610 is 8,715 mt (7,577 mt plus 1,138 mt).

In accordance with § 679.20(d)(1)(i), the Regional Administrator has determined that the C season allowance of the 2010 TAC of pollock in Statistical Area 610 of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 8,615 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 pollock in Statistical Area 610 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 pollock in Statistical Area 610 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 September 9, 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: September 10, 2010.

Emily H. Menashes,

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

[FR Doc. 2010–23025 Filed 9–10–10; 4:15 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 75, No. 178
Wednesday, September 15, 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 AGRICULTURE

Agricultural Marketing Service

7 CFR Part 987

[Docket No. AMS–FV–10–0059; FV10–987–2 PR]

Domestic Dates Produced or Packed in Riverside County, CA; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule would increase the assessment rate established for the California Date Administrative Committee (Committee) for the 2010–11 and subsequent crop years from $0.75 to $1.00 per hundredweight of dates handled. The Committee locally administers the marketing order, which regulates the handling of dates grown or packed in Riverside County, California. Assessments upon date handlers are used by the Committee to fund reasonable and necessary expenses of the program. The crop year begins October 1 and ends September 30. The assessment rate would remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Comments must be received by October 15, 2010.

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

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

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

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 987, as amended (7 CFR part 987), regulating the handling of dates grown or packed in Riverside County, California, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the "Act."

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

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, Riverside County, California date handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as proposed herein would be applicable to all assessable dates beginning October 1, 2010, and would continue until amended, suspended, or terminated.

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

This rule would increase the assessment rate established for the Committee for the 2010–11 and subsequent crop years from $0.75 to $1.00 per hundredweight of dates.

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

For the 2009–10 and subsequent crop years, the Committee recommended, and USDA approved, an assessment rate that would continue in effect from crop year to crop year unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee met on June 24, 2010, and unanimously recommended 2010–11 expenditures of $245,000 and an assessment rate of $1.00 per hundredweight of California dates. In comparison, last year's budgeted expenditures were $200,000. The modified assessment rate of $1.00 is $0.25 higher than the rate currently in effect. The Committee recommended a higher assessment rate to offset the 2010–11 budgeted increases in salaries, operating expenses, and promotion programs, and to build their operating reserve. The higher assessment rate should be sufficient to cover the 2010–

11 budgeted expenses and meet their financial goals.

Section 987.72(c) authorizes the Committee to establish and maintain an operating reserve not to exceed 50 percent of an average year's expenses. Funds from the reserve are available for the Committee's use during the crop year to cover budgeted expenses as necessary or for other purposes deemed appropriate by USDA. The Committee expects to carry a $40,000 reserve into the 2010–11 crop year. They expect to add $16,500 to the reserve during the year, for a desired carryout of approximately $56,000, which is well below the limit specified in the order.

Income from the sale of cull dates is deposited in a surplus account for subsequent use by the Committee to cover the surplus pool share of the Committee's expenses. Handlers may also dispose of cull dates of their own production within their own livestock-feeding operation; otherwise, such cull dates must be shipped or delivered to the Committee for sale to non-human food product outlets. Pursuant to § 987.72(b), the Committee is authorized to temporarily use funds derived from assessments to defray expenses incurred in disposing of surplus dates. All such expenses are required to be deducted from proceeds obtained by the Committee from the disposal of surplus dates. For the 2010–11 crop year, the Committee estimated that $1,500 from the surplus account would be needed to temporarily defray expenses incurred in disposing of surplus dates.

The major expenditures recommended by the Committee for the 2010–11 crop year include $85,000 for general and administrative programs, $127,875 for promotional programs, $17,900 for nutritional research, and $14,225 for marketing and media consulting. The budgeted amount for promotional programs includes a $29,000 contingency fund that would allow the Committee to take advantage of unexpected marketing opportunities that may present themselves during the year.

By comparison, expenditures recommended by the Committee for the 2009–10 crop year included $60,000 for general and administrative programs, $97,000 for promotional programs, $15,000 for nutritional research, and $28,000 for marketing and media consulting.

The assessment rate of $1.00 per hundredweight of assessable dates was derived by applying the following formula where:

A = 2009–10 estimated reserve on 09/30/10 ($40,000);
B = 2010–11 estimated reserve on 09/30/11 ($56,500);
C = 2010–11 expenses ($245,000);
D = Cull Surplus Fund ($1,500);
F = 2010–11 expected shipments (26,000,000 pounds).

$[(C - A + B - D)/F] \times 100$.

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

Although this proposed assessment rate would be in effect for an indefinite period, the Committee would continue to meet prior to or during each crop year to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA would evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The Committee's 2010–11 budget and those for subsequent crop years would be reviewed and, as appropriate, approved by USDA.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

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

There are approximately 85 producers of dates in the production area and 9 handlers subject to regulation under the marketing order. The Small Business Administration (13 CFR 121.201) defines small agricultural producers as those having annual receipts of less than $750,000, and small agricultural service firms are defined as those having annual receipts of less than $7,000,000.

According to the National Agricultural Statistics Service (NASS), data for the most-recently completed crop year, 2009–10, indicates that about 3.8 tons, or 7,600 pounds, of dates were produced per acre. The 2009–10 producer price published by NASS was $1,450 per ton, or $0.725 per pound. Thus, the value of date production in 2009–10 averaged about $5,510 per acre (7,600 pounds per acre times $0.725 per pound). At that average price, a producer would have to farm more than 136 acres to receive an annual income from dates of $750,000 ($750,000 divided by $5,510 per acre equals 136.1 acres). According to the Committee's staff, the majority of California date producers farm fewer than 136 acres. Thus, it can be concluded that the majority of date producers could be considered small entities. According to data from the Committee, the majority of California date handlers may also be considered small entities.

This rule would increase the assessment rate established for the Committee and collected from handlers for the 2010–11 and subsequent crop years from $0.75 to $1.00 per hundredweight of dates handled. The Committee unanimously recommended 2010–11 expenditures of $245,000 and an assessment rate of $1.00 per hundredweight of dates. The proposed assessment rate is $0.25 higher than the 2009–10 rate currently in effect. The quantity of assessable dates for the 2010–11 crop year is estimated at 26,000,000 pounds. Thus, the $1.00 rate should provide approximately $260,000 in assessment income and will be adequate to meet the budgeted expenses.

The major expenditures recommended by the Committee for the 2010–11 crop year include $85,000 for general and administrative programs, $127,875 for promotional programs, $17,900 for nutritional research, and $14,225 for marketing and media consulting. The Committee also hopes to add $16,500 to its operating reserve. Prior to arriving at this budget, the Committee considered information from various sources, such as the Committee's Marketing Subcommittee. Alternative expenditure levels were discussed, but the Committee ultimately decided that the recommended levels were reasonable to properly administer the order. The assessment rate of $1.00 per hundredweight of dates was then derived, based upon the Committee's estimates of the available operating reserve, projected crop size, and anticipated expenses.

As previously noted, NASS reported that the average producer price for 2009–10 crop dates was $1,450 per ton, or $72.50 per hundredweight. No

official NASS estimate is available yet for 2010–11. However, the average grower price for the 3-year period between 2007–08 and 2009–10 was $1,756.67 per ton, or $87.83 per hundredweight.

Assuming that the average producer price for 2010–11 will range between $72.50 and $87.83 per hundredweight, the estimated assessment revenue, stated as a percentage of producer revenue, would range between 1.38 and 1.14 percent ($1.00 per hundredweight divided by either $72.50 or $87.83 per hundredweight). Thus, assessment revenue should be less than 1.5 percent of estimated producer revenue for 2010–11.

This action would increase the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to producers. However, these costs would be offset by the benefits derived by the operation of the marketing order. In addition, the Committee's meeting was widely publicized throughout the California date industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the June 24, 2010, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit comments on this rule, including the regulatory and informational impacts of this action on small businesses.

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

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

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

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/MarketingOrdersSmallBusinessGuide.* Any questions about the compliance guide should be sent to Antoinette Carter at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 30-day comment period is provided to allow interested persons to respond to this proposed rule. Thirty days is deemed appropriate because: (1) The 2010–11 crop year begins on October 1, 2010, and the marketing order requires that the rate of assessment for each crop year apply to all assessable dates handled during such crop year; (2) the Committee needs to have sufficient funds to pay its expenses, which are incurred on a continuous basis; and (3) handlers are aware of this action, which was unanimously recommended by the Committee at a public meeting and is similar to other assessment rate actions issued in past years.

List of Subjects in 7 CFR Part 987

Dates, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 987 is proposed to be amended as follows:

PART 987—DATES PRODUCED OR PACKED IN RIVERSIDE COUNTY, CALIFORNIA

1. The authority citation for 7 CFR part 987 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Section 987.339 is revised to read as follows:

§ 987.339 Assessment rate.

On and after October 1, 2010, an assessment rate of $1.00 per hundredweight is established for California dates.

Dated: September 10, 2010.

David R. Shipman,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2010–22981 Filed 9–14–10; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket No. EERE–2008–BT–STD–0005]

RIN 1904–AB57

Energy Conservation Standards for Battery Chargers and External Power Supplies: Public Meeting and Availability of the Preliminary Technical Support Document

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of public meeting and availability of preliminary technical support document.

SUMMARY: The U.S. Department of Energy (DOE) will hold a public meeting to discuss and receive comments on the following: the product classes DOE plans to analyze for the purposes of amending energy conservation standards for Class A external power supplies (EPSs) and establishing energy conservation standards for battery chargers (BCs) and non-Class A EPSs; the analytical framework, models, and tools DOE is using to evaluate standards for these products; the results of preliminary analyses performed by DOE for these products; and potential energy conservation standard levels derived from these analyses that DOE could consider for these products. DOE also encourages interested parties to submit written comments on these subjects. To inform stakeholders and facilitate the public meeting and comments process, DOE has prepared an agenda, a preliminary technical support document (TSD), and briefing materials, which are available at: *http://www1.eere.energy.gov/buildings/appliance_standards/residential/battery_external.html.*

DATES: The Department will hold a public meeting on Wednesday, October 13, 2010, from 9 a.m. to 5 p.m. in Washington, DC. Any person requesting to speak at the public meeting should submit such request, along with an electronic copy of the statement to be given at the public meeting, before 4 p.m., Wednesday, September 29, 2010. Written comments are welcome, especially following the public meeting, and should be submitted by October 15, 2010.

ADDRESSES: The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room 8E–089, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Please note that foreign nationals participating in the public meeting are subject to advance security screening procedures. If a foreign national wishes to participate in the public meeting, please inform DOE of this fact as soon as possible by contacting Ms. Brenda Edwards at (202) 586–2945 so that the necessary procedures can be completed.

Interested persons may submit comments, identified by docket number EERE–2008–BT–STD–0005, by any of the following methods:

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

• *E-mail: BC&EPS_ECS@ee.doe.gov.* Include EERE–2008–BT–STD–0005 and/or RIN 1904–AB57 in the subject line of the message.

• *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, Public Meeting for Battery Chargers and External Power Supplies, EERE–2008–BT–STD–0005 and/or RIN 1904–AB57, 1000 Independence Avenue, SW., Washington, DC 20585–0121. *Phone:* (202) 586–2945. Please submit one signed paper original.

• *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 6th Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024. *Phone:* (202) 586–2945. Please submit one signed paper original.

Instructions: All submissions received must include the agency name and docket number or RIN for this rulemaking.

Docket: For access to the docket to read background documents, a copy of the transcript of the public meeting, or comments received, go to the U.S. Department of Energy, 6th Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please call Ms. Brenda Edwards at (202) 586–2945 for additional information regarding visiting the Resource Room.

FOR FURTHER INFORMATION CONTACT: Mr. Victor Petrolati, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. *Telephone:* (202) 586–4549. *E-mail: Victor.Petrolati@ee.doe.gov.*

In the Office of General Counsel, contact Ms. Francine Pinto or Mr. Michael Kido, U.S. Department of Energy, Office of the General Counsel, GC–72, 1000 Independence Avenue, SW., Washington, DC 20585. *Telephone:* (202) 586–9507. *E-mail: Francine.Pinto@hq.doe.gov or Michael.Kido@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

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I. Statutory Authority

Title III of the Energy Policy and Conservation Act (42 U.S.C. 6291 *et seq.;* EPCA or the Act) sets forth a variety of provisions designed to improve energy efficiency. Part A of Title III (42 U.S.C. 6291–6309) establishes the "Energy Conservation Program for Consumer Products Other Than Automobiles," which covers consumer products and certain commercial products (all of which are referred to below as "covered products"), including BCs and EPSs.

These provisions authorize the Department to establish energy efficiency standards for certain consumer products. Any new or amended standard for these products must (1) achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified, and (2) result in significant conservation of energy. (42 U.S.C. 6295(o)(2)(A)) To determine whether a proposed standard is economically justified, DOE must, after receiving comments on the proposed standard, determine whether the benefits of the standard exceed its burdens to the greatest extent practicable, considering the following seven factors:

1. The economic impact of the standard on manufacturers and consumers of products subject to the standard;

2. The savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products which are likely to result from the imposition of the standard;

3. The total projected amount of energy savings likely to result directly from the imposition of the standard;

4. Any lessening of the utility or the performance of the covered products likely to result from the imposition of the standard;

5. The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard;

6. The need for national energy conservation; and

7. Other factors the Secretary [of Energy] considers relevant. (42 U.S.C. 6295(o)(2)(B)(i))

Prior to proposing a standard, DOE typically seeks public input on the analytical framework, models, and tools that will be used to evaluate standards; the results of preliminary analyses; and potential energy conservation standard levels derived from these analyses. With this notice DOE is announcing the availability of the preliminary technical support document (preliminary TSD), which details the preliminary analyses, discusses the comments on the framework document, and summarizes the preliminary results. In addition, DOE is announcing a public meeting to solicit feedback from interested parties on its analytical framework, models, and preliminary results.

II. History of Standards Rulemaking for Battery Chargers and External Power Supplies

The following sections provide a brief summary of the rulemaking activities for battery charger and external power supply energy conservation standards.

A. Background

Section 135 of the Energy Policy Act of 2005 (EPACT 2005), Public Law 109–58 amended sections 321 and 325 of EPCA by defining battery chargers and external power supplies and directing the Secretary to prescribe "definitions and test procedures for the power use of battery chargers and external power supplies" and to "issue a final rule that determines whether energy conservation standards shall be issued for battery chargers and external power supplies or classes of battery chargers and external power supplies." (42 U.S.C. 6295(u)(1)(A) and (E))

On December 8, 2006, DOE complied with the first of these requirements by publishing a final rule that prescribed test procedures for a variety of products. 71 FR 71340, 71365–75. That rule, which is currently codified in multiple sections of the Code of Federal Regulations (CFR), included definitions and test procedures for BCs and EPSs. The test procedures for these products are found in 10 CFR part 430, subpart B, appendix Y ("Uniform Test Method for Measuring the Energy Consumption of Battery Chargers") and 10 CFR part 430, subpart B, appendix Z ("Uniform Test Method for Measuring the Energy Consumption of External Power Supplies").

DOE initiated the determination analysis rulemaking for BCs and EPSs in 2006, which included a scoping workshop on January 24, 2007, at DOE headquarters in Washington, DC Information pertaining to the scoping workshop can be found on DOE's Web site at *http://www.eere.energy.gov/buildings/appliance_standards/residential/battery_external.html.*

B. Current Rulemaking Process

Subsequent to the activities noted above, Congress enacted the Energy Independence and Security Act of 2007 (EISA 2007), Public Law 110–140 (Dec. 19, 2007), which, among other things, amended sections 321, 323, and 325 of EPCA. As part of these amendments, EISA 2007 altered the external power supply definition. Under the definition previously set by EPACT 2005, the statute defined an external power supply as "an external power supply circuit that is used to convert household electric current into DC current or lower-voltage AC current to operate a consumer product." (42 U.S.C. 6291(36)(A)) Section 301 of EISA 2007 amended that definition by creating a subset of external power supplies called "Class A External Power Supplies." The new subset of products consisted of those EPSs that are "able to convert to only 1 AC or DC output voltage at a time" and have "nameplate output power that is less than or equal to 250 watts." The definition of Class A EPS excludes any device that "requires Federal Food and Drug Administration listing and approval as a medical device in accordance with section 513 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360c)" or "powers the charger of a detachable battery pack or charges the battery of a product that is fully or primarily motor operated." (42 U.S.C. 6291(36)(C)) Section 301 of EISA 2007 also established for these products energy conservation standards that became effective on July 1, 2008, and directed DOE to conduct an energy conservation standards rulemaking to review those standards by July 1, 2011.

Additionally, section 309 of EISA 2007 amended section 325(u)(1)(E) of EPCA by directing DOE to issue a final rule that prescribes energy conservation standards for BCs or classes of BCs or to determine that no energy conservation standard is technologically feasible and economically justified. DOE is bundling this BC rulemaking proceeding with the requirement to review and consider amending the energy conservation standards for Class A EPSs, as both rulemakings must be completed by July 1, 2011. The new rulemaking requirements contained in sections 301 and 309 of EISA 2007 effectively superseded the prior determination analysis that EPACT 2005 required DOE to conduct.

Section 309 of EISA 2007 also instructed DOE to "issue a final rule that determines whether energy conservation standards shall be issued for external power supplies or classes of external power supplies" no later than two years after EISA 2007's enactment. (42 U.S.C. 6295(u)(1)(E)(i)(I)) Because DOE cannot conduct a determination analysis for a product for which standards have already been set, DOE interpreted these sections jointly as a requirement to determine, in a separate rulemaking, whether energy conservation standards are warranted for EPSs outside of Class A (non-Class A EPSs). Non-Class A EPSs include those with nameplate output power greater than 250 watts, those able to convert to more than one AC or DC output voltage at the same time, and those specifically excluded from coverage under the Class A EPS definition in EISA 2007 by virtue of their application, *e.g.,* EPSs used with medical devices. DOE has determined that standards are warranted for non-Class A EPSs. The determination was published in the **Federal Register** on May 14, 2010. 75 FR 27170. Given the related nature of such products, DOE included non-Class A EPSs within the ongoing standards rulemaking.

Finally, section 310 of EISA 2007 established definitions for active mode, standby mode, and off mode, and directed DOE to amend its existing test procedures for BCs and EPSs to measure the energy consumed in standby mode and off mode. (42 U.S.C. 6295(gg)(2)(B)(i)) Consequently, DOE published a final rule incorporating standby and off mode measurement into the DOE test procedure. 74 FR 13318, 13334–13336 (March 27, 2009). DOE is now considering amending the test procedure for BCs to include BC active mode. A notice of proposed rulemaking (NOPR) was published in the **Federal Register** on April 2, 2010. 75 FR 16958.

To initiate the bundled BC and Class A EPS rulemaking, the Department published on its website the Energy Conservation Standards Rulemaking Framework Document for Battery Chargers and External Power Supplies (the framework document). The framework document explains the issues, analysis, and process DOE anticipates using to develop energy efficiency standards for those products. This document is available at: *https://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/bceps_frameworkdocument.pdf.* DOE also published a notice announcing the availability of the framework document, a public meeting to discuss the proposed analytical framework, and inviting written comments concerning the development of standards for BCs and EPSs. 74 FR 26816 (June 4, 2009).

DOE held a public meeting on July 16, 2009, to discuss the analyses and issues identified in various sections of the framework document. At the meeting, DOE described the different analyses it would conduct, the methods proposed for conducting them, and the relationships among the various analyses. Manufacturers, trade associations, environmental advocates, regulators, and other interested parties attended the meeting. Comments received since publication of the framework document have helped DOE identify and resolve issues involved in the preliminary analyses. Chapter 2 of the preliminary TSD summarizes and addresses the comments DOE received.

III. Summary of the Analyses Performed by DOE

For each of the products currently under consideration, DOE conducted in-depth technical analyses in the following areas: (1) Engineering, (2) markups to determine product price, (3) energy use, (4) life-cycle cost (LCC) and payback period (PBP) analyses, and (5) national impact analysis (NIA). The preliminary TSD presents the methodology and results of each of these analyses. It is available at the Web address given in the **SUMMARY** section of this notice. The analyses are described in more detail below.

DOE also conducted several other analyses that either support the five major analyses or are preliminary analyses that will be expanded upon for the NOPR. These analyses include the market and technology assessment, the screening analysis (which contributes to the engineering analysis), and the shipments analysis (which contributes to the NIA). In addition to these analyses, DOE has completed preliminary work on the manufacturer impact analysis (MIA) and identified the methods to be used for the LCC subgroup analysis, the environmental assessment, the employment impact analysis, the regulatory impact analysis, and the utility impact analysis. DOE will expand on these analyses in the NOPR.

A. Engineering Analysis

The engineering analysis establishes the relationship between the cost and efficiency of a product DOE is evaluating. This relationship serves as the basis for cost-benefit calculations for individual consumers, manufacturers, and the nation. The engineering analysis identifies representative baseline products, which is the starting point for analyzing technologies that provide energy efficiency improvements. Baseline product refers to a model or models having features and technologies typically found in products currently offered for sale. The baseline model in each product class represents the

characteristics of the least efficient products in that class and, for products already subject to energy conservation standards, usually is a model that just meets the current standard. Chapter 5 of the preliminary TSD discusses the engineering analysis.

B. Markups To Determine Product Prices

DOE derives consumer prices for products from data on manufacturer costs, manufacturer markups, retailer markups, distributor markups, and sales taxes. In deriving these markups, DOE has determined (1) the distribution channels for product sales; (2) the markup associated with each party in the distribution chain; and (3) the existence and magnitude of differences between markups for baseline products (baseline markups) and for more efficient products (incremental markups). DOE calculates both overall baseline and overall incremental markups based on the product markups at each step in the distribution chain. The overall incremental markup relates the change in the manufacturer sales price of higher efficiency models (the incremental cost increase) to the change in the retailer or distributor sales price. Chapter 6 of the preliminary TSD discusses estimating markups.

C. Energy Use Analysis

The energy use analysis provides estimates of the annual energy consumption of BCs and EPSs. DOE uses these values in the LCC and PBP analyses and in the NIA. DOE developed energy consumption estimates for each of the products analyzed in the engineering analysis and for those non-analyzed product classes included in the NIA. Chapter 7 of the preliminary TSD discusses the energy use analysis.

D. Life-Cycle Cost and Payback Period Analyses

The LCC and PBP analyses determine the economic impact of potential standards on individual consumers. The LCC is the total consumer expense for a product over the life of the product. The LCC analysis compares the LCCs of products designed to meet possible energy conservation standards with the LCCs of the products likely to be installed in the absence of standards. DOE determines LCCs by considering (1) total or incremental installed cost to the purchaser (which consists of manufacturer selling price, sales taxes, distribution chain markups, and installation cost); (2) the operating expenses of the products (energy use and maintenance); (3) product lifetime; and (4) a discount rate that reflects the real consumer cost of capital and puts the LCC in present-value terms. The PBP is the number of years needed to recover the increase in purchase price (including installation cost) of more efficient products through savings in the operating cost of the product. It is the quotient of the change in total installed cost due to increased efficiency divided by the change in annual operating cost from increased efficiency. Chapter 8 of the preliminary TSD discusses the LCC and PBP analyses.

E. National Impact Analysis

The NIA estimates the national energy savings (NES) and the net present value (NPV) of total consumer costs and savings expected to result from new standards at specific efficiency levels. DOE calculated NES and NPV for each candidate standard level as the difference between a base case forecast (without new standards) and the standards case forecast (with standards at that level). Cumulative energy savings are the sum of the annual NES determined over a specified time period. The national NPV is the sum over time of the discounted net savings each year, which consists of the difference between total operating cost savings and increases in total installed costs. Critical inputs to this analysis include shipments projections, estimated product lifetimes, and estimates of changes in shipments in response to changes in product costs due to standards. Chapter 10 of the preliminary TSD discusses the NIA.

DOE consulted with interested parties as part of its process for conducting all of the analyses and invites further input from the public on these topics. The preliminary analytical results are subject to revision following review and input from the public. The final rule will contain the final analysis results.

The Department encourages those who wish to participate in the public meeting to obtain the preliminary TSD and to be prepared to discuss its contents. A copy of the preliminary TSD is available at the Web address given in the **SUMMARY** section of this notice. However, public meeting participants need not limit their comments to the topics identified in the preliminary TSD. The Department is also interested in receiving views concerning other relevant issues that participants believe would affect energy conservation standards for these products or that DOE should address in the NOPR.

Furthermore, the Department invites all interested parties, regardless of whether they participate in the public meeting, to submit in writing by October 15, 2010, comments and information on matters addressed in the preliminary TSD and on other matters relevant to consideration of standards for battery chargers and external power supplies.

The public meeting will be conducted in an informal, conference style. A court reporter will be present to record the minutes of the meeting. There shall be no discussion of proprietary information, costs or prices, market shares, or other commercial matters regulated by United States antitrust laws.

After the public meeting and the expiration of the period for submitting written statements, the Department will consider all comments and additional information that is obtained from interested parties or through further analyses, and it will prepare a NOPR. The NOPR will include proposed energy conservation standards for the products covered by this rulemaking, and members of the public will be given an opportunity to submit written and oral comments on the proposed standards.

Issued in Washington, DC, on August 27, 2010.

Cathy Zoi,

Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. 2010–23012 Filed 9–14–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2010–0813]

RIN 1625–AA08

Special Local Regulations for Marine Events, Wrightsville Channel; Wrightsville Beach, NC

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes establishing Special Local Regulations for the swim portions of "Beach 2 Battleship Full and Half Iron Distance Triathlon", to be held on the waters of Banks Channel, adjacent to Wrightsville Beach, North Carolina. These Special Local Regulations are necessary to provide for the safety of life on navigable waters during the event. This action is intended to restrict vessel traffic on Banks, Motts, and Wrightsville Channels during the swimming portion of this event.

DATES: Comments and related material must be received by the Coast Guard on or before October 15, 2010.

ADDRESSES: You may submit comments identified by docket number USCG–2010–0813 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 proposed rule, call or e-mail BOSN3 Joseph M. Edge, Prevention Department, Coast Guard Sector North Carolina; telephone 252–247–4525, e-mail *Joseph.M.Edge@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–2010–0813), 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 deliver, 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–2010–0813" 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 comments 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 the 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–2010–0813" 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.**

Background and Purpose

On November 13, 2010 from 7 a.m. to 11 a.m., the Wilmington Family YMCA will sponsor the "Beach 2 Battleship Full and Half Iron Distance Triathlon" on the waters of Banks Channel including the waters of Wrightsville Channel adjacent to Wrightsville Beach, North Carolina. The swim portion of the event will consist of two groups of 750 swimmers entering Banks Channel south west of the Coast Guard Station and swimming northeast along Wrightsville Channel and Motts Channel to Seapath Marina. A fleet of spectator vessels are expected to gather near the event site to view the competition. To provide for the safety of the participants, spectators and other transiting vessel, the Coast Guard will temporarily restrict vessel traffic in the event area during this event.

Discussion of Proposed Rule

The Coast Guard is proposing to establish a special local regulation that will restrict vessel movement on the specified waters of Wrightsville Channel, Wrightsville Beach, NC. During the Marine Event no vessel will be allowed to transit the waterway unless the vessel is given permission from the Patrol Commander to transit.

Any vessel transiting the regulated area must do so at a no-wake speed during the effective period. Nothing in this proposed rule negates the requirement to operate at a safe speed as provided in the Navigational Rules and Regulations.

Regulatory Analysis

We developed this proposed 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 proposed 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 regulation prevents traffic from transiting waters of Wrightsville Channel during the event, the effect of this regulation will not be significant due to the limited duration that the regulated area will be in effect. Extensive advance notification will be made to the maritime community via marine information broadcast and local area newspapers so mariners can adjust their plans accordingly. Vessel traffic will be able to transit the regulated area before and after the races, when the Coast Guard Patrol Commander deems it is safe to do so.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed 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 proposed rule would affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit this section of the Wrightsville Channel from 7 a.m. to 11 a.m. on November 13, 2010.

This rule will not have a significant economic impact on substantial number of small entities for the following reasons. Although the regulated area will apply to the Wrightsville Channel, traffic may be allowed to pass through the regulated area with the permission of the Coast Guard Patrol Commander. In the case where the Patrol Commander authorizes passage through the regulated area, vessels shall proceed at the minimum speed necessary to maintain a safe course that minimizes wake near the swim course. The Patrol Commander will allow non-participating vessels to transit the event area once all swimmers are safely clear of navigation channels and vessel traffic areas. Before the enforcement period, we will issue maritime advisories so mariners can adjust their plans accordingly.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (*see* **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking process. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact BOSN3 Joseph Edge, Prevention Department, Sector North Carolina, 252–247–4525. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

Collection of Information

This proposed rule would call 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 proposed 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 proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This proposed rule would 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 proposed 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 proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would 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 proposed 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 proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this proposed 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 made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. A preliminary environmental analysis checklist supporting this determination is available in the docket where indicated under **ADDRESSES**. This proposed rule is categorically excluded, under figure 2–1, paragraph (34)(h), of this instruction. The special local regulation is necessary to provide for the safety of the general public and event participants from potential hazards associated with vessels. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 100

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

2. Add a temporary § 100.35–T05–0813 to read as follows:

§ 100.35–T05–0813 Wrightsville Channel, Wrightsville Beach, NC.

(a) The waters of Banks Channel, adjacent to Wrightsville Beach, NC, from the southern tip of Wrightsville Beach approximate position latitude 34°11′15″ N., longitude 077°48′51″ W., thence northeast to Seapath Marina, Wrightsville Beach, NC, approximate position latitude 34°11′45″ N., longitude 077°48′27″ W. All coordinates reference Datum NAD 1983.

(b) *Definitions.* (1) Coast Guard Patrol Commander means a commissioned, warrant, or petty officer of the Coast Guard who have been designated by the Commander, Coast Guard Sector North Carolina.

(2) Official Patrol means any person or vessel assigned or approved by Commander, Coast Guard Sector North Carolina with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

(3) Participant includes all swimmers and support vessels participating in the "Beach 2 Battleship Full and Half Iron Distance Triathlon" under the auspices of the Marine Event Permit issued to the event sponsor and approved by Commander, Coast Guard Sector North Carolina.

(c) *Special local regulations.* (1) Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area.

(2) The operator of any vessel in the regulated area must:

(i) Stop the vessel immediately when directed to do so by any Official Patrol and then proceed only as directed.

(ii) All persons and vessels shall comply with the instructions of the Official Patrol.

(iii) The operator of a vessel in the regulated area shall stop the vessel immediately when instructed to do so by the Official Patrol and then proceed as directed.

(iv) When authorized to transit the regulated area, all vessels shall proceed at the minimum speed necessary to maintain a safe course that minimizes wake near the swim course.

(d) *Enforcement Period.* This section will be enforced from 7 a.m. until 11 a.m. on November 13, 2010.

Dated: August 27, 2010.

Anthony Popiel,

Captain, U.S. Coast Guard, Captain of the Port North Carolina.

[FR Doc. 2010–22931 Filed 9–14–10; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2010–0620; FRL–9199–7]

Approval and Promulgation of Air Quality Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Prevention of Significant Deterioration (PSD)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the Texas PSD State Implementation Plan (SIP). EPA proposes to approve a SIP revision submitted February 1, 2006, as amended by a SIP revision submitted July 16, 2010. This action makes no significant changes to the Texas PSD SIP; it merely approves reorganization and renumbering of the Texas PSD SIP rules. Further, the July 16, 2010 submission corrects certain deficiencies identified in EPA's September 23, 2009 proposed disapproval. The EPA proposes to approve these revisions pursuant to section 110 and part C of the Federal Clean Air Act (Act or CAA).

DATES: Written comments must be received on or before October 15, 2010.

ADDRESSES: Comments may be mailed to Mr. Stanley M. Spruiell, Air Permits Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Comments may also be submitted electronically or through hand delivery/courier by following the detailed instructions in the Addresses section of the direct final rule located in the rules section of this **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Stanley M. Spruiell, Air Permits Section (6PD–R), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–7212; fax number 214–665–7263; e-mail address *Spruiell.stanley@epa.gov*.

SUPPLEMENTARY INFORMATION: In the final rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no relevant adverse comments are received in response to this action, no further activity is contemplated. If EPA receives relevant adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

For additional information, see the direct final rule which is located in the rules section of this **Federal Register**.

Dated: August 31, 2010.

Al Armendariz,

Regional Administrator, Region 6.

[FR Doc. 2010–22671 Filed 9–14–10; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R6–ES–2009–0081]
[MO 92210-0-0008]

Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to List Sprague's Pipit as Endangered or Threatened Throughout Its Range

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 Sprague's pipit (*Anthus spragueii*) as endangered or threatened and to designate critical habitat under the Endangered Species Act of 1973, as amended (ESA). After review of all available scientific and commercial information, we find that listing the Sprague's pipit as endangered or threatened is warranted. However, listing the Sprague's pipit is currently precluded by higher priority actions to amend the Lists of Endangered and Threatened Wildlife and Plants. Upon publication of this 12-month petition finding, we will add the Sprague's pipit to our candidate species list. We will develop a proposed rule to list Sprague's pipit as our priorities allow. We will make any determination on critical habitat during development of the proposed listing rule. In the interim period, we will address the status of the candidate taxon through our annual Candidate Notice of Review (CNOR).

DATES: The finding announced in this document was made on September 15, 2010.

ADDRESSES: This finding is available on the Internet at *http://www.regulations.gov* at Docket Number **FWS–R6–ES–2009–0081**. 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, North Dakota Field Office, 3425 Miriam Avenue, Bismarck, ND 58501. Please submit any new information, materials, comments, or questions concerning this finding to the above street address.

FOR FURTHER INFORMATION CONTACT: Jeffrey Towner, Field Supervisor, North Dakota Field Office (see **ADDRESSES**); by telephone at 701-250-4481; by facsimile at 701-355-8513; or by postal mail to: 3425 Miriam Ave. Bismarck, ND 58501. 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 ESA (16 U.S.C. 1531 *et seq.*) requires that, for any petition to revise the Federal Lists of Threatened and Endangered Wildlife and Plants that contains substantial scientific or commercial information that listing a species may be warranted, we make a finding within 12 months of the date of receipt of the petition. In this finding, we determine whether the petitioned action is: (a) Not warranted, (b) warranted, or (c) warranted, but immediate proposal of a regulation implementing the petitioned action is precluded by other pending proposals to determine whether species are endangered or threatened, and expeditious progress is being made to add or remove qualified species from the Federal Lists of Endangered and Threatened Wildlife and Plants. Section 4(b)(3)(C) of the ESA requires that we treat a petition for which the requested action is found to be warranted but precluded as though resubmitted on the date of such finding, that is, requiring a subsequent finding to be made within 12 months. We must publish these 12–month findings in the **Federal Register**.

Previous Federal Actions

On October 10, 2008, we received a petition dated October 9, 2008, from WildEarth Guardians, requesting that we list the Sprague's pipit as endangered or threatened under the ESA and designate critical habitat. 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 December 5, 2008. In that letter, we also stated that an emergency regulation temporarily listing the species under section 4(b)(7) of the ESA was not necessary. We also stated that we planned to complete the 90–day finding for this species in Fiscal Year (Fiscal Year) 2009. On January 28, 2009, we received a 60–day notice of intent (NOI) to sue from the petitioner stating that the Service was in violation of the ESA by failing to take action under section 4(b)(3)(A) of the ESA. On August 20, 2009, the petitioner filed a complaint on the Service's failure to complete the 90–day finding.

We published the 90–day finding in the **Federal Register** on December 3, 2009 (74 FR 63337). On May 19, 2010, the Service and WildEarth Guardians entered into a settlement agreement. According to the agreement, the Service will submit a 12–month finding to the **Federal Register** on or before September 10, 2010. This notice constitutes the 12–month finding on the October 9, 2008, petition to list the Sprague's pipit as endangered or threatened.

Species Information

Taxonomy and Species Description

The Sprague's pipit is a small passerine of the family Motacillidae, genus *Anthus,* endemic to the Northern Great Plains (Robbins and Dale 1999, p. 1). It was first described by Audubon (1844, pp. 334-336). It is one of the few bird species endemic to the North American prairie. The closest living relative is believed to be the yellowish pipit (*A. lutescens*) of South America (Robbins and Dale 1999, p. 9).

The Sprague's pipit is about 10 to 15 centimeters (cm) (3.9 to 5.9 inches (in.)) in length, and weighs 22 to 26 grams (g) (0.8 to 0.9 of an ounce (oz)), with buff and blackish streaking on the crown, nape, and underparts. Males and females are similar in appearance. The Sprague's pipit has a plain buffy face with a large eye-ring. The bill is relatively short, slender, and straight, with a blackish upper mandible. The lower mandible is pale with a blackish tip. The wings and tail have two indistinct wing-bars, and the outer retrices (tail feathers) are mostly white (Robbins and Dale 1999, p. 3-4). Juveniles are slightly smaller, but similar to adults, with black spotting rather than streaking (Robbins and Dale 1999, p. 3).

Habitat Description and Characteristics

Sprague's pipits are strongly tied to native prairie (land which has never been plowed) throughout their life cycle (Owens and Myres 1973, pp. 705, 708; Davis 2004, pp. 1138-1139; Dechant *et al.* 1998, pp. 1-2; Dieni *et al.* 2003, p. 31; McMaster *et al.* 2005, p. 219). They are rarely observed in cropland (Koper *et al.* 2009, p. 1987; Owens and Myres 1973, pp. 697, 707; Igl *et al.* 2008, pp. 280, 284) or land in the Conservation Reserve Program (a program whereby marginal farmland is planted primarily with grasses) (Higgins *et al.* 2002, pp. 46-47). Sprague's pipits will use nonnative planted grassland (Higgins *et al.* 2002, pp. 46-47; Dechant *et al.* 1998, p. 3; Dohms 2009, pp. 77-78, 88). Vegetation structure may be a better predictor of occurrence than species

composition (Davis 2004, pp. 1135, 1137).

Native grassland is disturbance dependant. Without disturbance, the vegetative species mix changes, and grasslands are ultimately overgrown with woody vegetation (Grant *et al.* 2004, p. 808) unsuitable for Sprague's pipits. Historical sources of disturbance were fire or grazing by bison. With fires being less prevalent on the prairie, current sources of disturbance are generally mowing or grazing by cattle. While Sprague's pipits prefer areas that are regularly disturbed (Askins *et al.* 2007, p. 21; Madden 1996, pp. 48-59), their preference for vegetation of intermediate height means that they will not use a mowed or burned area until the vegetation has had a chance to grow, which may be late in the following growing season, or may take several seasons (Dechant *et al.* 1998, pp. 1-2; Kantrud 1981, p. 414). The frequency of disturbance required for habitat maintenance depends on how quickly the grasses grow following a disturbance event, with precipitation rates being a major driver. For example, pre-colonial fire return rates are estimated to be approximately 6 years in North Dakota, but 10 to 26 years in Montana and other relatively dry portions of the range (Askins *et al.* 2007, pp. 20-21). After bison grazed an area, they may not have returned for 1 to 8 years (Askins *et al.* 2007, p. 21).

Breeding Range and Habitat

The breeding range is described as throughout North Dakota, except for the easternmost counties; northern and central Montana east of the Rocky Mountains; northern portions of South Dakota; and northwestern Minnesota. In Canada, Sprague's pipits breed in southeastern Alberta, the southern half of Saskatchewan, and in southwest Manitoba (Robbins and Dale 1999, p. 5).

During the breeding season, Sprague's pipits prefer large patches of native grassland with a minimum size requirement thought to be approximately 145 ha (358.3 ac) (range 69 to 314 ha (170 to 776 ac)) (Davis 2004, p. 1134). They were not observed in areas smaller than 29 ha (71.6 acres) (Davis 2004, p. 1134). While they have been reported to be less abundant in or absent from grassland that has been planted (Madden 1996, p. 104), recent research suggests that nesting success in planted grassland is similar to nesting success in native habitat (Dohms 2009, pp. 41-81). Preferred grass height has varied between studies, but is estimated to be between 10 and 30 cm (4 and 12 in.) (Dieni and Jones 2003, p. 390; Madden *et al.* 2000, p. 382; Sutter 1997, pp. 464-466). They will use nonnative planted grassland if the vegetative structure is suitable, but strongly prefer native prairie (Dechant *et al.* 1998, pp. 1, 4). The species prefers to breed in well-drained, open grasslands and avoids grasslands with excessive shrubs (Desmond *et al.* 2005, p. 442; Grant *et al.* 2004, p. 812; Sutter 1997, p. 464).

Sprague's pipits can be found in lightly to moderately grazed areas (Dechant *et al.* 1998, p. 4), but in North Dakota, a greater abundance of Sprague's pipits have been reported from moderately to heavily grazed areas (Kantrud 1981, p. 414). However, these descriptions are relative; vegetation described as lightly grazed in one study may be called heavily grazed in another (Madden *et al.* 2000, p. 388). The species is rarely found in cultivated areas (Owens and Myres 1973, p. 705). They may avoid roads, trails, and habitat edges (Dale *et al.* 2009, pp. 194, 200; Koper *et al.* 2009, pp. 1293-1295; Linnen 2008, p. 1; Sutter *et al.* 2000, p. 114).

Migration and Wintering Range and Habitat

The Sprague's pipit's wintering range includes south-central and southeast Arizona, Texas, southern Oklahoma, southern Arkansas, northwest Mississippi, southern Louisiana, and northern Mexico. There have been migration sightings in Michigan, western Ontario, Ohio, Massachusetts, and Gulf and Atlantic States from Mississippi east and north to South Carolina. Sprague's pipits also have been sighted in California during fall migration (Robbins and Dale 1999, p. 6).

Migration and wintering ecology are poorly known, but migrating and wintering Sprague's pipits are found in both densely and sparsely vegetated grassland, and pastures (Desmond *et al.* 2005, p. 442; Emlen 1972, p. 324). They are rarely found in fallow cropland (Wells 2007, p. 297). Sprague's pipits exhibit a strong preference for grassland habitat during the winter and an avoidance of areas with too much shrub encroachment (Desmond *et al.* 2005, p. 442). Their use of an area is dependent on habitat conditions. On their wintering grounds, after a wet year, when grass is denser, Sprague's pipits were dense, compared with few individuals in the same areas after dry years when grasses were sparse (Dieni *et al.* 2003, p. 31; Maci´as-Duarte *et al.* 2009, p. 869). They are not found in the narrow strips of grassland remaining along agricultural field borders (Desmond *et al.* 2005, p. 448). In migration, they may be found near or on trails and roads or near water (Maher 1973, p. 20), and they have been sighted in sunflower fields (Hagy *et al.* 2007, p. 66).

It has been estimated that only about 2.5 percent of the entire Chihuahuan desert region, an ecosystem extending across the border between the United States and Mexico entirely within the wintering range of the Sprague's pipit, is protected, mostly on the U.S. side (Desmond *et al.* 2005, p. 449).

Feeding Habits

Sprague's pipits eat a wide variety of insects during the breeding season and a very small percentage of seeds (1 to 2 percent) (Maher 1974, pp. 5, 32, 58).

Breeding Phenology

Male Sprague's pipits have a territorial flight display that takes place high in the air and that can last up to 3 hours (Robbins 1998, pp. 435-436). Sprague's pipits are very secretive around the nest itself, sometimes not flushing until a searcher is extremely close (Jones and Dieni 2007, p. 123). When returning to the nest, they can land several meters away and run to the nest through the grass (Jones and Dieni 2007, p. 123).

Nests are generally constructed in areas of relatively dense cover, low forb density, and little bare ground (Sutter 1997, p. 462). The nest is usually dome-shaped; is constructed from woven grasses; and is generally at the end of a covered, sharply curved runway up to 15 cm (5.9 in.) long which may serve as heat-stress protection (Sutter 1997, p. 467; Dechant *et al.* 1998, p. 2). The female lays four to five eggs (Allen 1951, p. 379; Maher 1973, p. 25), which she incubates for 11 to 17 days (Davis 2009, pp. 265, 267). Females may do most or all of the incubation (Sutter *et al.* 1996, p. 695), but both parents may feed the young (Dohms and Davis 2009, p. 826). Parental care likely continues well past fledging (Harris 1933, p. 92; Sutter *et al.* 1996, p. 695). The female will renest if the first nest fails, and some females have been documented successfully nesting two times during one breeding season (Sutter *et al.* 1996, p. 694; Davis 2009, p. 265). Long intervals between renesting attempts suggest that the rate of renesting is low (Sutter *et al.* 1996, p. 694). However, breeding pairs may only produce an average of 1.5 clutches per year (Sutter *et al.* 1996, p. 694). Males were documented to be polygamous (have two females on two nests at the same time), but the rate of polygyny is unknown (Dohms and Davis 2009, pp. 826, 828).

Population Trend Information

Due to its cryptic coloring and secretive nature, the Sprague's pipit has been described as "one of the least known birds in North America" (Robbins and Dale 1999, p. 1), and range-wide surveys for the species have not been conducted. The population from 1990-1999 was estimated at approximately 870,000, based on extrapolation of Breeding Bird Survey (BBS) data (Blancher *et al.* 2007, p. 27; Rich *et al.* 2004, p. 18). The population has continued to decline since that time (Sauer *et al.* 2008, p. 13). The species was described as abundant in the late 1800s in the upper Missouri River basin (Coues 1874, p. 42; Seton 1890, p. 626). More recent long-term estimates of Sprague's pipit abundance are derived from the BBS, a long-term, large-scale survey of North American birds that began in 1966. The BBS is generally conducted by observers driving on roads along established routes, with stops every half-mile to sample for birds. Because Sprague's pipits avoid roads (Sutter *et al.* 2000, p. 114), roadside surveys may not be the best measure of abundance of Sprague's pipits (Sutter *et al.* 2000, pp. 113-114). Nonetheless, the methods of the BBS have been consistent through time, and are the best available information for the breeding range at this time. The trend analysis suggests that the population is in steep decline (Peterjohn and Sauer 1999, p. 32), with an estimated 80-percent decrease from 1966 through 2007 in the U.S. and Canadian breeding range (approximately 3.9 percent annually) (Sauer *et al.* 2008, p. 8). The annual population decline shows some slight variation, but the long-term trend is consistently negative (95-percent confidence interval -5.6 to -2.2) (Sauer *et al.* 2008, pp. 5-6, 8). Assuming that the population was approximately 870,000 in 1995 (the mid-point between 1990 and 1999 (Rich *et al.* 2004, p. 18)), and the population continues to decline at 3.9 percent annually, the population would have declined to approximately 479,000 by 2010. By 2060, the population could drop to 66,000, and in 100 years, by 2110, the population could decline to 8,970. However, this estimate involves a number of assumptions. The original population estimate comes from the BBS data and is characterized as "beige," indicating that the 95-percent confidence limit around the average is within 20 percent of the average itself (Blancher *et al.* 2007, p. 22). Additionally, this assumes that the population will continue to decline in a linear fashion.

In addition to BBS surveys, the Canadian Wildlife Service conducts a Grassland Bird Monitoring program (GBM) using the same methodology as the BBS. GBM surveys are conducted along roads in areas within the mixed-grass prairie ecosystem where grassland is still common (Dale *et al.* 2005, entire; Environment Canada 2008, pp. 3-4). The GBM survey shows an even sharper decline of 10.5 percent annually from 1996-2004 in the core area of Sprague's pipit's habitat in Canada (Environment Canada 2008, pp. iii, 3-4). The GBM program decline compares with a 1.8-percent decline for the same period from the BBS data (Environment Canada 2008, pp. iii, 3-4). Since the GBM survey is conducted in habitat that should be optimal for Sprague's pipits in Canada, it indicates a serious decline in species abundance (Environment Canada 2008, p. 4).

The Christmas Bird Count (CBC) represents the only long-term data set that we are aware of that includes wintering information for the Sprague's pipit. The CBC is an annual count performed around the end of December in which volunteers observe birds in 15-mile-radius "count circles." The Sprague's pipit CBC data from the winters of 1966/1967 through 2005/2006 (a 40–year span) were analyzed following the methods described in Link *et al.* (2006, entire) (Niven 2010, pers. comm.). The 40–year trend data for Sprague's pipit shows an annual decline for Texas (2.54 percent), Louisiana (6.21 percent), Mississippi (10.21 percent), and Arkansas (9.27 percent). The data from Oklahoma, New Mexico, Arizona, Florida, and California indicated an uncertain or stable trend (Niven 2010, pers. comm.). California and Florida are outside of the described range, and the number of sightings was quite low, presumably representing a few birds straying off of their normal migration routes or wintering areas. Oklahoma is part of the migration route, so sightings there in December may be somewhat varied, depending on annual weather conditions. Overall, the 40–year trend showed a median declining population of approximately 3.23 percent annually and a 73.1-percent decline for the entire time period (Niven 2010, pers. comm.). These estimates are fairly consistent with the decline observed on the breeding grounds, indicating that the observed decline is real, rather than an artifact of the sampling technique.

Sprague's pipit is included on a number of Federal, State, and nongovernmental organization lists as a sensitive species. Sprague's pipit is listed in the *Birds of Conservation Concern*, a list of bird species (beyond those already federally listed as threatened or endangered) in greatest need of conservation action. The list is derived from three bird conservation plans: the Partners in Flight North American Landbird Conservation Plan, the United States Shorebird Conservation Plan, and the North American Waterbird Conservation Plan (Service 2008, pp. iii, 1, 27, 28-34, 35, 37, 41 50- 53, 58, 60, 63, 67, 76, 85). Sprague's pipits' status is listed as vulnerable on the International Union of Conservation Networks Red List (Birdlife International 2008, p. 1). It has a NatureServe Global Rank of G4, indicating that the population is apparently secure (NatureServe 2009, p. 1). The species is ranked as yellow on the Audubon 2007 watch list, indicating that it is either declining or rare. Species on the Audubon watch list typically are species of national conservation concern (Audubon 2007, p. 2). Partners in Flight also has placed Sprague's pipit on its watch list, indicating that the species is a species of conservation concern at the global scale, a species in need of management action, and a high priority candidate for rapid status assessment (Rich *et al.* 2004, p. 18).

Several states have identified the Sprague's pipit as a sensitive species in their State wildlife action plans, including Arizona, Louisiana, Minnesota, Montana, New Mexico, North Dakota, South Dakota, and Texas (Arizona Game and Fish Department 2010, p. 3; Louisiana Department of Wildlife and Fisheries 2005, p. 6; Minnesota Department of Natural Resources 2010, p. 1; Montana Fish, Wildlife and Parks 2010, p. 2; New Mexico Game and Fish 2010, p. 4; North Dakota Game and Fish Department 2010, p. 3; South Dakota Game, Fish, and Parks 2010, p. 3; Texas Parks and Wildlife 2005, p. 6). The criteria used to determine which species are listed as species of greatest conservation concern varies by State, but generally include known information about population trends on a State, regional, and national level; the importance of the State in the species' range; and often rankings on national lists (for example Natureserve and the Audubon watch list (NatureServe 2009, p. 1; Audubon 2007, p. 2)).

Summary of Information Pertaining to the Five Factors

Section 4 of the ESA (16 U.S.C. 1533) and implementing regulations (50 CFR 424) set forth procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the ESA, 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 considering what factors might constitute threats, we must look beyond the exposure of the species to the factor to determine whether the species responds to the factor in a way that causes actual impacts to the species. If there is exposure and the species responds negatively, the factor may be a threat and we then attempt to determine how significant a threat it is. If the threat is significant, it may drive or contribute to the risk of extinction of the species such that the species warrants listing as endangered or threatened as those terms are defined by the ESA.

Factor A. Present or Threatened Destruction, Modification, or Curtailment of the Habitat or Range.

Habitat Conversion

Thirty percent of prairie habitat in the Great Plains and Canada remains from pre-colonial times (Samson *et al.* 2004, p. 7), but as discussed below, the amount of suitable habitat remaining in the Sprague's pipit's range is much lower. Land conversion is accelerating in native prairie, with a conversion rate faster than the estimated conversion rate of rainforests in the Amazon (Stephens *et al.* 2008, pp. 1326-1327). Much of the land conversion is from native prairie to agricultural uses.. A Government Accountability Office report on agricultural conversion documented the continued conversion of native prairie to cropland, particularly in the Northern Plains of Montana, North Dakota, and South Dakota (Government Accountability Office 2007, pp. 4, 12, 15). A number of factors that encourage farmers to convert native prairie were identified, including; higher crop prices, especially for corn; farm payment programs that increase expected cropland profitability without increasing risk; the advent of herbicide-ready crops, and no-till farming methods, which allow farmers to plant directly into native prairie. The Northern Plains is identified as an area with continued conversion of native grassland (Government Accountability Office 2007, p. 4). From 2005 through 2007 (the most recent year data was available), approximately 94,400 ha (233,000 acres) of virgin prairie was broken for the first time, or approximately 32,000 ha (78,000 acres) annually (Stephens 2010, pers. comm.).

To determine the amount of potentially suitable habitat remaining within the Sprague's pipit's range, we performed a Geographic Information System (GIS) analysis for the U.S. portion of the breeding range (Loesch 2010, pers. comm.). We based the breeding range on data from the BBS in the U.S. range, and included cover types which were classified as grassland, pastureland, prairie, or temporary wetland (Loesch 2010, pers. comm.). From these data, we determined that approximately 2.1 percent of the total area (10 million ha [25 million ac]) in the Sprague's pipit's U.S. breeding range as defined by the BBS remains in suitable habitat, with most of the historic range converted to other uses. Nonsuitable land cover types within the Sprague's pipit's range include urban areas, transportation infrastructure, barren areas, cropland, forest, tree rows, shrublands, water, and wetland areas. Researchers predict that native grassland will continue to be converted, and the rate of conversion may increase (Fargione *et al.* 2009, p. 769; Stephens *et al.* 2008 p. 1328). Prairie habitat loss in the Missouri River Coteau is estimated to be approximately 0.4 percent annually (Stephens *et al.* 2008, pp. 1320, 1327). Even in areas that remain in native prairie, historic and current land management, including increased stocking levels, fencing, augmentation of water sources (which concentrate animals, making overgrazing more likely), and fire suppression, have all changed the grassland ecology and species mix (Knopf 1994, pp. 248-250; Weltzin *et al.* 1997, pp. 758-760). The changes in the grassland ecosystem have led to a steep decline in many grassland bird species, including the Sprague's pipit (Knopf 1994, pp. 251-254; Grant *et al.* 2004, p. 812; Lueders *et al.* 2006, pp. 602-604).

As in the United States, most of the native grasslands in Canada have been converted to other uses, which are largely not suitable for nesting of the Sprague's pipit (Environment Canada 2008, p. 6). Analysis done with imagery taken around 2000 suggested that approximately 94 percent of the species' range has been lost in Canada (Dale 2010, pers. comm.). Of the approximately 20 million ha (49.4 million ac) remaining as grassland in the Sprague's pipit's range in Canada, 15 to 20 percent (3 to 4 million ha (7.4 to 9.9 million ac)) remains in patches large enough to support breeding territories (Dale 2010, pers. comm.).

Prairie conversion is continuing, and is expected to continue (Fargione *et al.* 2009, p. 775; Stephens *et al.* 2008, pp. 1320, 1325). Because of the decreased amount of suitable native prairie remaining throughout the United States and Canada, the continued conversion of native prairie to other land uses, and the altered management regime in the native prairie that remains, we conclude that ongoing habitat loss and land conversion is a significant threat (i.e., a threat that, alone or in combination with other factors, is causing the species to be in danger of extinction, now or in the foreseeable future) to Sprague's pipit throughout its range.

Grazing

Grazing is a major driver in the prairie ecosystem. An appropriate level of grazing can help to maintain the prairie habitat, while too much or too little may make the habitat unsuitable for Sprague's pipits. Much of the prairie is now grazed more uniformly than it was in pre-colonial times and is often overgrazed, leading to a decline in species diversity and an increase in woody structure (since cattle do not eat woody vegetation, it has a competitive advantage over grass if some other mechanism is not used to remove trees and shrubs) (Walker *et al.* 1981, pp. 478-481; Towne *et al.* 2005, pp. 1550-1558). Additionally, cattle have replaced bison as the primary herbivore in Sprague's pipit habitat. Substituting cattle for bison does not necessarily lead to a change in grassland vegetation. A study comparing native prairie stocked with moderate levels of cattle to native prairie stocked with moderate levels of bison determined that, while there were some differences in the grazing habits of the two species, after 10 years the plant diversity and plant density in the two areas were similar (Towne *et al.* 2005, pp. 1552-1558). The authors suggest that the vegetation differences that many studies find between native prairie grazed by cattle and native prairie grazed by bison are due to different herd management practices and grazing intensity, rather than an inherent difference in the effect of the two herbivore species on vegetation (Towne *et al.* 2005, p. 1558). Ranchers often allow cattle to graze at high densities compared to the historic grazing densities of bison, which leads to a greater probability of overgrazing in grasslands (Towne *et al.* 2005, p. 1558). However, one study (Lueders *et al.* 2006, p. 602) noted that Sprague's pipits were more common on areas grazed by cattle than areas grazed by bison. The

management regimes (i.e., fire regimes, grazing densities) and sampling intensities of studies conducted on the two areas were quite disparate, precluding firm conclusions.

While improperly timed or overly heavy or light grazing negatively impacts Sprague's pipits' ability to use an area, we do not believe that grazing is a major threat to Sprague's pipits. While some areas are undoubtedly poorly managed, we believe this is a local rather than a rangewide problem. There is not enough information at this time to determine conclusively how grazing or substituting cattle for bison throughout much of the range impacts the Sprague's pipit, but from the available information, we do not believe that grazing is a significant threat to the species.

Fire

Like grazing, fire is a major driver on the prairie ecosystem. While there are still some controlled and wild prairie burns, fire is no longer a widespread regular phenomenon as it was in pre-colonial times. Fire suppression has allowed suites of plants, especially woody species, to flourish (Knopf 1994, p. 251; Samson *et al.* 1998, p. 11). Fire suppression since European settlement throughout the Sprague's pipit's range has impacted the composition and structure of native prairie, favoring the incursion of trees and shrubs in areas that were previously grassland (Knopf 1994, p. 251). This change of structure negatively impacts Sprague's pipits, which avoid trees and are negatively associated with shrub cover on both their breeding and wintering grounds (Desmond *et al.* 2005, p. 442; Grant *et al.* 2004; p. 812; Sutter 1997, p. 464). Eliminating fire from the landscape has likely changed the overall composition of the prairie (Towne *et al.* 2005, pp. 1557-1558). Trees and shrubs can be controlled to some extent through grazing or eliminated by regular mowing, although these management practices may result in selection for yet another suite of grassland plant species (Owens and Myres 1973, pp. 700-701).

The lack of widespread fire in current prairie management has contributed to land conversion to landcover types not suitable for the pipit. Some form of disturbance is necessary to maintain the grassland ecosystem, and grazing and mowing are generally used today. While the lack of widespread fires as a management technique has led to changes in the grassland ecosystem, we believe that other methods of habitat maintenance are substituting for the role that fire historically played, albeit while selecting for a different suite of grassland species. We do not have information to suggest that the change in fire regime is a significant threat to the species.

Mowing

Like grazing and fire, mowing is a management technique that can be used as a source of disturbance to prevent woody species from invading into grassland habitat. However, mowing (i.e., haying) in the breeding range could negatively impact Sprague's pipits by directly destroying nests, eggs, nestlings, and young fledglings, and by reducing the amount of nesting habitat available in the short term. Nest success of ground-nesting birds is already low, with an estimated 70 percent of nests destroyed by predators (Davis 2003, p. 119). While Sprague's pipits occasionally will renest if the first nest fails or if nestlings from the first clutch fledge early enough in the season, long intervals between nesting attempts suggest that renesting is relatively uncommon (Sutter *et al.* 1996, p. 694). Thus, early mowing can negatively impact reproductive success for the year. Even mowing done later in the season after chicks have fledged may impact the availability of breeding habitat the following year because Sprague's pipits will not use areas with short grass until later in the season when the grass has grown, possibly due to dense revegetation and the lack of litter (Dechant *et al.* 1998, p. 3; Owens and Myres 1973, p. 708; Kantrud 1981, p. 414). On the other hand, as noted above, mowing can improve Sprague's pipit habitat in the long term by removing trees and shrubs (Owens and Myres 1973, p. 700).

There is not sufficient information available about the extent, timing, and frequency of mowing throughout the species' range to make firm conclusions about how much of a threat mowing poses. Since mowing can play both a positive and negative role in the maintenance of Sprague's pipit habitat, the impacts of mowing are mixed. In some parts of the range where large portions of the remaining grasslands are mowed annually or grass growth is slow or both, mowing may be negatively impacting the population. However, at this time, we do not have information to indicate that mowing is a significant threat to the species rangewide.

Habitat Fragmentation on the Breeding Grounds

Whereas direct conversion of native prairie results in an obvious loss of habitat, fragmentation of the remaining native prairie can make large portions of otherwise suitable habitat unusable for nesting Sprague's pipits. A number of studies have found that Sprague's pipits appear to avoid non-grassland features in the landscape, including roads, trails, oil wells, croplands, woody vegetation, and wetlands (Dale *et al.* 2009, pp. 194, 200; Koper *et al.* 2009, pp. 1287, 1293, 1294, 1296; Greer 2009, p. 65; Linnen 2008, pp. 1, 9-11, 15; Sutter *et al.* 2000, pp. 112-114). The extent to which Sprague's pipits avoids roads varies between studies. One study found that of 46 mapped Sprague's pipit territories, only 5 (11 percent) crossed a trail or pipeline (*in* Dale *et al.* 2009, p. 200). However, other studies found that Sprague's pipits avoid roads but not trails, presumably because of the difference in structure in the road right-of-way (Sutter *et al.* 2000, p. 110), and one study did not document avoidance of roads, although it did document avoidance of other changes in habitat structure (Koper *et al.* 2009, pp. 1287, 1293). Sprague's pipits may be particularly sensitive to habitat fragmentation because their high flight display affords them a wide view of the area, and thus they may select their territories based on landscape, rather than site-specific features (Koper *et al.* 2009, p. 1298).

The effect of a non-grassland feature (e.g., shrubs, trees, roads, human-made structures) in the landscape can be much larger than its actual footprint. Sprague's pipits are sensitive to patch size (i.e., the amount of contiguous native grassland available (Davis 2004, pp. 1134, 1135-1137; Davis *et al.* 2006, pp. 812-814; Greer 2009, p. 65)), and they avoid edges between grassland and other habitat features that are structurally different than grassland (Davis 2004, p. 1134; Koper *et al.* 2009, pp. 1287, 1293-1296). Sprague's pipits were not found in patches less than 29 ha (71.7 ac), and the minimum size requirement is thought to be 145 ha (358.3 ac) (range 69 to 314 ha (170 to 776 ac)) (Davis 2004, p. 1134), with even larger patches preferred (Davis 2004, pp. 1134-1135, 1138; Greer 2009, p. 65).

The shape of the patch also is important. Since Sprague's pipits have been shown to avoid edges (Linnen 2008, pp. 1, 9-11, 15), grassland areas with a low edge-to-area ratio provide optimal habitat (Davis 2004, pp. 1139-1140). Thus, a linear patch may not be suitable for a Sprague's pipit's territory, even if it is sufficiently large. Koper *et al.* (2009, p. 1295) noted that conversion of one quarter section (64 ha (158 ac)) in the middle of a grassland patch reduced the utility of an additional 612 ha (1,512 ac) of grassland.

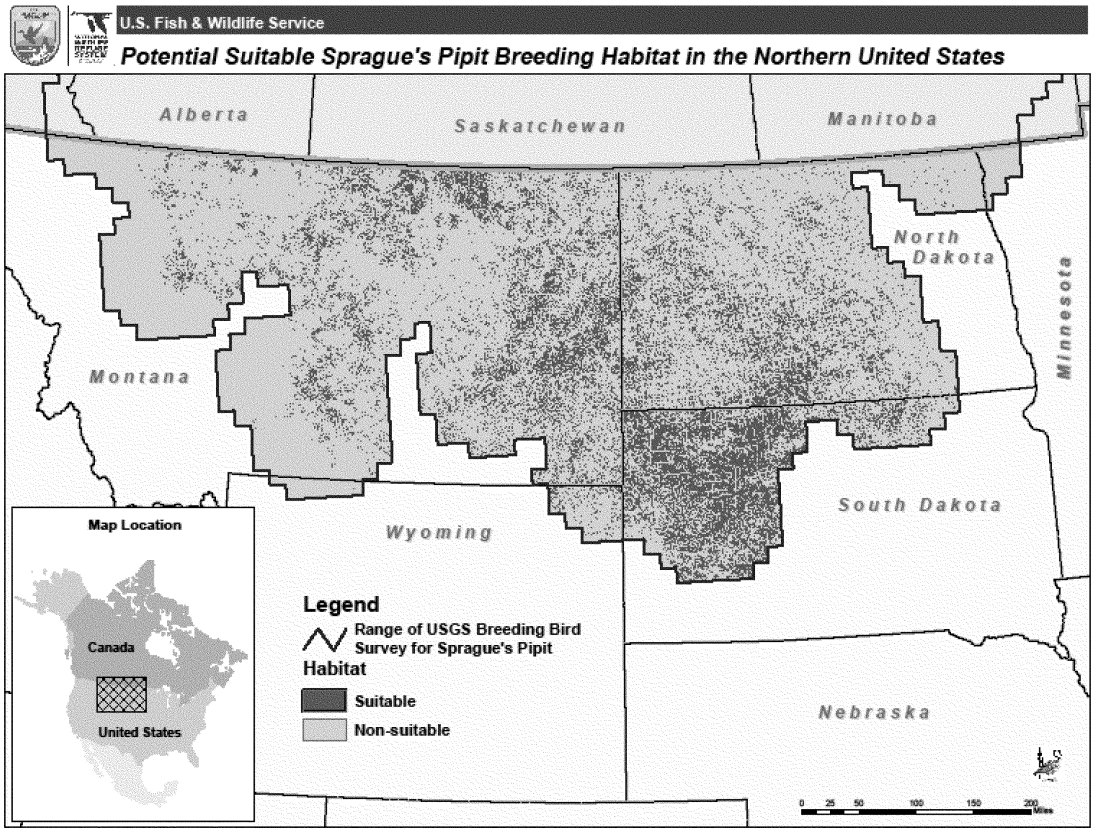
Because of the Sprague's pipit's selection for relatively large grassland

areas and avoidance of edges, habitat fragmentation is a threat throughout the population's breeding range. As more roads, oil and gas development, wind farms, and other features are constructed in the Northern Great Plains, the fragmentation of the native prairie is expected to increase, further decreasing the amount of suitable habitat in large enough patches to be used by breeding pairs.

In order to determine the potential cumulative impact of human features on Sprague's pipits, we performed a GIS analysis. We used the BBS to map the breeding distribution of the species. The BBS uses inverse distancing to smooth the data by using route relative abundance to estimate presence beyond the end of a survey road (Sauer *et al.* 2008, pp. 17-19). We overlaid layers of suitable Sprague's pipit habitat, the road system, permitted oil and gas wells, and existing wind towers in the U.S. breeding range. Since GIS information regarding the location of the roads constructed by the energy companies to access their wells or towers was not available, we estimated new road construction by having the GIS program measure the shortest distance from the nearest road to the energy feature (Loesch 2010, pers. comm.). Topography may preclude building a road following the most direct route, so this is a conservative estimate of the miles of new roads constructed. We buffered the roads, wind towers, and oil and gas well pads by 350 m (1148 ft) based on an estimate of Sprague's pipits' avoidance of oil pads and associated roads (Linnen 2008, pp. 1, 9-11).

As noted above, approximately 2 percent of the U.S. breeding range remains in a habitat type that is potentially suitable for Sprague's pipit nesting. When we overlaid current and approximated roads, oil and gas wells, and wind development, the amount of suitable habitat in patches larger than 145 ha (358.3 ac), described as the minimum size requirement for breeding Sprague's pipits (Davis 2004, p. 1134), declined to 1.55 percent of the historic breeding range (Figure 1) (Loesch 2010, pers. comm.). If we include habitat patches 29 ha (71.6 ac) or larger, the smallest patch size where Sprague's pipits were observed (Davis 2004, p. 1134), the amount of potentially suitable habitat increases marginally to 1.86 percent of the historic breeding range in the United States (Loesch 2010, pers. comm.). If energy development continues as projected, the amount of suitable habitat will decline even further.

FIGURE 1: Current grassland habitat patches for Sprague's pipits of 145 ha (358.3 ac) or larger in areas of the north-central United States where the species has been encountered by the BBS (Loesch 2010, pers. comm.).



A similar GIS analysis of remaining suitable breeding habitat in Canada, including oil and gas wells, roads, and trails leading to each well, determined that about 5.6 percent of the Canadian range is suitable (having a greater than 50 percent probability of occupancy) for Sprague's pipits (Dale 2010, pers. comm.). A similar estimate (5 to 6 percent) was independently reached by another researcher also analyzing land cover data for the Canadian range (Davis 2010, pers. comm.).

Our analysis shows that the remaining suitable habitat continues to be converted and fragmented, a trend that we expect to increase. With only 1.55 to 1.86 percent of the U.S. historic breeding habitat and only approximately 15 to 20 percent of the Canadian breeding habitat still suitable for Sprague's pipit nesting, the areas where birds can relocate to as more habitat becomes fragmented and unsuitable for Sprague's pipit nesting is drastically diminished. As development continues, we expect the potential area for Sprague's pipits to nest to decline further. The existing and ongoing fragmentation of suitable habitat makes the long-term observed decline of Sprague's pipit likely to continue into the future.

Energy Development

Energy development (oil, gas, and wind) and associated roads and facilities increase the fragmentation of grassland habitat. Much of the Sprague's pipit's breeding range overlaps with major areas of oil and gas development, which have been increasing rapidly in some portions of the Sprague's pipit's range. In North Dakota, the number of drilling permits nearly doubled between 2007 and 2008, from 494 permits issued in 2007 to 946 in 2008 (North Dakota Petroleum Council 2009, p. 2). This trend is expected to increase; up to 1,850 wells could be drilled annually for a total of up to 19,860 additional wells in North Dakota over the next 20 years (North Dakota Department of Mineral Resources Undated, pp. 7-17). Oil officials anticipate that production will continue to expand at record levels (MacPherson 2010; entire). Much of the oil activity is occurring in areas of native prairie, a trend that we expect to continue (Loesch 2010, pers. comm). The Bakken formation that is currently being drilled lies entirely within the U.S. and Canadian breeding range (USGS 2008, p. 1; Robbins and Dale 1999, p. 5). Sprague's pipits avoid oil wells, staying up to 350 meters (m) (1148 feet (ft)) away (Linnen 2008, pp. 1, 9-11), magnifying the effect of the well feature itself. Oil and gas wells, especially at high densities, decrease the amount of habitat available for breeding territories. We calculated that each well and associated road has impacted approximately 21 ha (51 acres), including the area that Sprague's pipits avoid (Loesch 2010, pers. comm.). Thus, an additional 19,860 wells could impact 400,000 ha (1 million acres) just in the Sprague's pipit range in North Dakota.

Each oil and gas well pad requires some amount of associated new road construction. As discussed above, there is evidence that Sprague's pipits avoid roads and trails on the breeding grounds (Linnen 2008, pp. 1, 9-11; Dale *et al.* 2009, p. 200). Oil and gas development has been shown to double the density of roads on range lands (Naugle *et al.* 2009, pp. 11, 46). In areas with ranching, tillage agriculture, and oil and gas development, 70 percent of the land was within 100 m (109 yards (yd)), and 85 percent of the land was within 200 m (218 yd), of a human feature (Naugle *et al.* 2009, p. 11). Researchers estimated that in those areas, every square km (0.39 square miles) of land may be both bounded by a road and bisected by a powerline (Naugle *et al.* 2009, p. 11). With increased oil and gas development in much of the Sprague's pipit's range, this level of fragmentation is likely to be occurring over a large percentage of the range. As discussed above, habitat

fragmentation is one of the major threats facing the species.

Wind energy development has been increasing rapidly in recent years, with increases of more than 45 percent in 2007, and more than 50 percent in 2008 (Manville 2009, p. 1). Like oil development, wind projects built in native grassland fragment the habitat with turbines, towers, roads, transmission infrastructure, and associated facilities. We estimate that each turbine and associated road impacts approximately 34.5 ha (85.3 acres) of land, including an area around the road that Sprague's pipits avoid (Linnen 2008, p. 9-10; Loesch 2010, pers. comm.). However, because most turbines are placed close enough together for the avoidance areas to overlap, we calculated the impact of each individual turbine to be less, approximately 16.4 ha (40.5 acres) per turbine on average. To date, we estimate that 12,400 ha (30,522 ac) have been impacted by 752 wind turbines and associated roads within the Sprague's pipit U.S. range. We anticipate the number of wind farms to continue to increase dramatically throughout the species' range. For example, in North Dakota alone, we are aware of a plan to construct 4,194 new turbines within the Sprague's pipit's range (Ellsworth 2010, pers. comm.). This proposed development has the potential to make 69,200 to 145,000 ha (170,000 to 358,000 acres) of land unsuitable for pipit nesting, depending on how the turbines are spaced. This likely represents a fraction of potential habitat loss from wind energy development, because we typically are not informed of wind projects until sites are selected.

North Dakota and South Dakota each have the potential wind-energy capacity of at least 4 mega-watts (MW) of wind power per km^2, while Montana has been projected to have the potential for 3 to 4 MW of wind power per km^2 (National Research Council 2007, p. 45). We calculated how much of the Sprague's pipit's U.S. range this amount of development may impact, using the following assumptions:

1) Each turbine would provide 2 MW of power. Onshore turbines are constructed between 700 kW to 2.5 MW (American Wind Energy Association 2010, p. 3), with most industrial projects that we are aware of in the 1.5 MW range. However, wind industry is working toward developing larger turbines , so we believe that in the future turbine size is likely to be 2 MW or greater.

2) Future wind projects would be constructed at approximately the same density as existing wind farms in these states, with the area of habitat that Sprague's pipits avoid from one turbine overlapping the avoidance area from another. We also assume that each turbine, road and associated area makes approximately 16.4 ha (40.5 acres) of habitat unsuitable for nesting.

3) Turbines would be evenly distributed across the Sprague's pipit range in the U.S. This assumption is likely conservative in terms of effects to habitat because the areas with the highest wind potential in these states are largely within the remaining suitable prairie habitat. Major wind development is likely to occur in the remaining suitable Sprague's pipit habitat (U.S. Department of Energy 2010a, p. 1; Loesch, pers. comm. 2010).

Using the above assumptions, we estimate that a minimum of 4.8 million hectares (12 million acres) could become unsuitable for nesting within the range in North Dakota and a minimum of 2.1 million ha (5.1 million acres) could become unsuitable in South Dakota, while in Montana from 6.6 to 8.8 million hectares (16.4 to 21.8 million acres) could be impacted. While full development of the wind potential in Sprague's pipit habitat is not likely, these figures indicate that even a fraction of full development could result in significant losses of Sprague's pipit habitat. This estimate only includes the impacts from the turbines and associated roads. The potential impacts from other associated infrastructure (e.g. power lines) is not known, but may impact the species (e.g. from power-line strikes). The areas with the highest wind potential often overlap with the areas of remaining native prairie, making it likely that wind development will focus on the remaining suitable Sprague's pipit habitat (U.S. Department of Energy 2010a, p. 1; Loesch, pers. comm. 2010).

There is some information suggesting that wind farms adversely impact grassland songbirds, a group that is already in decline (Casey 2005, p. 4; Manville 2009, p. 1). The entire U.S. range of the Sprague's pipit is within an area with high potential for wind development (American Wind Energy Association 1991, p. 1; U.S. Department of Energy 2010a, p. 1). Thousands of acres of Sprague's pipit habitat have already been fragmented by wind development (Loesch 2010, pers. comm.), a trend which is presumably consistent throughout the range as the number of wind farms increases (U.S. Department of Energy 2010b, entire). Thirty-three States and the District of Columbia have requirements or voluntary goals for renewable energy to make up a percentage of their energy needs, including North Dakota, South Dakota, Minnesota, and Montana (U.S. Department of Energy 2009, entire). Mandates for "green" energy in States without Sprague's pipits are likely to fuel increases in wind development in the Sprague's pipits' range because wind power generated in these wind-rich areas are generally transmitted out-of-State (e.g. Great River Energy 2010, p. 1). We anticipate the number of turbines throughout the Sprague's pipit range to continue to dramatically increase.

Oil and gas extraction is ongoing throughout much of the Sprague's pipit's range in Canada, and is expected to increase into the future (Dale 2010, pers. comm.). Similarly, wind development is increasing throughout the Canadian range of the Sprague's pipit (Canadian Wind Energy Association 2010, entire; Canadian Environmental Assessment Agency – Canadian Environmental Assessment Registry 2010, entire).

Because of wide-scale energy development across the Sprague's pipits' range, we believe that oil, gas, and wind development represents a serious threat to the continued existence of the Sprague's pipit. Sprague's pipits avoid features in the landscape that are structurally different than grassland, so the construction of energy-related structures negatively impacts the species' use of a wide area. The amount and extent of energy development has been increasing rapidly and is expected to continue to increase, so energy development will be an ongoing and increasing threat into the future.

Roads

In addition to fragmenting the habitat, roads enable the spread of exotic species because vegetative propagules (parts that can sprout independently) can be inadvertently transported along roads, while the ground disturbance associated with road construction provides sites where propagules can readily germinate (Trombulak and Frissell 2000, p. 24; Simmers 2006, p. 7). Furthermore, the dust and chemical runoff from roads allow only tolerant plant species to grow nearby, changing the plant composition even if the right-of-way were not actually disturbed and reseeded (Trombulak and Frissell 2000, p. 23). Even 20 years after reclamation, the nonnative seeds used on reclaimed roadbeds can still dominate the area (Simmers 2006, p. 24). These nonnative species spread into the nearby prairie, indicating that long-term impacts of road construction extend beyond the original footprint of the roadway (Simmers 2006, p. 24). Even if vehicles are cleaned before entering an area, they pick up nonnative seeds when visiting

infested sites, and carry them to newly disturbed areas, transporting nonnative species throughout the landscape (Dale *et al.* 2009, p. 195). In addition, as discussed under Factor C, roads serve as pathways for predators (Pitman *et al.* 2005, p. 1267). Thus, a secondary impact of habitat fragmentation may be an increase in predation.

The increase in roads throughout the Sprague's pipit's range represents a serious and ongoing threat to the species. Because every new energy feature requires at least some new road construction, the impacts of energy development on the species are closely tied to the impacts of road development. Both further fragment the remaining suitable habitat, leaving remnant patches that may be too small for the nesting of Sprague's pipit. Roads negatively affect the structure and make-up of the prairie, and also make grassland habitat more accessible to predators, likely decreasing Sprague's pipits' reproductive success.

Migration and Wintering Habitat

Although there have been few studies of non-breeding Sprague's pipits, Sprague's pipits appear to be strongly tied to native prairie habitat during the winter (Desmond *et al.* 2005, p. 442; Emlin 1972, p. 324). They are occasionally observed in other habitat types, especially during migration (Maher 1973, p. 20; Robbins and Dale 1999, pp. 13-14). Several researchers have noted the rapid conversion rate to cropland and extremely limited area protected in the Chihuahuan desert region along the border between the United States and Mexico (Desmond *et al.* 2005; pp. 448-449; Maci´as-Duarte *et al.* 2009, p. 902; Manzano-Fischer *et al.* 2006, p. 3820). In the Chihuahuan Desert Region (United States and Mexico), an estimated 7 percent of grassland habitat remained in 2005 (Desmond *et al.* 2005, pp. 439, 448). Between 2005 and 2008, an estimated 30,000 ha (74,000 ac) of this grassland was converted (Macias-Duarte *et al.* 2009, p. 902). In many places where native grassland remains, a variety of factors have led to shrub encroachment, including overgrazing, elimination of prairie dogs, changes in stream flow and the water table due to irrigation, and changes in climate patterns (Desmond *et al.* 2005, p. 448; Manzano-Fischer *et al.* 2006, p. 3820; Walker *et al.* 1981, p. 493). Reversing the pattern of woody species invasion is very difficult because once established, woody species tend to be stable in the landscape (Whitford *et al.* 2001, p. 9).

Because Sprague's pipit's presence on the wintering grounds in a particular area is related to rainfall the previous year (Dieni *et al.* 2003, p. 31; Maci´as-Duarte 2009, p. 901), pipits move to different parts of the wintering range annually, with densities dependent on local conditions. Therefore, it is likely necessary for sufficient suitable habitat to be available throughout the wintering range so that areas that are too dry one year may be used when conditions improve but are poor elsewhere. With conversion of grassland habitat on the wintering grounds, the amount of suitable habitat available to Sprague's pipits is shrinking (Maci´as-Duarte 2009, p. 896; Manzano-Fischer *et al.* 2006, p. 3820). Even grassland that is not actively converted is becoming unsuitable for Sprague's pipits due to widespread changes in grassland management and resulting changes in grassland structure. These changes are caused by overgrazing, shrub encroachment, and an increase in the biomass of annual grasses, among other causes (Drilling 2010, pp. 9-10; Manzano-Fischer *et al.* 2006, pp. 3819-3821; Walker *et al.* 1981, pp. 473-474).

The Sprague's pipit's wintering habitat has undergone widespread conversion to farmland and degradation from management changes since pre-colonial times. These changes are likely negatively impacting the Sprague's pipit population as a whole. As conversion and degradation continue, we expect wintering habitat to be more limiting. However, there have not been specific studies examining Sprague's pipits' habitat use during migration or on the wintering grounds, so it is not possible to determine if the changes to the migration and wintering grounds already constitute a threat to the species that may be placing the species at risk of extinction now or in the future. However, we think the magnitude of loss on the breeding grounds is sufficient to determine that the species is at risk of extinction now or in the future even in the absence of specific information on the wintering grounds.

Summary of Factor A

The Sprague's pipit is a grassland obligate species that is sensitive to fragmentation and that requires relatively large grassland patches to form breeding territories. As identified above in our Factor A analysis, the native prairie habitat on which Sprague's pipits depend has been drastically altered since European settlement, with most of the native prairie converted to other uses. Habitat conversion, fragmentation, improperly timed mowing, and energy development and associated facilities are all contributing, individually and collectively, to the present and threatened destruction, modification, and curtailment of the habitat and range of the Sprague's pipit. Only approximately 1.55 to 1.86 percent of the breeding range remains in large enough patches to be used for breeding in the United States and only approximately 5 to 6 percent remains suitable in Canada. Land conversion and fragmentation of remaining grassland habitat are accelerating throughout the species' breeding range. Grassland on the wintering range also is rapidly being converted to uses not suitable for the species. We anticipate that conversion and fragmentation will continue to occur, and are likely to increase, on both the breeding and wintering range. As discussed above, the Sprague's pipit population is experiencing a long-term decline. As more habitat becomes unsuitable, we expect the population decline to continue or to accelerate.

We have evaluated the best scientific and commercial information available regarding the present or threatened destruction, modification, or curtailment of the Sprague's pipit's habitat or range. Based on the current and ongoing habitat issues identified here, their synergistic effects, and their likely continuation in the future, we have determined that this factor poses a significant threat to the species.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes.

We are not aware of any commercial, recreational, or educational uses of the species. Sprague's pipit has not been extensively studied for scientific purposes (e.g., Robbins and Dale 1999, p. 1; Davis 2009, p. 265). A limited number of studies have involved close observation or handling of Sprague's pipit adults, nests, or young (e.g., Sutter *et al.* 1996, pp. 694-696; Davis 2003, pp. 119-128; Dieni and Jones 2003, pp. 388-389; Jones *et al.* 2007; Dohms and Davis 2009, pp. 826-830). Work involving radio-transmitter attachment on Sprague's pipit nestlings found no evidence that the devices impacted survival, although the transmitter may temporarily impact the birds' balance and movement (Davis and Fischer 2009, p. 199; Fischer *et al.* 2010, pp. 1, 3-5).

Most research that includes the Sprague's pipit relies on passive sampling (e.g., point counts) rather than active handling. The studies that involve active handling of adults, nestlings, or nests may impact the individuals involved, but are small enough in scale that they are unlikely to affect the population as a whole. Passive

sampling techniques are unlikely to have negative impacts on Sprague's pipits.

Summary of Factor B

We do not have any evidence of risks to Sprague's pipits from overutilization for commercial, recreational, scientific, or educational purposes, and we have no reason to believe this factor will become a threat to the species in the future. Therefore, we find that overutilization for commercial, recreational, scientific, or educational purposes is not a significant threat to the Sprague's pipit now or in the foreseeable future.

Factor C. Disease or Predation.

Disease

We are not aware of any information to indicate that disease poses a significant threat to Sprague's pipits at this time. The Intergovernmental Panel on Climate Change (IPCC) (2007, p. 51) suggests that the distribution of some disease vectors may change as a result of climate change. However, the Service currently has no information to suggest that any specific disease may become problematic to Sprague's pipit.

Predation

Predation is thought to destroy up to 70 percent of grassland bird nests (Davis 2003, p. 119). The predation rate on Sprague's pipits may be lower due to their well-concealed nests and secretive behavior (Davis 2003, pp. 124; Davis and Sealy 2000, p. 223; Jones and Dieni 2007, pp. 117-122). The species' tendency to choose taller vegetation and to build covered nests with a runway presumably is at least in part an attempt to avoid being seen by predators (Sutter 1997, p. 467), although a covered nest may not reduce predation (Jones and Dieni 2007, p. 123). Predation has been documented to be the main cause of mortality of nestling and fledgling Sprague's pipits (Davis and Fisher 2009, entire).

We do not believe that the natural level of predation presents a threat to the species. Rather, the predation risk for the Sprague's pipit may be unnaturally increased by the fragmentation of habitat discussed above under Factor A. Songbird predators tend to travel along habitat edges, avoiding prairie areas where escape is more difficult (Johnson and Temple 1990, p. 110). Birds that may nest near a habitat edge, such as a road, could experience lower nest success because they may be more likely to be parasitized by cowbirds (Davis 1994, p. i) and because roads may serve as travel routes for predators (Pitman *et al.* 2005, p. 1267). The Sprague's pipit's preference for larger patches of unfragmented prairie may reduce their susceptibility to predation. However, as fewer large patches of grassland are available, predation risk to Sprague's pipits may increase.

Cowbird Parasitism

Cowbird parasitism also leads to Sprague's pipit nest failures, because the cowbirds remove or damage host eggs and cowbird young out-compete the hosts for resources (Davis 2003, pp. 119, 127). Limited evidence suggests that Sprague's pipit nests that are parasitized do not produce any pipit young (Davis and Sealy 2000, p. 226). Both nest predation and cowbird parasitism generally are higher in small remnant grassland plots near habitat edges (Johnson and Temple 1990, pp. 106, 108; Davis 1994, p. i; Davis and Sealy 2000, p. 226), so the Sprague's pipit's preference for larger tracts of grassland, when these are available, may make the species less susceptible to cowbird parasitism than some other grassland species. As with predation, the continued loss and fragmentation of native grassland (see discussion under Factor A) means that the remaining habitat is more fragmented, likely leading to increased levels of cowbird parasitism and predation.

We are concerned that continued landscape fragmentation will increase the effects of predation on this species, potentially resulting in a further reduction in Sprague's pipit productivity and abundance in the future. However, there is very limited information on the extent to which such effects might be occurring.

Summary of Factor C

We do not find evidence that disease is currently impacting the Sprague's pipit, nor do we have information to indicate that disease outbreaks will increase in the future. We find that disease is not a threat to the Sprague's pipit now and is not expected to become so in the future. While the level of predation for all grassland birds is high, we do not have information at this time to suggest that predation or cowbird parasitism is impacting Sprague's pipits at a level that threatens the species. Because Sprague's pipits select large grassland patches for nesting, when larger habitat patches are available Sprague's pipits may be less susceptible to cowbird parasitism than other grassland species. However, the increased fragmentation of habitat, as discussed under Factor A, may lead to increased predation and cowbird parasitism, and we believe that predation may become a more serious factor affecting the species. However, at this time, based on the available information we conclude that disease or predation is a not significant threat to the species now and is not likely to become so in the future.

Factor D. Inadequacy of Existing Regulatory Mechanisms.

Federal Mechanisms

There are numerous Federal laws, acts, and policies in addition to the ESA that encourage coordination of activities that may impact wildlife and promote conservation of wildlife. Some of the most frequently encountered Federal regulatory mechanisms that may influence Sprague's pipit management are described below.

The Sprague's pipit is protected under the Migratory Bird Treaty Act (MBTA; 16 U.S.C. 703-712), which prohibits the direct take of migratory birds native to the United States, their eggs, or their active nests. Unlike the ESA, the MBTA does not protect species' habitat. Upland habitat for migratory birds can be legally destroyed as long as it does not result in the direct take of birds, eggs, or active nests. As discussed under Factor A, habitat loss and fragmentation is a main reason for the species' decline. Therefore, even if all public and private activities are designed and carried out to avoid direct take of Sprague's pipits, the magnitude of the loss of breeding (and possibly migration and wintering) habitat would still constitute a significant threat to the species.

The National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) requires all Federal agencies to examine the environmental impacts of their actions, incorporate environmental information, and utilize public participation in the planning and implementation of all actions. NEPA requires disclosure of actions, but does not require mandatory minimization measures for, or protection of, the species or its habitat. NEPA would not protect Sprague's pipit habitat from conversion and is insufficient to address the threats to the Sprague's pipit.

As noted under Factor A, favorable market prices often encourage farmers to plow new land for crop production. There are no Federal laws or regulations prohibiting conversion of uplands from native habitat to cropland, and we are not aware of any State regulatory mechanisms that govern conversion of native grassland to cropland when migratory birds will be impacted.

Wind Farms and Federal Mechanisms

The Service has developed interim guidelines for siting wind farms (Service 2003, pp. 1-57) to reduce impacts to wildlife and wildlife habitat, but they are voluntary and are not consistently applied (or applied at all) on private land where there is not a Federal nexus (Manville 2009, p. 1). As previously discussed, the MBTA does not protect habitat. Even where a Federal regulatory mechanism exists, migratory bird habitat can, and is, being converted to industrial uses. Wind turbines can be, and are being, constructed on National Wildlife Refuge System easements (Wind Energy Advisory Group 2007, entire).

State Regulatory Mechanisms

As discussed above, a number of States have identified the Sprague's pipit as a species of conservation concern (Arizona Game and Fish Department 2010, p. 3; Louisiana Department of Wildlife and Fisheries 2005, p. 6; Minnesota Department of Natural Resources 2010, p. 1; Montana Fish, Wildlife and Parks 2010, p. 2; New Mexico Game and Fish 2010, p. 4; North Dakota Game and Fish Department 2010, p. 3; South Dakota Game, Fish, and Parks 2010, p. 3; Texas Parks and Wildlife 2005, p. 6). While the State wildlife agencies work with partners to protect the species, there are no State regulations protecting habitat (Baker 2010, pers. comm.; Francis 2010, pers. comm.; Gilbert 2010, pers. comm.; Glusenkamp 2010, pers. comm.; Johnson 2010, pers. comm.; Michon 2010, pers. comm.; Ode 2010, pers. comm.; Wightman 2010, pers. comm.). In Montana, much of the prime Sprague's pipit habitat is managed as school trust land, and as such may be sold or converted at any time to generate income for State schools (McDonald 2010, pers. comm.). Thus, the States do not have regulations that would protect Sprague's pipit habitat from further conversion or fragmentation.

Wind Energy and State Mechanisms

Some States have permit requirements for wind farm construction. However, as discussed above, except for Minnesota, there are no requirements to avoid Sprague's pipit habitat. A State permit is required in South Dakota for wind farms larger than 100 megawatts (South Dakota Public Utilities Commission 2010, p. 1), and in North Dakota for wind farms larger than 60 megawatts (North Dakota Public Service Commission 2010, p. 3). No State permit is required in Montana (Montana Department of Environmental Quality 2009, p. 1).

Canadian Regulatory Mechanisms

In Canada, the Sprague's pipit is listed as threatened under the Species At Risk Act (SARA), providing it with many similar protections as would be afforded by the ESA if the species were listed as an endangered or threatened species (SARA: Government of Canada 2010, entire). Once a species is listed under SARA, it becomes illegal to "kill, harass, capture, or harm it in any way." The SARA also protects critical habitat from destruction (Fisheries and Oceans Canada 2009, pp. 1-2). Critical habitat has not yet been designated for the Sprague's pipit under SARA (Davis 2010, pers. comm.), so at this time, habitat is only protected during the nesting season. If Canada designates critical habitat in that country, the emphasis would be placed on Canadian Federal lands, and a SARA permit would be required to destroy critical habitat. On provincial or private lands, the province's laws would apply to critical habitat. If there is a potential serious impact to critical habitat and the province is not willing to stop the project, the Canadian government can intercede.

Under SARA, an environmental review is conducted for projects on Canadian Federal land, for projects that require a Canadian Federal permit or authorizations, and for projects that receive Canadian Federal funding. The applicant must demonstrate that they have considered reasonable alternatives and have taken all feasible measures to minimize potential project impacts, and that the project will not jeopardize the survival or recovery of the species. On provincial land, provincial legislation protects the species under the province's environmental review process. Provinces can invite the Canadian Federal government to comment on their projects. Similarly, on private land with no Federal involvement, provincial laws would apply.

The SARA provides significant protection to the species in Canada, and is likely sufficient to address many of the threats facing the species in Canada. Approximately 75 percent of the population is estimated to breed in Canada (Blancher *et al.* 2007, p. 27). Given the lack of protection in the United States as well as the concurrent decline in habitat on the wintering grounds in the United States and Mexico, we do not think that the protection in Canada alone is sufficient to halt or reverse the species' decline.

Wintering Grounds in the United States and Mexico

The species benefits from protections on U.S. National Wildlife Refuge lands, protected lands in Mexico, and lands purchased by nonprofit organizations on the wintering grounds, but these lands are a relatively small portion of the wintering range and may not be sufficient to support the species (Emlen 1972, pp. 302, 304; Wells 2007, pp. 296-298). Habitat conservation and restoration for the federally endangered Attwater's greater prairie-chicken (*Tympanuchus cupido attwateri*) also should benefit the Sprague's pipit along the eastern coast of Texas. However, Attwater's greater prairie-chicken's habitat is a very small portion of the Sprague's pipit wintering range. Furthermore, the recovery plan for the Attwater's greater prairie-chicken notes that efforts to protect habitat are hampered by rapid urbanization (Service 2010, pp. 2, 28-29). As discussed under Factor A, Sprague's pipits likely move widely throughout the wintering region in response to precipitation patterns and local habitat conditions. Therefore, relatively few, scattered, protected areas may not provide sufficient habitat over the long term to provide for the species' needs.

Other than some limited protected lands in Mexico, we are not aware of any regulatory mechanisms protecting the Sprague's pipit in Mexico.

Summary of Factor D

The MBTA currently provides Federal protection from direct take of migratory birds native to the United States, their active nests, and their eggs, but it does not provide protection for habitat. As discussed under Factor A, remaining habitat in both the breeding and wintering range is rapidly being converted and fragmented. While most of the States in the Sprague's pipit's range have identified the Sprague's pipit as a species of conservation concern, this designation does not provide protection of remaining habitat. Because the main threat to the species is habitat loss, we find that existing U.S. regulatory mechanisms do not protect the species from the threat of habitat loss.

In Canada, the Sprague's pipit is listed as a threatened species (Environment Canada 2008, p. 1). While this listing provides considerable protection to the species, the population would be unlikely to reverse its decline without additional protection on the U.S. breeding portion of the range as well as on its wintering grounds.

Other than some limited protected areas, we are not aware of any regulatory mechanisms protecting Sprague's pipits' habitat in Mexico. A large portion of the wintering range is in Mexico, and the literature suggests that habitat is rapidly being converted (Desmond *et al.* 2005, pp. 448-449; Maci´as-Duarte *et al.* 2009, p. 902; Manzano-Fischer *et al.* 2006, p. 3820). While the lack of regulatory mechanisms preventing habitat conversion on the wintering range in the United States and Mexico is likely contributing to the decline of the species, we have limited information at this time regarding whether the lack of regulatory mechanisms on the wintering grounds alone is a significant threat to the continued existence of the species.

Based on our review of the best scientific and commercial information available, we conclude that existing regulatory mechanisms are inadequate to protect the species and its habitat. The inadequacy of existing regulatory mechanisms therefore is a significant threat to the species, now and in the foreseeable future.

E. Other Natural or Manmade Factors Affecting Its Continued Existence.

Climate Change

No information on the direct relationship between climate change and Sprague's pipit population trends is available; however, climate change could potentially impact the species. According to the IPCC (2007, p. 6), "warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level." Average Northern Hemisphere temperatures during the second half of the 20th century were very likely higher than during any other 50–year period in the last 500 years and likely the highest in at least the past 1,300 years (IPCC 2007, p. 6). It is very likely that over the past 50 years cold days, cold nights, and frosts have become less frequent over most land areas, and hot days and hot nights have become more frequent (IPCC 2007, p. 6). It is likely that heat waves have become more frequent over most land areas, and the frequency of heavy precipitation events has increased over most areas (IPCC 2007, p. 6).

Changes in the global climate system during the 21st century are likely to be larger than those observed during the 20th century (IPCC 2007, p. 19). For the next 2 decades, a warming of about 0.2 Celsius (°C) (0.4 Fahrenheit (°F)) per decade is projected (IPCC 2007, p. 19). Afterward, temperature projections increasingly depend on specific emission scenarios (IPCC 2007, p. 19). Various emissions scenarios suggest that by the end of the 21st century, average global temperatures are expected to increase 0.6 to 4.0 °C (1.1 to 7.2 °F), with the greatest warming expected over land (IPCC 2007, p. 20).

The IPCC (2007, pp. 22, 27) report outlines several scenarios that are virtually certain or very likely to occur in the 21st century, including:

(1) Over most land, there will be warmer and fewer cold days and nights, and warmer and more frequent hot days and nights;

(2) Areas affected by drought will increase; and

(3) The frequency of warm spells and heat waves over most land areas will likely increase.

The IPCC predicts that the resiliency of many ecosystems is likely to be exceeded this century by an unprecedented combination of climate change-associated disturbances (e.g., flooding, drought, wildfire, and insects) and other global drivers. With medium confidence, IPCC predicts that approximately 20 to 30 percent of plant and animal species assessed so far are likely to be at an increased risk of extinction if increases in global average temperature exceed 1.5 to 2.5 °C (3 to 5 °F). Given the large amount of land conversion that has already taken place throughout North America, it is not clear that the Sprague's pipit's range could shift into new areas in response to changes in climate.

There is some variability between models in projecting the effect of future climate change on Sprague's pipit breeding habitat. One model projected that the Sprague's pipit's breeding range would experience a wetter climate by the end of this century (U.S. Global Change Research Program Great Plains 2009, p. 125). In contrast, another model suggested that much of the remaining suitable habitat for Sprague's pipit nesting would likely become drier due to climate change (Johnson *et al.* 2005, p. 871).

In a 3–year study looking at a drought and post-drought period in western North Dakota, Sprague's pipit numbers declined in periods of drought, although they rebounded once the drought ended (George *et al.* 1992, pp. 275, 278-279). By contrast, a study comparing numbers from the BBS to moisture levels in eastern and northern North Dakota found that Sprague's pipit numbers actually increased during dry periods (Niemuth *et al.* 2008, pp. 213-217). However, amount of moisture was a relative descriptor and not constant between studies.

Sprague's pipits prefer areas with grassy cover and a low amount of bare ground (Dieni and Jones 2003, p. 392; Sutter 1997, p. 464). Extreme drought may lead to poor grass growth and thus less optimal habitat (Dieni and Jones 2003, pp. 393-395). While the species can increase in abundance after a short-term drought ends, climate change may lead to drier conditions in much of the Sprague's pipit's breeding range (Johnson *et al.* 2005, pp. 869-871), which may have more lasting impacts on the habitat and thus the Sprague's pipit (George *et al.* 1992, pp. 281-283).

Temperatures in the wintering range also are expected to rise, while precipitation is projected to decline (U.S. Global Change Research Program Southwest 2009, p. 125). Therefore, substantial landscape changes are expected in the wintering range (U.S. Global Change Research Program Southwest 2009, p. 131). These changes in temperature and precipitation throughout the species' range may have a large impact on ecosystems (U.S. Global Change Research Program Great Plains 2009, p. 126; U.S. Global Change Research Program Southwest 2009, p. 131) and thus the Sprague's pipit.

In the arid areas where Sprague's pipits migrate and winter, the amount of grass is driven by precipitation the previous year. The grass structure, in turn, influences migratory bird use of an area (Maci´as-Duarte *et al.* 2009, p. 901). As climate patterns change, the available suitable habitat in the migration and wintering areas may become less suitable for Sprague's pipits.

If, as predicted, climate change causes shifts in large-scale weather patterns, this would likely alter the optimal areas for the Sprague's pipit's breeding and wintering grounds. Since there is already limited grassland remaining, it is unlikely that there would be suitable habitat available elsewhere. However, there is not sufficient information at this time to determine the likely effects of climate change on the Sprague's pipit.

Chemical Use and Harassment in Agricultural Fields

The Sprague's pipit is primarily associated with grassland, but it is occasionally observed in cropland (Igl *et al.* 2008, pp. 280, 284). Agricultural practices on the wintering grounds may impact Sprague's pipits. The pesticide flowable carbofuran (brand name Furidan) was reportedly used in Mexico to protect crops against insects (Manzano-Fischer *et al.* 2006, p. 3821). This practice not only reduces the prey

base in the area, but also has been linked with the mortality of passerines nearby (Manzano-Fischer *et al.* 2006, p. 3821). The use of carbofuran is prohibited in the United States, and cancellation is being considered in Canada (Environmental Protection Agency 2010, p. 1; Health Canada 2009, p. 1). The use of carbofuran is currently legal in Mexico (Doucoure 2010, pers. comm.). However, since Sprague's pipits rarely use cropfields, carbofuran is unlikely to be causing major impacts to the species, even in places where it is still used.

Sprague's pipits primarily feed on arthropods, and have been sighted in sunflower fields, although their use of crop fields is rare (Igl *et al.* 2008, pp. 280-284; Hagy *et al.* 2007, p. 66; Wells 2007, p. 297). The poisoning of sunflower fields with grain bait used to kill blackbirds (Family: Icteridae) may impact Sprague's pipits (Hagy *et al.* 2007, p. 66). As discussed above, Sprague's pipits do not generally use crop fields, so the impacts of poisoning are limited.

Some sunflower growers harass birds, primarily several species of blackbirds that feed on their crops. Harassment of birds on cropland may negatively impact their energy stores during migration, when they may already be low on reserves (Hagy *et al.* 2007, pp. 62, 69). Any Sprague's pipits that are present in sunflower fields could be incidentally harassed out of those fields along with blackbirds and any other species present.

We acknowledge the potential for negative impacts on Sprague's pipit from harassment and poisoning in agricultural fields. Such impacts are likely minimal and localized as Sprague's pipits spend limited time in agricultural fields. Therefore, we determine the potential impacts of harassment and poisoning on Sprague's pipits to be low at this time. Thus, we have determined that pesticide use and harassment is not a significant threat to the Sprague's pipit.

Summary of Factor E

Due to the large level of uncertainty, we do not find climate change to be a significant threat to the species at this time. However, the IPCC states that warming of the climate is unequivocal (2007, p. 15). Additional information would improve our understanding of its effects on the species.

While chemical use to control insects likely has both direct and indirect effects on the Sprague's pipit, we have limited information regarding the scope of its use. Therefore, we do not have information to determine whether insecticide use is having a substantial impact on the species at this time. We do not believe that poisoning and harassment in agricultural fields pose a significant threat to Sprague's pipit population persistence. We conclude that the best scientific and commercial information available indicates that other natural or manmade factors are not a significant threat to the Sprague's pipit.

Finding

As required by the ESA, we conducted a review of the status of the species and considered the five factors in assessing whether the Sprague's pipit is endangered or threatened throughout all or a significant portion of its range. We examined the best scientific and commercial information available regarding the past, present, and future threats faced by the Sprague's pipit. We reviewed the petition, information available in our files, and other available published and unpublished information, and we consulted with Sprague's pipit and grassland bird experts and other Federal, State, and Canadian resource agencies.

In this review of the status of the species, we identified a number of threats under the five-factor analysis including: habitat fragmentation on the breeding grounds, energy development, roads, and inadequacy of existing regulatory mechanisms.

Native prairie is one of the most imperiled habitats worldwide, with loss rates approximating 70 percent in the United States and Canada, and prairie loss is accelerating. The remaining prairie is being converted to other land uses and is being increasingly fragmented, largely due to the development of wind, oil, and gas-generating facilities and associated roads and infrastructure. Land conversion is likely impacting the species throughout its range, but the effects of fragmentation most strongly impact the species on the breeding grounds. Because Sprague's pipits avoid unsuitable landscape features in breeding territories, the effect of a change in the landscape is magnified beyond the simple footprint of the disturbance. Only approximately 2 percent of the species' historical U.S. range remains in potentially suitable habitat. When we included the effects of fragmentation and disturbance, the remaining suitable habitat declined even further to 1.55 to1.86 percent of the historical breeding habitat in the United States and between 5 and 6 percent of the historical breeding range in Canada remaining in large enough patches to support nesting territories. This loss of suitable habitat will likely continue and accelerate for the foreseeable future with the increase in energy development throughout much of the species' range. We estimate that habitat will likely continue to be converted from native prairie at a rate of approximately 32,000 ha (78,000 ac) annually, with a total potential conversion of 640,000 ha (1.6 million ac) in 20 years within the U.S. breeding range. In addition, wind power has the potential to impact a substantial amount of the suitable habitat remaining within the range. With limited exceptions, existing regulatory mechanisms do not protect the species' habitat from development.

The evidence we have at this time suggests that while grazing, mowing, overutilization, predation, cowbird parasitism, harassment and chemical use may have some impacts on Sprague's pipits, these effects are unlikely to be influencing the population as a whole. Climate change may lead to large-scale population level impacts if it causes changes in the remaining suitable habitat. The available information strongly suggests that changes in the global climate system are likely to impact rainfall and temperature throughout the Sprague's pipits' range, but the nature and magnitude of these changes on the Sprague's pipit population is unknown at this time. While there are some broad estimates of how climate change will impact the central region of North America, many uncertainties remain. Land conversion, fragmentation of habitat, and inadequacy of regulatory mechanisms to halt habitat loss are causing a significant decline in the Sprague's pipit population, such that listing is warranted.

Both the BBS and the CBC data show long-term, sustained declines in the Sprague's pipit population of 3.23 to 3.9 percent annually and a 73 to 80 percent decline over the past 40 years. These surveys provide an indication of population trends. The evidence for decline is particularly strong because these two lines of independent evidence both point to the same conclusion. Even though the surveys take place in different parts of the species' range (breeding and wintering) and use different methodologies, the resulting estimates for population trend are remarkably similar. The only available population estimate comes from the BBS data, estimating the population at approximately 870,000 in 1995 (Blancher *et al.* 2007 p. 27). The population trend since that time has continued to decline, suggesting that the population is approximately 479,000

today, assuming a continued population decline of 3.9 percent annually.

Prairie habitat loss and fragmentation has resulted in only 1.55 to1.86 percent of the historical breeding habitat in the United States and between 5 and 6 percent of the historical breeding range in Canada remaining in patches large enough to support nesting. We expect current habitat loss and fragmentation to continue into the future. Farm policy and practices continue to provide economic incentives for farmers to convert native prairie into cropland, while advances in farming (herbicide resistant crops and the advent of no-till planting) contribute to decisions to convert prairie to cropland. The historic primary impact to the Sprague's pipit population has been land conversion to cropland. While land conversion to cropland is ongoing and remains a chronic threat, the major threat in the future is further fragmentation and degradation of native prairie habitat from the rapid expansion of oil and gas production and wind farm development. While there are approximately 10 million ha (25 million ac) of native prairie remaining in the U.S. range, only approximately 7 million ha (17 million ac) of this habitat remains in large enough patches to be used by breeding Sprague's pipits. Similarly, in the Canadian range, only approximately 3 to 4 million ha (7.4 to 9.9 million ac) remains in patches large enough to be used by breeding Sprague's pipits. Even this remaining habitat is becoming increasingly fragmented through continued conversion and fragmentation, especially due to energy development. As the amount of suitable habitat declines, the quality is also reduced, because the remaining habitat is increasingly fragmented, with more edge effects and greater impact from predators, cowbirds, and weed incursion. We anticipate the current rate of population decline (3.23 to 3.9 percent annually) to continue, and possibly increase, into the future due to the current and future loss of suitable breeding habitat. Given the current and anticipated decline in suitable habitat on both the breeding and wintering grounds, the inadequacy of existing regulatory mechanisms to protect remaining habitat, and the long-term, ongoing population decline, we find that listing the Sprague's pipit throughout its range (United States, Canada, and Mexico) is warranted.

This status review identified threats to the Sprague's pipit attributable to Factors A and D. The primary threat to the species is from habitat conversion and fragmentation (Factor A), especially due to native prairie conversion to other uses and fragmentation from energy (oil, gas, and wind) development.

On the basis of the best scientific and commercial information available, we find that the petitioned action, listing the Sprague's pipit as endangered or threatened, is warranted. We will make a determination on the status of the species as endangered or threatened when we prepare a proposed listing determination. However, as explained in more detail below, an immediate proposal of a regulation implementing this action is precluded by higher priority listing actions, and progress is being made to add or remove qualified species from the Lists of Endangered and Threatened Wildlife and Plants.

We reviewed the available information to determine if the existing and foreseeable threats render the species at risk of extinction now such that issuing an emergency regulation temporarily listing the species under section 4(b)(7) of the ESA is warranted. We determined that issuing an emergency regulation temporarily listing the species is not warranted for this species at this time, because while the population shows a long-term sustained decline, there is sufficient habitat remaining to prevent the species' numbers from plummeting drastically in the short term. Additionally, while we believe that both the U.S. and Canadian portions of the breeding range are necessary for the long-term survival of the species, the protections afforded in Canada under SARA should somewhat buffer the species' decline. However, if at any time we determine that issuing an emergency regulation temporarily listing the Sprague's pipit is warranted, we will initiate the action at that time.

Listing Priority Number

The Service adopted guidelines on September 21, 1983 (48 FR 43098), to establish a rational system for utilizing available resources for the highest priority species when adding species to the Lists of Endangered or Threatened Wildlife and Plants or reclassifying species listed as threatened to endangered status. These guidelines, titled "Endangered and Threatened Species Listing and Recovery Priority Guidelines" address the immediacy and magnitude of threats, and the level of taxonomic distinctiveness by assigning priority in descending order to monotypic genera (genus with one species), full species, and subspecies (or equivalently, distinct population segments of vertebrates). We assigned the Sprague's pipit an LPN of 2 based on our finding that the species faces threats that are of high magnitude and are imminent. These threats include the present or threatened destruction, modification, or curtailment of its habitat and the inadequacy of existing regulatory mechanisms. This is the highest priority that can be provided to a species under our guidance. Our rationale for assigning the Sprague's pipit an LPN 2 is outlined below.

Under the Service's LPN Guidance, the magnitude of threat is the first criterion we look at when establishing a listing priority. The guidance indicates that species with the highest magnitude of threat are those species facing the greatest threats to their continued existence. These species receive the highest listing priority. The threats that the Sprague's pipit faces are high in magnitude because the major threats (habitat conversion and fragmentation, energy development, inadequacy of regulatory mechanisms) occur throughout all of the species' range. Based on an evaluation of suitable habitat remaining in the species' breeding range, we determined that less than 2 percent of the U.S. range and only about 6 percent of the Canadian range remain in a suitable habitat type for the Sprague's pipit to breed. Habitat loss through grassland conversion was historically a major threat to the species, with approximately 98 percent of the U.S. breeding range lost to habitat conversion. On the remaining 2 percent of U.S. breeding range, grassland conversion is still occurring at a rate of approximately 32,000 ha (78,000 ac) per year. While conversion continues to reduce the amount of habitat available, energy development is the current and projected future major threat to the species. The amount of oil and gas and wind development has been increasing rapidly (Manville 2009, p. 1; Macpherson 2010, p. 1), and is expected to continue to do so into the foreseeable future. Wind development alone has the potential to impact from 14 to 16 million ha (33 to 39 million ac) in the U.S. breeding range. In North Dakota alone, oil and gas development could impact approximately 570,000 ha (1.4 million ac) within the Sprague's pipit range in 20 years. Both oil and gas and the wind development are land intensive, causing wide-scale fragmentation and degradation of the remaining grassland making it unsuitable for this species. There is less specific information available on the wintering grounds, but the data available indicate that large areas of the wintering grounds are being converted from grassland habitat. The documented, long-term, continuous population decline indicates that loss of

habitat is having a population-level effect.

Adequate regulations are not in place at the local, State, or Federal level to adequately minimize the threat of habitat degradation and fragmentation. Regulatory mechanisms do not exist to prevent large-scale changes to prairie habitat. Energy development (oil, gas, and wind) and associated infrastructure is projected to increase throughout the Sprague's pipit's range, further precluding the species' use of large portions for breeding or wintering activities. There are not adequate regulations related to placement and spacing of these energy features to avoid impacts to remaining unfragmented grassland habitat. We believe the ability of the Sprague's pipit population to stabilize or increase over the long term is highly diminished given the landscape-level changes that are occurring. Thus, we believe that the available information indicates that the magnitude of threats is high.

Under our LPN Guidance, the second criterion we consider in assigning a listing priority is the immediacy of threats. This criterion is intended to ensure that the species that face actual, identifiable threats are given priority over those for which threats are only potential or that are intrinsically vulnerable but are not known to be presently facing such threats. The threats are imminent because we have factual information that the threats are identifiable and that the species is currently facing them throughout all portions of its breeding range and in large portions of its wintering range. These actual, identifiable threats are covered in detail under the discussion of Factors A and D of this finding and currently include habitat conversion and fragmentation and inadequate regulatory mechanisms. In addition to their current existence, we expect these threats to continue and likely intensify in the foreseeable future. State agency representatives, energy industry spokesmen, and researchers anticipate that the amount of wind and oil and gas development will increase in the northern Great Plains for the foreseeable future. Since both oil and gas and wind development are occurring in areas that remain in native prairie, we believe that the impacts of increased development will further reduce the remaining suitable Sprague's pipit habitat.

The third criterion in our LPN guidance is intended to devote resources to those species representing highly distinctive or isolated gene pools as reflected by taxonomy. The Sprague's pipit is a valid taxon at the species level, and therefore receives a higher priority than subspecies or DPSs, but a lower priority than species in a monotypic genus.

The Sprague's pipit faces high magnitude, imminent threats, and is a valid taxon at the species level. Thus, in accordance with our LPN guidance, we have assigned the Sprague's pipit an LPN of 2.

We will continue to monitor the threats to the Sprague's pipit, and the species' status on an annual basis, and should the magnitude or the imminence of the threats change, we will revisit our assessment of the LPN.

Work on a proposed listing determination for the Sprague's pipit is precluded by work on higher priority listing actions with absolute statutory, court-ordered, or court-approved deadlines and final listing determinations for those species that were proposed for listing with funds from Fiscal Year 2009. This work includes all the actions listed in the tables below under expeditious progress.

Preclusion and Expeditious Progress

Preclusion is a function of the listing priority of a species in relation to the resources that are available and competing demands for those resources. Thus, in any given fiscal year (FY), multiple factors dictate whether it will be possible to undertake work on a proposed listing regulation or whether promulgation of such a proposal is warranted but precluded by higher-priority listing actions.

The resources available for listing actions are determined through the annual Congressional appropriations process. The appropriation for the Service Listing Program is available to support work involving the following listing actions: Proposed and final listing rules; 90–day and 12–month findings on petitions to add species to the Lists of Endangered and Threatened Wildlife and Plants (Lists) or to change the status of a species from threatened to endangered; annual determinations on prior "warranted but precluded" petition findings as required under section 4(b)(3)(C)(i) of the Act; critical habitat petition findings; proposed and final rules designating critical habitat; and litigation-related, administrative, and program-management functions (including preparing and allocating budgets, responding to Congressional and public inquiries, and conducting public outreach regarding listing and critical habitat). The work involved in preparing various listing documents can be extensive and may include, but is not limited to: Gathering and assessing the best scientific and commercial data available and conducting analyses used as the basis for our decisions; writing and publishing documents; and obtaining, reviewing, and evaluating public comments and peer review comments on proposed rules and incorporating relevant information into final rules. The number of listing actions that we can undertake in a given year also is influenced by the complexity of those listing actions; that is, more complex actions generally are more costly. The median cost for preparing and publishing a 90–day finding is $39, 276; for a 12–month finding, $100,690; for a proposed rule with critical habitat, $345,000; and for a final listing rule with critical habitat, the median cost is $305,000.

We cannot spend more than is appropriated for the Listing Program without violating the Anti-Deficiency Act (see 31 U.S.C. 1341(a)(1)(A)). In addition, in FY 1998 and for each fiscal year since then, Congress has placed a statutory cap on funds which may be expended for the Listing Program, equal to the amount expressly appropriated for that purpose in that fiscal year. This cap was designed to prevent funds appropriated for other functions under the Act (for example, recovery funds for removing species from the Lists), or for other Service programs, from being used for Listing Program actions (see House Report 105-163, 105th Congress, 1st Session, July 1, 1997).

Since FY 2002, the Service's budget has included a critical habitat subcap to ensure that some funds are available for other work in the Listing Program ("The critical habitat designation subcap will ensure that some funding is available to address other listing activities" (House Report No. 107 - 103, 107th Congress, 1st Session, June 19, 2001)). In FY 2002 and each year until FY 2006, the Service has had to use virtually the entire critical habitat subcap to address court-mandated designations of critical habitat, and consequently none of the critical habitat subcap funds have been available for other listing activities. In FY 2007, we were able to use some of the critical habitat subcap funds to fund proposed listing determinations for high-priority candidate species. In FY 2009, while we were unable to use any of the critical habitat subcap funds to fund proposed listing determinations, we did use some of this money to fund the critical habitat portion of some proposed listing determinations so that the proposed listing determination and proposed critical habitat designation could be combined into one rule, thereby being more efficient in our work. In FY 2010, we are using some of

the critical habitat subcap funds to fund actions with statutory deadlines.

Thus, through the listing cap, the critical habitat subcap, and the amount of funds needed to address court-mandated critical habitat designations, Congress and the courts have in effect determined the amount of money available for other listing activities. Therefore, the funds in the listing cap, other than those needed to address court-mandated critical habitat for already listed species, set the limits on our determinations of preclusion and expeditious progress.

Congress also recognized that the availability of resources was the key element in deciding, when making a 12–month petition finding, whether we would prepare and issue a listing proposal or instead make a "warranted but precluded" finding for a given species. The Conference Report accompanying Public Law 97-304, which established the current statutory deadlines and the warranted-but-precluded finding, states (in a discussion on 90–day petition findings that by its own terms also covers 12–month findings) that the deadlines were "not intended to allow the Secretary to delay commencing the rulemaking process for any reason other than that the existence of pending or imminent proposals to list species subject to a greater degree of threat would make allocation of resources to such a petition [that is, for a lower-ranking species] unwise."

In FY 2010, expeditious progress is that amount of work that can be achieved with $10,471,000, which is the amount of money that Congress appropriated for the Listing Program (that is, the portion of the Listing Program funding not related to critical habitat designations for species that are already listed). However these funds are not enough to fully fund all our court-ordered and statutory listing actions in FY 2010, so we are using $1,114,417 of our critical habitat subcap funds in order to work on all of our required petition findings and listing determinations. This brings the total amount of funds we have for listing actions in FY 2010 to $11,585,417. Our process is to make our determinations of preclusion on a nationwide basis to ensure that the species most in need of listing will be addressed first and also because we allocate our listing budget on a nationwide basis. The $11,585,417 is being used to fund work in the following categories: compliance with court orders and court-approved settlement agreements requiring that petition findings or listing determinations be completed by a specific date; section 4 (of the Act) listing actions with absolute statutory deadlines; essential litigation-related, administrative, and listing program-management functions; and high-priority listing actions for some of our candidate species. In 2009, the responsibility for listing foreign species under the Act was transferred from the Division of Scientific Authority, International Affairs Program, to the Endangered Species Program. Starting in FY 2010, a portion of our funding is being used to work on the actions described above as they apply to listing actions for foreign species. This has the potential to further reduce funding available for domestic listing actions. Although there are currently no foreign species issues included in our high-priority listing actions at this time, many actions have statutory or court-approved settlement deadlines, thus increasing their priority. The allocations for each specific listing action are identified in the Service's FY 2010 Allocation Table (part of our administrative record).

Based on our September 21, 1983, guidance for assigning an LPN for each candidate species (48 FR 43098), we have a significant number of species with a LPN of 2. Using this guidance, we assign each candidate an LPN of 1 to 12, depending on the magnitude of threats (high vs. moderate to low), immediacy of threats (imminent or nonimminent), and taxonomic status of the species (in order of priority: monotypic genus (a species that is the sole member of a genus); species; or part of a species (subspecies, distinct population segment, or significant portion of the range)). The lower the listing priority number, the higher the listing priority (that is, a species with an LPN of 1 would have the highest listing priority). Because of the large number of high-priority species, we have further ranked the candidate species with an LPN of 2 by using the following extinction-risk type criteria: International Union for the Conservation of Nature and Natural Resources (IUCN) Red list status/rank, Heritage rank (provided by NatureServe), Heritage threat rank (provided by NatureServe), and species currently with fewer than 50 individuals, or 4 or fewer populations. Those species with the highest IUCN rank (critically endangered), the highest Heritage rank (G1), the highest Heritage threat rank (substantial, imminent threats), and currently with fewer than 50 individuals, or fewer than 4 populations, originally comprised a group of approximately 40 candidate species ("Top 40"). These 40 candidate species have had the highest priority to receive funding to work on a proposed listing determination. As we work on proposed and final listing rules for those 40 candidates, we apply the ranking criteria to the next group of candidates with an LPN of 2 and 3 to determine the next set of highest priority candidate species.

To be more efficient in our listing process, as we work on proposed rules for the highest priority species in the next several years, we are preparing multi-species proposals when appropriate, and these may include species with lower priority if they overlap geographically or have the same threats as a species with an LPN of 2. In addition, available staff resources are also a factor in determining high-priority species provided with funding. Finally, proposed rules for reclassification of threatened species to endangered are lower priority, since as listed species, they are already afforded the protection of the Act and implementing regulations.

We assigned the Sprague's pipit an LPN of 2, based on our finding that the species faces immediate and high magnitude threats from the present or threatened destruction, modification, or curtailment of its habitat and from the inadequacy of existing regulatory mechanisms. Under our 1983 Guidelines, a "species" facing imminent high-magnitude threats is assigned an LPN of 1, 2, or 3 depending on its taxonomic status. Because the Sprague's pipit is a species, we assigned it an LPN of 2 (the highest category available for a species). Therefore, work on a proposed listing determination for the Sprague's pipit is precluded by work on higher priority candidate species; listing actions with absolute statutory, court ordered, or court-approved deadlines; and final listing determinations for those species that were proposed for listing with funds from previous fiscal years. This work includes all the actions listed in the tables below under expeditious progress.

As explained above, a determination that listing is warranted but precluded must also demonstrate that expeditious progress is being made to add or remove qualified species to and from the Lists of Endangered and Threatened Wildlife and Plants. (Although we do not discuss it in detail here, we are also making expeditious progress in removing species from the Lists under the Recovery program, which is funded by a separate line item in the budget of the Endangered Species Program. As explained above in our description of the statutory cap on Listing Program

funds, the Recovery Program funds and actions supported by them cannot be considered in determining expeditious progress made in the Listing Program.) As with our "precluded" finding, expeditious progress in adding qualified species to the Lists is a function of the resources available and the competing demands for those funds. Given that limitation, we find that we are making progress in FY 2010 in the Listing Program. This progress included preparing and publishing the following determinations:

FY 2010 COMPLETED LISTING ACTIONS

Publication Date	Title	Actions	FR Pages
10/08/2009	Listing *Lepidium papilliferum* (Slickspot Peppergrass) as a Threatened Species Throughout Its Range	Final Listing Threatened	74 FR 52013-52064
10/27/2009	90-day Finding on a Petition To List the American Dipper in the Black Hills of South Dakota as Threatened or Endangered	Notice of 90–day Petition Finding, Not substantial	74 FR 55177-55180
10/28/2009	Status Review of Arctic Grayling (*Thymallus arcticus*) in the Upper Missouri River System	Notice of Intent to Conduct Status Review	74 FR 55524-55525
11/03/2009	Listing the British Columbia Distinct Population Segment of the Queen Charlotte Goshawk Under the Endangered Species Act: Proposed rule.	Proposed Listing Threatened	74 FR 56757-56770
11/03/2009	Listing the Salmon-Crested Cockatoo as Threatened Throughout Its Range with Special Rule	Proposed Listing Threatened	74 FR 56770-56791
11/23/2009	Status Review of Gunnison sage-grouse (*Centrocercus minimus*)	Notice of Intent to Conduct Status Review	74 FR 61100-61102
12/03/2009	12-Month Finding on a Petition to List the Black-tailed Prairie Dog as Threatened or Endangered	Notice of 12–month petition finding, Not warranted	74 FR 63343-63366
12/03/2009	90-Day Finding on a Petition to List Sprague's Pipit as Threatened or Endangered	Notice of 90–day Petition Finding, Substantial	74 FR 63337-63343
12/15/2009	90-Day Finding on Petitions To List Nine Species of Mussels From Texas as Threatened or Endangered With Critical Habitat	Notice of 90–day Petition Finding, Substantial	74 FR 66260-66271
12/16/2009	Partial 90-Day Finding on a Petition to List 475 Species in the Southwestern United States as Threatened or Endangered With Critical Habitat	Notice of 90–day Petition Finding, Not substantial and Substantial	74 FR 66865-66905
12/17/2009	12–month Finding on a Petition To Change the Final Listing of the Distinct Population Segment of the Canada Lynx To Include New Mexico	Notice of 12–month petition finding, Warranted but precluded	74 FR 66937-66950
1/05/2010	Listing Foreign Bird Species in Peru and Bolivia as Endangered Throughout Their Range	Proposed Listing Endangered	75 FR 605-649
1/05/2010	Listing Six Foreign Birds as Endangered Throughout Their Range	Proposed Listing Endangered	75 FR 286-310
1/05/2010	Withdrawal of Proposed Rule to List Cook's Petrel	Proposed rule, withdrawal	75 FR 310-316
1/05/2010	Final Rule to List the Galapagos Petrel and Heinroth's Shearwater as Threatened Throughout Their Ranges	Final Listing Threatened	75 FR 235-250
1/20/2010	Initiation of Status Review for *Agave eggersiana* and *Solanum conocarpum*	Notice of Intent to Conduct Status Review	75 FR 3190-3191
2/09/2010	12–month Finding on a Petition to List the American Pika as Threatened or Endangered	Notice of 12–month petition finding, Not warranted	75 FR 6437-6471
2/25/2010	12-Month Finding on a Petition To List the Sonoran Desert Population of the Bald Eagle as a Threatened or Endangered Distinct Population Segment	Notice of 12–month petition finding, Not warranted	75 FR 8601-8621

FY 2010 COMPLETED LISTING ACTIONS—Continued

Publication Date	Title	Actions	FR Pages
2/25/2010	Withdrawal of Proposed Rule To List the Southwestern Washington/ Columbia River Distinct Population Segment of Coastal Cutthroat Trout (*Oncorhynchus clarki clarki*) as Threatened	Withdrawal of Proposed Rule to List	75 FR 8621-8644
3/18/2010	90-Day Finding on a Petition to List the Berry Cave salamander as Endangered	Notice of 90–day Petition Finding, Substantial	75 FR 13068-13071
3/23/2010	90-Day Finding on a Petition to List the Southern Hickorynut Mussel (*Obovaria jacksoniana*) as Endangered or Threatened	Notice of 90–day Petition Finding, Not substantial	75 FR 13717-13720
3/23/2010	90-Day Finding on a Petition to List the Striped Newt as Threatened	Notice of 90–day Petition Finding, Substantial	75 FR 13720-13726
3/23/2010	12-Month Findings for Petitions to List the Greater Sage-Grouse (*Centrocercus urophasianus*) as Threatened or Endangered	Notice of 12–month petition finding, Warranted but precluded	75 FR 13910-14014
3/31/2010	12-Month Finding on a Petition to List the Tucson Shovel-Nosed Snake (*Chionactis occipitalis klauberi*) as Threatened or Endangered with Critical Habitat	Notice of 12–month petition finding, Warranted but precluded	75 FR 16050-16065
4/5/2010	90-Day Finding on a Petition To List Thorne's Hairstreak Butterfly as or Endangered	Notice of 90–day Petition Finding, Substantial	75 FR 17062-17070
4/6/2010	12–month Finding on a Petition To List the Mountain Whitefish in the Big Lost River, Idaho, as Endangered or Threatened	Notice of 12–month petition finding, Not warranted	75 FR 17352-17363
4/6/2010	90-Day Finding on a Petition to List a Stonefly (*Isoperla jewetti*) and a Mayfly (*Fallceon eatoni*) as Threatened or Endangered with Critical Habitat	Notice of 90–day Petition Finding, Not substantial	75 FR 17363-17367
4/7/2010	12-Month Finding on a Petition to Reclassify the Delta Smelt From Threatened to Endangered Throughout Its Range	Notice of 12–month petition finding, Warranted but precluded	75 FR 17667-17680
4/13/2010	Determination of Endangered Status for 48 Species on Kauai and Designation of Critical Habitat	Final Listing Endangered	75 FR 18959-19165
4/15/2010	Initiation of Status Review of the North American Wolverine in the Contiguous United States	Notice of Initiation of Status Review	75 FR 19591-19592
4/15/2010	12-Month Finding on a Petition to List the Wyoming Pocket Gopher as Endangered or Threatened with Critical Habitat	Notice of 12–month petition finding, Not warranted	75 FR 19592-19607
4/16/2010	90-Day Finding on a Petition to List a Distinct Population Segment of the Fisher in Its United States Northern Rocky Mountain Range as Endangered or Threatened with Critical Habitat	Notice of 90–day Petition Finding, Substantial	75 FR 19925-19935
4/20/2010	Initiation of Status Review for Sacramento splittail (*Pogonichthys macrolepidotus)*	Notice of Initiation of Status Review	75 FR 20547-20548
4/26/2010	90-Day Finding on a Petition to List the Harlequin Butterfly as Endangered	Notice of 90–day Petition Finding, Substantial	75 FR 21568-21571
4/27/2010	12-Month Finding on a Petition to List Susan's Purse-making Caddisfly (*Ochrotrichia susanae*) as Threatened or Endangered	Notice of 12–month petition finding, Not warranted	75 FR 22012-22025
4/27/2010	90–day Finding on a Petition to List the Mohave Ground Squirrel as Endangered with Critical Habitat	Notice of 90–day Petition Finding, Substantial	75 FR 22063-22070

FY 2010 COMPLETED LISTING ACTIONS—Continued

Publication Date	Title	Actions	FR Pages
5/4/2010	90-Day Finding on a Petition to List Hermes Copper Butterfly as Threatened or Endangered	Notice of 90–day Petition Finding, Substantial	75 FR 23654-23663
6/1/2010	90-Day Finding on a Petition To List *Castanea pumila* var. *ozarkensis*	Notice of 90–day Petition Finding, Substantial	75 FR 30313-30318
6/1/2010	12–month Finding on a Petition to List the White-tailed Prairie Dog as Endangered or Threatened	Notice of 12–month petition finding, Not warranted	75 FR 30338-30363
6/9/2010	90-Day Finding on a Petition To List van Rossem's Gull-billed Tern as Endangered orThreatened.	Notice of 90–day Petition Finding, Substantial	75 FR 32728-32734
6/16/2010	90-Day Finding on Five Petitions to List Seven Species of Hawaiian Yellow-faced Bees as Endangered	Notice of 90–day Petition Finding, Substantial	75 FR 34077-34088
6/22/2010	12-Month Finding on a Petition to List the Least Chub as Threatened or Endangered	Notice of 12–month petition finding, Warranted but precluded	75 FR 35398-35424
6/23/2010	90-Day Finding on a Petition to List the Honduran Emerald Hummingbird as Endangered	Notice of 90–day Petition Finding, Substantial	75 FR 35746-35751
6/23/2010	Listing *Ipomopsis polyantha* (Pagosa Skyrocket) as Endangered Throughout Its Range, and Listing *Penstemon debilis* (Parachute Beardtongue) and *Phacelia submutica* (DeBeque Phacelia) as Threatened Throughout Their Range	Proposed Listing Endangered Proposed Listing Threatened	75 FR 35721-35746
6/24/2010	Listing the Flying Earwig Hawaiian Damselfly and Pacific Hawaiian Damselfly As Endangered Throughout Their Ranges	Final Listing Endangered	75 FR 35990-36012
6/24/2010	Listing the Cumberland Darter, Rush Darter, Yellowcheek Darter, Chucky Madtom, and Laurel Dace as Endangered Throughout Their Ranges	Proposed Listing Endangered	75 FR 36035-36057
6/29/2010	Listing the Mountain Plover as Threatened	Reinstatement of Proposed Listing Threatened	75 FR 37353-37358
7/20/2010	90-Day Finding on a Petition to List *Pinus albicaulis* (Whitebark Pine) as Endangered or Threatened with Critical Habitat	Notice of 90–day Petition Finding, Substantial	75 FR 42033-42040
7/20/2010	12-Month Finding on a Petition to List the Amargosa Toad as Threatened or Endangered	Notice of 12–month petition finding, Not warranted	75 FR 42040-42054
7/20/2010	90-Day Finding on a Petition to List the Giant Palouse Earthworm (*Driloleirus americanus*) as Threatened or Endangered	Notice of 90–day Petition Finding, Substantial	75 FR 42059-42066
7/27/2010	Determination on Listing the Black-Breasted Puffleg as Endangered Throughout its Range; Final Rule	Final Listing Endangered	75 FR 43844-43853
7/27/2010	Final Rule to List the Medium Tree-Finch (*Camarhynchus pauper*) as Endangered Throughout Its Range	Final Listing Endangered	75 FR 43853-43864
8/3/2010	Determination of Threatened Status for Five Penguin Species	Final Listing Threatened	75 FR 45497-45527
8/4/2010	90-Day Finding on a Petition To List the Mexican Gray Wolf as an Endangered Subspecies With Critical Habitat	Notice of 90–day Petition Finding, Substantial	75 FR 46894-46898

FY 2010 COMPLETED LISTING ACTIONS—Continued

Publication Date	Title	Actions	FR Pages
8/10/2010	90-Day Finding on a Petition to List *Arctostaphylos franciscana* as Endangered with Critical Habitat	Notice of 90–day Petition Finding, Substantial	75 FR 48294-48298
8/17/2010	Listing Three Foreign Bird Species from Latin America and the Caribbean as Endangered Throughout Their Range	Final Listing Endangered	75 FR 50813-50842
8/17/2010	90-Day Finding on a Petition to List Brian Head Mountainsnail as Endangered or Threatened with Critical Habitat	Notice of 90–day Petition Finding, Not substantial	75 FR 50739-50742
8/24/2010	90-Day Finding on a Petition to List the Oklahoma Grass Pink Orchid as Endangered or Threatened	Notice of 90–day Petition Finding, Substantial	75 FR 51969-51974
9/1/2010	12-Month Finding on a Petition to List the White-Sided Jackrabbit as Threatened or Endangered	Notice of 12–month petition finding, Not warranted	75 FR 53615-53629
9/8/2010	Proposed Rule To List the Ozark Hellbender Salamander as Endangered	Proposed Listing Endangered	75 FR 54561-54579
9/8/2010	Revised 12-Month Finding to List the Upper Missouri River Distinct Population Segment of Arctic Grayling as Endangered or Threatened	Notice of 12–month petition finding, Warranted but precluded	75 FR 54707-54753
9/9/2010	12-Month Finding on a Petition to List the Jemez Mountains Salamander (*Plethodon neomexicanus*) as Endangered or Threatened with Critical Habitat	Notice of 12–month petition finding, Warranted but precluded	75 FR 54822-54845

Our expeditious progress also includes work on listing actions that we funded in FY 2010 but have not yet been completed to date. These actions are listed below. Actions in the top section of the table are being conducted under a deadline set by a court. Actions in the middle section of the table are being conducted to meet statutory timelines, that is, timelines required under the Act. Actions in the bottom section of the table are high-priority listing actions. These actions include work primarily on species with an LPN of 2, and selection of these species is partially based on available staff resources, and when appropriate, include species with a lower priority if they overlap geographically or have the same threats as the species with the high priority. Including these species together in the same proposed rule results in considerable savings in time and funding, as compared to preparing separate proposed rules for each of them in the future.

ACTIONS FUNDED IN FY 2010 BUT NOT YET COMPLETED

Species	Action
Actions Subject to Court Order/Settlement Agreement	
6 Birds from Eurasia	Final listing determination
African penguin	Final listing determination
Flat-tailed horned lizard	Final listing determination
Mountain plover[4]	Final listing determination
6 Birds from Peru	Proposed listing determination
Sacramento splittail	12–month petition finding
Pacific walrus	12–month petition finding
Gunnison sage-grouse	12–month petition finding
Wolverine	12–month petition finding
Agave eggergsiana	12–month petition finding

ACTIONS FUNDED IN FY 2010 BUT NOT YET COMPLETED—Continued

Species	Action
Solanum conocarpum	12–month petition finding
Sprague's pipit	12–month petition finding
Desert tortoise – Sonoran population	12–month petition finding
Pygmy rabbit (rangewide)[1]	12–month petition finding
Thorne's Hairstreak butterfly[3]	12–month petition finding
Hermes copper butterfly[3]	12–month petition finding
Actions with Statutory Deadlines	
Casey's june beetle	Final listing determination
Georgia pigtoe, interrupted rocksnail, and rough hornsnail	Final listing determination
7 Bird species from Brazil	Final listing determination
Southern rockhopper penguin – Campbell Plateau population	Final listing determination
5 Bird species from Colombia and Ecuador	Final listing determination
Queen Charlotte goshawk	Final listing determination
5 species southeast fish (Cumberland darter, rush darter, yellowcheek darter, chucky madtom, and laurel dace)	Final listing determination
Salmon crested cockatoo	Proposed listing determination
CA golden trout	12–month petition finding
Black-footed albatross	12–month petition finding
Mount Charleston blue butterfly	12–month petition finding
Mojave fringe-toed lizard[1]	12–month petition finding
Kokanee – Lake Sammamish population[1]	12–month petition finding
Cactus ferruginous pygmy-owl[1]	12–month petition finding
Northern leopard frog	12–month petition finding
Tehachapi slender salamander	12–month petition finding
Coqui Llanero	12–month petition finding
Dusky tree vole	12–month petition finding
3 MT invertebrates (mist forestfly*(Lednia tumana*), *Oreohelix* sp.3, *Oreohelix* sp. 31) from 206 species petition	12–month petition finding
5 UT plants *(Astragalus hamiltonii*, *Eriogonum soredium*, *Lepidium ostleri*, *Penstemon flowersii*, *Trifolium friscanum*) from 206 species petition	12–month petition finding
2 CO plants *(Astragalus microcymbus*, *Astragalus schmolliae*) from 206 species petition	12–month petition finding
5 WY plants *(Abronia ammophila*, *Agrostis* rossiae, *Astragalus proimanthus*, *Boechere (Arabis*) *pusilla*, *Penstemon gibbensii*) from 206 species petition	12–month petition finding
Leatherside chub (from 206 species petition)	12–month petition finding
Frigid ambersnail (from 206 species petition)	12–month petition finding
Gopher tortoise – eastern population	12–month petition finding
Wrights marsh thistle	12–month petition finding
67 of 475 southwest species	12–month petition finding
Grand Canyon scorpion (from 475 species petition)	12–month petition finding

ACTIONS FUNDED IN FY 2010 BUT NOT YET COMPLETED—Continued

Species	Action
Anacroneuria wipukupa (a stonefly from 475 species petition)	12–month petition finding
Rattlesnake-master borer moth (from 475 species petition)	12–month petition finding
3 Texas moths *(Ursia furtiva*, *Sphingicampa blanchardi*, *Agapema galbina*) (from 475 species petition)	12–month petition finding
2 Texas shiners *(Cyprinella* sp., *Cyprinella lepida*) (from 475 species petition)	12–month petition finding
3 South Arizona plants *(Erigeron piscaticus*, *Astragalus hypoxylus*, *Amoreuxia gonzalezii*) (from 475 species petition)	12–month petition finding
5 Central Texas mussel species (3 from 474 species petition)	12–month petition finding
14 parrots (foreign species)	12–month petition finding
Berry Cave salamander[1]	12–month petition finding
Striped Newt[1]	12–month petition finding
Fisher – Northern Rocky Mountain Range[1]	12–month petition finding
Mohave Ground Squirrel[1]	12–month petition finding
Puerto Rico Harlequin Butterfly	12–month petition finding
Western gull-billed tern	12–month petition finding
Ozark chinquapin *(Castanea pumila* var. *ozarkensis*)	12–month petition finding
HI yellow-faced bees	12–month petition finding
Giant Palouse earthworm	12–month petition finding
Whitebark pine	12–month petition finding
OK grass pink *(Calopogon oklahomensis*)[1]	12–month petition finding
Southeastern pop snowy plover & wintering pop. of piping plover[1]	90–day petition finding
Eagle Lake trout[1]	90–day petition finding
Smooth-billed ani[1]	90–day petition finding
Bay Springs salamander[1]	90–day petition finding
32 species of snails and slugs[1]	90–day petition finding
42 snail species (Nevada & Utah)	90–day petition finding
Red knot *roselaari* subspecies	90–day petition finding
Peary caribou	90–day petition finding
Plains bison	90–day petition finding
Spring Mountains checkerspot butterfly	90–day petition finding
Spring pygmy sunfish	90–day petition finding
Bay skipper	90–day petition finding
Unsilvered fritillary	90–day petition finding
Texas kangaroo rat	90–day petition finding
Spot-tailed earless lizard	90–day petition finding
Eastern small-footed bat	90–day petition finding
Northern long-eared bat	90–day petition finding
Prairie chub	90–day petition finding

ACTIONS FUNDED IN FY 2010 BUT NOT YET COMPLETED—Continued

Species	Action
10 species of Great Basin butterfly	90–day petition finding
6 sand dune (scarab) beetles	90–day petition finding
Golden-winged warbler	90–day petition finding
Sand-verbena moth	90–day petition finding
404 Southeast species	90–day petition finding
High-Priority Listing Actions[3]	
19 Oahu candidate species[2] (16 plants, 3 damselflies) (15 with LPN = 2, 3 with LPN = 3, 1 with LPN =9)	Proposed listing
19 Maui-Nui candidate species[2] (16 plants, 3 tree snails) (14 with LPN = 2, 2 with LPN = 3, 3 with LPN = 8)	Proposed listing
Dune sagebrush lizard (formerly Sand dune lizard)[3] (LPN = 2)	Proposed listing
2 Arizona springsnails[2] *(Pyrgulopsis bernadina* (LPN = 2), *Pyrgulopsis trivialis* (LPN = 2))	Proposed listing
New Mexico springsnail[2] *(Pyrgulopsis chupaderae* (LPN = 2)	Proposed listing
2 mussels[2] (rayed bean (LPN = 2), snuffbox No LPN)	Proposed listing
2 mussels[2] (sheepnose (LPN = 2), spectaclecase (LPN = 4),)	Proposed listing
Altamaha spinymussel[2] (LPN = 2)	Proposed listing
8 southeast mussels (southern kidneyshell (LPN = 2), round ebonyshell (LPN = 2), Alabama pearlshell (LPN = 2), southern sandshell (LPN = 5), fuzzy pigtoe (LPN = 5), Choctaw bean (LPN = 5), narrow pigtoe (LPN = 5), and tapered pigtoe (LPN = 11))	Proposed listing

[1] Funds for listing actions for these species were provided in previous FYs.
[2] Although funds for these high-priority listing actions were provided in FY 2008 or 2009, due to the complexity of these actions and competing priorities, these actions are still being developed.
[3] Partially funded with FY 2010 funds; also will be funded with FY 2011 funds.

We have endeavored to make our listing actions as efficient and timely as possible, given the requirements of the relevant law and regulations, and constraints relating to workload and personnel. We are continually considering ways to streamline processes or achieve economies of scale, such as by batching related actions together. Given our limited budget for implementing section 4 of the Act, these actions described above collectively constitute expeditious progress.

The Sprague's pipit will be added to the list of candidate species upon publication of this 12–month finding. We will continue to monitor the status of this species as new information becomes available. This review will determine if a change in status is warranted, including the need to make prompt use of emergency listing procedures.

We intend that any proposed listing action for the Sprague's pipit will be as accurate as possible. Therefore, we will continue to accept additional information and comments from all concerned governmental agencies, the scientific community, industry, or any other interested party concerning this finding.

References Cited

A complete list of references cited is available on the Internet at *http://www.regulations.gov* and upon request from the North Dakota Field Office (see **ADDRESSES**).

Author

The primary authors of this notice are the staff members of the North Dakota Field Office.

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: September 2, 2010

Paul R. Schmidt

Acting Director, Fish and Wildlife Service

[FR Doc. 2010–22967 Filed 9–14– 10; 8:45 am]

BILLING CODE 4310–55–S

Notices

Federal Register
Vol. 75, No. 178
Wednesday, September 15, 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

Rural Utilities Service

Bemidji to Grand Rapids Minnesota 230 kV Transmission Line Project

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice of Availability of Final Environmental Impact Statement.

SUMMARY: The Rural Utilities Service (RUS), U.S. Forest Service Chippewa National Forest (CNF), U.S. Army Corps of Engineers (USACE) and Leech Lake Band of Ojibwe Division of Resource Management (LLBO) have issued a Final Environmental Impact Statement (EIS) for the proposed Bemidji to Grand Rapids, Minnesota 230 kV Transmission Line Project ("Project") in Minnesota. The Final EIS was prepared pursuant to the National Environmental Policy Act of 1969 (NEPA) (U.S.C. 4231 *et seq.*) in accordance with the Council on Environmental Quality's (CEQ) regulations for implementing the procedural provisions of NEPA (40 CFR 1500–1508), and RUS regulations (7 CFR 1794). To minimize duplication of effort pursuant to 40 CFR 1506.2, RUS prepared the Final EIS jointly with the Minnesota Department of Commerce, Office of Energy Security (OES) in compliance with federal responsibilities under NEPA and other federal statutes and regulations, and state responsibilities under the Minnesota Environmental Policy Act and the Minnesota Power Plant Siting Act. RUS is the lead federal agency as defined at 40 CFR 1501.5, and CNF and USACE are cooperating agencies. LLBO accepted an invitation to participate as a cooperating agency. The purpose of the Final EIS is to evaluate the potential environmental impacts of and alternatives to the application of Minnkota Power Cooperative, Inc. for RUS financing to construct a 230 kilovolt (kV) transmission line between the Wilton Substation near Bemidji, Minnesota and the Boswell Substation near Grand Rapids, Minnesota, which will cross portions of Beltrami, Hubbard, Itasca, and Cass counties. Minnkota also proposes to modify the Wilton and Boswell substations and construct a new 115 kV breaker station at Nary Junction, Minnesota. In addition, Minnkota proposes to upgrade an existing or construct a new substation in the Cass Lake, Minnesota area, depending on the route alternative selected for the Project. The Project is being jointly developed by Minnkota, Otter Tail Power Company, and Minnesota Power.

DATES: Written comments on this Final EIS will be accepted 30 days following the publication of the U.S. Environmental Protection Agency's notice of receipt of the Final EIS in the **Federal Register**.

ADDRESSES: To obtain copies of the Final EIS or further information, contact: Ms. Stephanie Strength, Environmental Protection Specialist, USDA Rural Utilities Service, Independence Avenue, SW., Stop 1571, Room 2239–S, Washington, DC 20250–1571, *telephone:* (970) 403–3559, *fax:* (202) 690–0649, or *e-mail: stephanie.strength@wdc.usda.gov.* Or contact Suzanne Steinhauer, Project Manager, Minnesota Department of Commerce, Office of Energy Security, 85 Seventh Place East, Suite 500, Saint Paul, Minnesota 55101–2198; telephone (651) 296–2888, or e-mail *suzanne.steinhauer@state.mn.us.*

A copy of the Final EIS has been sent to affected Federal, State, and local government agencies and to interested parties and can be viewed online at the RUS Web site at *http://www.usda.gov/rus/water/ees/eis.htm,* or at the Minnesota Public Utilities Web site at *http://energyfacilities.puc.state.mn.us/Docket.html?Id=19344.*

Copies of the Final EIS will also be available for public review at the following public libraries:

Bemidji Public Library, 509 America Ave., NW., Bemidji, MN 56601;
Cass Lake Community Library, 223 Cedar Ave., NW., Cass Lake, MN 56633;
Grand Rapids Area Library, 140 NE 2nd Street, Grand Rapids, MN 55744;
Blackduck Community Library, 72 First St., SE., Blackduck, MN 56630;
Margaret Welch Memorial Library, 5051 State 84, Longville, MN 56655;
Walker Public Library, 207 4th St., Walker, MN 56484;
Bovey Public Library, Village Hall, 402 2nd Street, Bovey, MN 55709–0130; and
Coleraine Public Library, Independent Building, 203 Cole Avenue, Coleraine, MN 55722–0225.

SUPPLEMENTARY INFORMATION: Minnkota Power, Otter Tail Power, and Minnesota Power propose to construct a new transmission line from Bemidji to Grand Rapids, Minnesota. The proposal is designed to correct a local load serving inadequacy for the Bemidji area and the northern Red River Valley in West Central Minnesota. It is part of the CapX2020 long-range planning effort that has identified a comprehensive framework for new transmission infrastructure that will be needed to maintain reliability of the transmission system throughout Minnesota and the surrounding region.

Minnkota Power is seeking financing from RUS for its portion of the investment. Prior to making a financial decision about whether to provide financial assistance for a proposal, RUS is required to conduct an environmental review under NEPA in accordance with the Agency's policies and procedures codified in 7 CFR Part 1794.

This proposal is identified under RUS regulation 7 CFR 1794.24(b)(1) as requiring an Environmental Assessment (EA) with scoping meetings. The State of Minnesota requires that an EIS be prepared by OES in accordance with Chapter 216E of the Minnesota Power Plant Siting Act, and Chapter 116D of the Minnesota Environmental Policy Act. RUS and OES have agreed to be co-lead agencies in preparing a joint federal/state EIS on the Project. Using information from the Alternatives Evaluation Study (AES), the Macro-Corridor Study (MCS), Public Scoping Meetings, the Draft EIS and public hearings and comments on the Draft EIS, RUS and OES developed this Final EIS in consultation with the cooperating agencies, CNF, USACE, and LLBO.

On July 18, 2008, RUS published in the **Federal Register** a Notice of Intent to prepare an EIS for the proposal. The EIS focused on potential impacts to the following resources: soils, topography and geology, water resources, air quality, biological resources, the acoustic environment, recreation, cultural and historic resources, visual

resources, transportation, farmland, land use, human health and safety, the socioeconomic environment, environmental justice, and cumulative effects. On March 3, 2010, the Rural Utilities Service published its Notice of Availability of the Draft EIS for the proposed project in the **Federal Register.** The 45-day comment period ended on April 19, 2010. Comments received on the Draft EIS were addressed in the Final EIS.

After considering various ways to meet the reliability needs, Minnkota identified construction of the proposed Project as its best course of action. This EIS considered four route alternatives in terms of cost-effectiveness, technical feasibility, and environmental factors.

The EIS analyzes in detail the no action alternative, the proposed action Route Alternative 4 and three other Route Alternatives. Route Alternative 4 has been identified as the applicants' preferred alternative, the federally preferred alternative and the environmentally preferred alternative.

Because the proposed Project may involve action in floodplains or wetlands, this Notice of Availability also serves as a notice of proposed floodplain or wetland action.

Any action by RUS related to the proposed Project will be subject to, and contingent upon, compliance with all relevant Federal, state and local environmental laws and regulations, and completion of the environmental review requirements as prescribed in RUS's Environmental Policies and Procedures, 7 CFR part 1794, as amended.

Dated: September 7, 2010.

Nivin Elgohary,

Acting Assistant Administrator, Electric Programs.

[FR Doc. 2010–22966 Filed 9–14–10; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the South Dakota Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a planning meeting of the South Dakota Advisory Committee to the Commission will convene by conference call at 1 p.m. and end at 3 p.m. on Tuesday, September 28, 2010. The purpose of the meeting is for the committee to discuss recent Commission and regional activities and current civil rights issues in the State and plan future activities.

This conference call is available to the public through the following call-in number: 1–800–516–9896, access code: 8334. Any interested member of the public may call this number and listen to the meeting. Callers can expect to incur charges made over wireless lines, and the Commission will not refund those charges incurred. Callers will incur no charge for calls using the call-in number over land-line connections. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–977–8339 and providing the Service with the conference call number and access code number.

To ensure that the Commission secures an appropriate number of lines for the public, persons are asked to register by contacting the Rocky Mountain Regional Office at least ten (10) working days before the scheduled meeting date.

Members of the public are entitled to submit written comments; the comments must be received in the regional office by October 28, 2010. The address is Rocky Mountain Regional Office, 999–18th Street, Suite 1380 South, Denver, CO 80202; (303) 866–1040. Comments may be e-mailed to *ebohor@usccr.gov*. Records generated by this meeting may be inspected and reproduced at the Rocky Mountain Regional Office, as they become available, both before and after the meeting. Persons interested in the work of this advisory committee are advised to go to the Commission's Web site, *http://www.usccr.gov,* or to contact the Rocky Mountain Regional Office at the above e-mail or street address.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission and FACA.

Dated in Washington, DC, on September 10, 2010.

Peter Minarik,

Acting Chief, Regional Programs Coordination Unit.

[FR Doc. 2010–22995 Filed 9–14–10; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Sunshine Act Notice

AGENCY: United States Commission on Civil Rights.

ACTION: Notice of meeting.

DATE AND TIME: Friday, September 24, 2010; 9:30 a.m. EDT

PLACE: 624 9th St., NW., Room 540, Washington, DC 20425.

Meeting Agenda

This meeting is open to the public.

I. Approval of Agenda

II. Program Planning

- Approval of New Black Panther Party Enforcement Report
- Consideration of Findings and Recommendations for Briefing Report on Health Care Disparities
- Consideration of FY 2011 Enforcement Report Topic
- Consideration of Concept Paper for Briefing on the Department of Education's Investigation of Disparate Impact in Student Discipline
- Consideration of Policy on Commissioner Statements and Rebuttals
- Update on Sex Discrimination in Liberal Arts College Admissions Project—Some of the discussion of this agenda item may be held in closed session.
- Update on Clearinghouse Project

III. State Advisory Committee Issues

- Maine SAC
- New Mexico SAC

IV. Approval of Minutes of September 10 Meeting

V. Staff Director's Report

VI. Announcements

VII. Adjourn

CONTACT PERSON FOR FURTHER INFORMATION: Lenore Ostrowsky, Acting Chief, Public Affairs Unit (202) 376–8591. TDD: (202) 376–8116.

Persons with a disability requiring special services, such as an interpreter for the hearing impaired, should contact Pamela Dunston at least seven days prior to the meeting at 202–376–8105. TDD: (202) 376–8116.

Dated: September 13, 2010.

David Blackwood,

General Counsel.

[FR Doc. 2010–23184 Filed 9–13–10; 4:15 pm]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Action Affecting Export Privileges; Mahan Airways and Gatewick LLC

Mahan Airways, Mahan Tower, No. 21, Azadegan St., M.A. Jenah Exp. Way, Tehran, Iran; and Gatewick LLC, a/k/a Gatewick Freight & Cargo Services, a/k/a/Gatewick Aviation Services, G#22 Dubai Airport Free Zone, P.O. Box 393754, Dubai, United Arab Emirates; and P.O. Box 52404,

Dubai, United Arab Emirates; and Mohamed Abdulla Alqaz Building, Al Maktoum Street, Al Rigga, Dubai, United Arab Emirates.

Order Renewing Order Temporarily Denying Export Privileges and Also Making That Temporary Denial of Export Privileges Applicable to Related Person

Pursuant to Section 766.24 of the Export Administration Regulations, 15 CFR Parts 730–774 (2010) ("EAR" or the "Regulations"), I hereby grant the request of the Bureau of Industry and Security ("BIS") to renew for 180 days the Order Temporarily Denying the Export Privileges of Mahan Airways ("TDO"), as I find that renewal of the TDO is necessary in the public interest to prevent an imminent violation of the EAR. Additionally, pursuant to Section 766.23 of the Regulations, including the provision of notice and an opportunity to respond, I find it necessary to add the following entity as a related person:

Gatewick LLC, a/k/a Gatewick Freight & Cargo Services, a/k/a Gatewick Aviation Services, G#22 Dubai Airport Free Zone, P.O. Box 393754, Dubai, United Arab Emirates; and P.O. Box 52404, Dubai, United Arab Emirates; and Mohamed Abdulla Alqaz Building, Al Maktoum Street, Al Rigga, Dubai, United Arab Emirates.

I. Procedural History

On March 17, 2008, Darryl W. Jackson, the then-Assistant Secretary of Commerce for Export Enforcement ("Assistant Secretary"), signed a TDO denying Mahan Airways' export privileges for a period of 180 days on the grounds that its issuance was necessary in the public interest to prevent an imminent violation of the Regulations. The TDO also named as denied persons Blue Airways, of Yerevan, Armenia ("Blue Airways of Armenia"), as well as the "Balli Group Respondents," namely, Balli Group PLC, Balli Aviation, Balli Holdings, Vahid Alaghband, Hassan Alaghband, Blue Sky One Ltd., Blue Sky Two Ltd., Blue Sky Three Ltd., Blue Sky Four Ltd., Blue Sky Five Ltd., and Blue Sky Six Ltd., all of the United Kingdom. The TDO was issued *ex parte* pursuant to Section 766.24(a), and went into effect on March 21, 2008, the date it was published in the **Federal Register.**

On July 18, 2008, in accordance with Section 766.23 of the Regulations, Assistant Secretary Jackson issued an Order adding to the TDO both Blue Airways FZE, of Dubai, United Arab Emirates ("the UAE"), and Blue Airways, also of Dubai, United Arab Emirates ("Blue Airways UAE"), as persons related to Blue Airways of Armenia. (Blue Airways of Armenia, Blue Airways FZE, and Blue Airways UAE are hereinafter collectively referred to as the "Blue Airways Respondents").[1]

On September 17, 2008, Assistant Secretary Jackson renewed the TDO for an additional 180 days in accordance with Section 766.24 of the Regulations, via an order effective upon issuance, and on March 16, 2009, the TDO was similarly renewed by then-Acting Assistant Secretary Kevin Delli-Colli.[2] On September 11, 2009, Acting Assistant Secretary Delli-Colli renewed the TDO for an additional 180 days against Mahan Airways.[3] BIS did not seek renewal of the TDO against the Blue Airways Respondents, which BIS believed at that time had ceased operating, or against the Balli Group Respondents.

On March 9, 2010, I renewed the TDO against Mahan Airways for an additional 180 days. That renewal was effective upon issuance and was published in the **Federal Register** on March 18, 2010.

On August 13, 2010, BIS, through its Office of Export Enforcement ("OEE"), filed a written request for renewal of the TDO against Mahan Airways for an additional 180 days, and served a copy of its request on Mahan in accordance with Section 766.5 of the Regulations. No opposition to renewal of the TDO has been received from Mahan Airways.

Additionally, BIS requested that I add Gatewick LLC ("Gatewick") to the TDO as a related person in accordance with Section 766.23. Gatewick was provided notice of BIS's intent to add it to the TDO and on August 26, 2010, submitted a written opposition.

II. Renewal of the TDO

A. Legal Standard

Pursuant to Section 766.24(d)(3) of the EAR, the sole issue to be considered in determining whether to continue a TDO is whether the TDO should be renewed to prevent an "imminent" violation of the EAR as defined in Section 766.24. "A violation may be 'imminent' either in time or in degree of likelihood." 15 CFR 766.24(b)(3). BIS may show "either that a violation is about to occur, or that the general circumstances of the matter under investigation or case under criminal or administrative charges demonstrate a likelihood of future violations." *Id.* As to the likelihood of future violations, BIS may show that "the violation under investigation or charges is significant, deliberate, covert and/or likely to occur again, rather than technical and negligent [.]" *Id.* A "lack of information establishing the precise time a violation may occur does not preclude a finding that a violation is imminent, so long as there is sufficient reason to believe the likelihood of a violation." *Id.*

B. The TDO and BIS's Request for Renewal

OEE's request for renewal is based upon the facts underlying the issuance of the initial TDO and the TDO renewals in this matter and the evidence developed over the course of this investigation indicating Mahan Airways' clear willingness to continue to disregard U.S. export controls and the TDO. The initial TDO was issued as a result of evidence that showed that Mahan Airways and other parties engaged in conduct prohibited by the EAR by knowingly re-exporting to Iran three U.S.-origin aircraft, specifically Boeing 747s ("Aircraft 1–3"), items subject to the EAR and classified under Export Control Classification Number ("ECCN") 9A991.b, without the required U.S. Government authorization. Further evidence submitted by BIS indicated that Mahan Airways was involved in the attempted re-export of three additional U.S.-origin Boeing 747s ("Aircraft 4–6") to Iran.

As discussed in the September 17, 2008 TDO Renewal Order, evidence presented by BIS indicated that Aircraft 1–3 continued to be flown on Mahan Airways' routes after issuance of the TDO, in violation of the Regulations and the TDO itself.[4] It also showed that Aircraft 1–3 had been flown in further violation of the Regulations and the TDO on the routes of Iran Air, an Iranian Government airline. In addition, as more fully discussed in the March 16, 2009 Renewal Order, in October 2008, Mahan Airways caused Aircraft 1–3 to be deregistered from the Armenian civil aircraft registry and subsequently registered the aircraft in Iran. The aircraft were relocated to Iran and were issued Iranian tail numbers, including EP–MNA and EP–MNB, and continued to be operated on Mahan Airways'

[1] The Related Persons Order was published in the **Federal Register** on July 24, 2008.

[2] The September 17, 2008 Renewal Order was published in the **Federal Register** on October 1, 2008. The March 16, 2009 Renewal Order was published in the **Federal Register** on March 25, 2009.

[3] The September 11, 2009 Renewal Order was published in the **Federal Register** on September 18, 2009.

[4] Engaging in conduct prohibited by a denial order violates the Regulations. 15 CFR 764.2(a) and (k).

routes in violation of the Regulations and the TDO.

Moreover, as discussed in the September 11, 2009 and March 9, 2010 Renewal Orders, Mahan Airways continued to operate at least two of Aircraft 1–3 in violation of the Regulations and the TDO,[5] and also committed an additional knowing and willful violation of the Regulations and the TDO when it negotiated for and acquired an additional U.S.-origin aircraft. The additional aircraft was an MD–82 aircraft, which was subsequently painted in Mahan Airways livery and flown on multiple Mahan Airways' routes under tail number TC–TUA.

The March 9, 2010 Renewal Order also noted that a court in the United Kingdom ("U.K.") had found Mahan Airways in contempt of court on February 1, 2010, for failing to comply with that court's December 21, 2009 and January 12, 2010 orders compelling Mahan Airways to remove the Boeing 747s from Iran and ground them in the Netherlands. Mahan Airways and the Balli Group Respondents have been litigating before the U.K. court concerning ownership and control of Aircraft 1–3. Blue Airways LLC also has been a party to that litigation. In a letter to the U.K. court dated January 12, 2010, Mahan Airways' Chairman indicated, inter alia, that Mahan Airways opposes U.S. Government actions against Iran, that it continued to operate the aircraft on its routes in and out of Tehran (and had 158,000 "forward bookings" for these aircraft), and that it wished to continue to do so and would pay damages if required by that court, rather than ground the aircraft.

OEE's evidence indicates that Aircraft 1–3 remain in Mahan Airways' possession, control, and livery in Tehran, Iran. These aircraft also remain, to BIS's knowledge, airworthy.

OEE also has submitted evidence that Mahan Airways' violations of the TDO have extended beyond operating U.S.-origin aircraft in violation of the TDO and attempting to acquire additional U.S.-origin aircraft. In February 2009, while subject to the TDO, Mahan Airways participated in the export of computer motherboards, items subject to the Regulations and designated as EAR99, from the United States to Iran, via the UAE, in violation of both the TDO and the Regulations, by transporting and/or forwarding the computer equipment from the UAE to Iran. Mahan Airways' violations were facilitated by Gatewick, which not only participated in the transaction, but also has stated to BIS that it is Mahan Airways' sole booking agent for cargo and freight forwarding services in the UAE.

As discussed below, renewal of the TDO against Mahan is necessary and appropriate. Renewal is necessary with or without the evidence relating to Mahan Airways' violations regarding the computer motherboards, but that evidence is in any event also pertinent to BIS's request to add Gatewick to the TDO as a related person.

C. Findings

Under the applicable standard set forth in Section 766.24 of the Regulations and my review of the record here, I find that the evidence presented by BIS convincingly demonstrates that Mahan Airways has repeatedly violated the EAR and the TDO, that such knowing violations have been significant, deliberate and covert, and that there is a likelihood of future violations. I find that, as alleged by OEE, the violations have involved both U.S.-origin aircraft and computer equipment that are subject to the Regulations. A renewal of the TDO is needed to give notice to persons and companies in the United States and abroad that they should continue to cease dealing with Mahan Airways in export transactions involving items subject to the EAR. Such a TDO is consistent with the public interest to prevent imminent violation of the EAR.[6]

Accordingly, I find pursuant to Section 766.24 that renewal of the TDO for 180 days against Mahan Airways is necessary in the public interest to prevent an imminent violation of the EAR.

III. Addition of Related Person

A. Legal Standard

Section 766.23 of the Regulations provides that "[i]n order to prevent evasion, certain types of orders under this part may be made applicable not only to the respondent, but also to other persons then or thereafter related to the respondent by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business. Orders that may be made applicable to related persons include those that deny or affect export privileges, including temporary denial orders * * *" 15 CFR 766.23(a).

B. Analysis and Findings

OEE has requested that Gatewick be added as a related person in order to prevent evasion of the TDO. OEE's request includes evidence, confirmed in writing by Gatewick, that indicates that a significant and on-going business connection between Gatewick and Mahan Airways. Gatewick officials previously told BIS during a 2009 post shipment verification that it acts as Mahan Airways' sole booking agent for cargo and freight forwarding services in the UAE, a major transshipment hub. This business connection was again confirmed by Gatewick in its written opposition to the related person's notice it received from BIS. Gatewick's opposition also included a copy of its General Cargo Sales Agreement ("GSA") with Mahan Airways, which remains in effect. Through this significant business relationship, Gatewick has the ability, with Mahan Airways' authorization and agreement, to use Mahan's import code to clear UAE customs and then re-book cargo on outbound Mahan flights, including to Iran.

In its August 26, 2010 opposition, Gatewick admits to having a current GSA with Mahan Airways, but it asserts that it is not owned by Mahan and does not have any common directors with Mahan, and thus should not be added to the TDO. Gatewick's submission includes copies of corporate registration documents in addition to the GSA with Mahan. However, rather than distancing itself from Mahan Airways and its co-conspirators, the documents provided by Gatewick actually reveal other connections or relationships between Gatewick and Mahan Airways, as well as the Blue Airways Respondents.

The GSA with Mahan Airways was signed on Gatewick's behalf by its Managing Director, Pejman Mahmood Kosarayanifard, also known as Kosarian Fard, who also owns 35% of Gatewick according to corporate registration documents submitted by the company. Kosarian Fard also played an important role in Mahan Airways' acquisition of Aircraft 1–3 discussed above, as indicated by evidence obtained by BIS during its investigation and as acknowledged by Kosarian Fard in his testimony in the U.K. litigation referenced above. Kosarian Fard was a founder, the majority shareholder, and the Commercial Director of Blue Airways of Armenia. In that capacity, he signed the Boeing 747 lease agreements with the Balli Group that ultimately led to Mahan Airways' acquisition of Aircraft 1–3.

[5] The third Boeing 747 appeared to have undergone significant service maintenance and may not have been operational at the time of the March 9, 2010 Renewal Order.

[6] My findings are made pursuant to Section 766.24 and the Regulations, and are not based on the contempt finding against Mahan Airways in the U.K. litigation. I note, however, that Mahan Airways' statements and actions in that litigation are consistent with my findings here.

Kosarian Fard's written testimony in the U.K. litigation included the following concerning his "close relationship" with Mahan Airways and some of the acts he took at its direction:

> As I have said, I was majority shareholder of Blue [Airways] but in the summer of 2007, I agreed to sell a 51% stake in Blue to Skyco (UK) Ltd. I did this at the request of Mahan. Given my close relationship with Mahan, I did not ask questions but, again, acted on the basis of the trust I had in Mr. Arabnejad and Mr. Mahmoudi [two Mahan Airways' directors].

Kosarian Fard Written Statement to U.K. Court (signed and dated May 27, 2009 by hand), at page 7, paragraph 12.

The record also shows that Gatewick is located at the same G#22 Dubai Airport Free Zone location formerly used by the Blue Airways FZE and Blue Airways UAE.

Based on the information provided by OEE and Gatewick's submission, I find that Gatewick's significant and on-going business relationship and/or connections with Mahan Airways satisfies the requirements of Section 766.23, and that Gatewick's addition to the TDO as a related person is necessary to prevent evasion. This is demonstrated not only by the nature and significance of Gatewick's relationship with Mahan Airways and its stated role as Mahan Airways' sole booking agent in the UAE for Mahan's cargo and freight forwarding services, but also by Gatewick's participation with Mahan Airways in the 2009 transaction involving the export of computer motherboards to Iran, via the UAE, in violation of the outstanding TDO against Mahan. It is further demonstrated by Kosarian Fard's central role at Gatewick, as Managing Director and owner, his admitted close relationship with Mahan Airways, and the prominent role he played in the unlawful re-export of Aircraft 1–3 to Mahan.

IV. Order

It is therefore ordered:

First, that MAHAN AIRWAYS, Mahan Tower, No. 21, Azadegan St., M.A. Jenah Exp.Way, Tehran, Iran, and GATEWICK LLC, A/K/A GATEWICK FREIGHT & CARGO SERVICES, A/K/A GATEWICK AVIATION SERVICE, G#22 Dubai Airport Free Zone, P.O. Box 393754, Dubai, United Arab Emirates, and P.O. Box 52404, Dubai, United Arab Emirates, and Mohamed Abdulla Alqaz Building, Al Maktoum Street, Al Rigga, Dubai, United Arab Emirates (each a "Denied Person" and collectively the "Denied Persons"), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as "item") exported or to be exported from the United States that is subject to the Export Administration Regulations ("EAR"), or in any other activity subject to the EAR including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR; or

C. Benefiting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR.

Second, that no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of a Denied Person any item subject to the EAR;

B. Take any action that facilitates the acquisition or attempted acquisition by a Denied Person of the ownership, possession, or control of any item subject to the EAR that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby a Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from a Denied Person of any item subject to the EAR that has been exported from the United States;

D. Obtain from a Denied Person in the United States any item subject to the EAR with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the EAR that has been or will be exported from the United States and which is owned, possessed or controlled by a Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by a Denied Person if such service involves the use of any item subject to the EAR that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, that, after notice and opportunity for comment as provided in section 766.23 of the EAR, any other person, firm, corporation, or business organization related to a Denied Person by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of this Order.

Fourth, that this Order does not prohibit any export, reexport, or other transaction subject to the EAR where the only items involved that are subject to the EAR are the foreign-produced direct product of U.S.-origin technology.

In accordance with the provisions of Sections 766.24(e) and 766.23(c)(2) of the EAR, Mahan Airways and/or Gatewick LLC may, at any time, appeal this Order by filing a full written statement in support of the appeal with the Office of the Administrative Law Judge, U.S. Coast Guard ALJ Docketing Center, 40 South Gay Street, Baltimore, Maryland 21202–4022.[7]

In accordance with the provisions of Section 766.24(d) of the EAR, BIS may seek renewal of this Order by filing a written request not later than 20 days before the expiration date. A renewal request may be opposed as provided in Section 766.24(d), by filing a written submission with the Assistant Secretary of Commerce for Export Enforcement, which must be received not later than seven days before the expiration date of the Order.[8]

A copy of this Order shall be provided to Mahan Airways and Gatewick LLC and shall be published in the **Federal Register**. This Order is effective immediately and shall remain in effect for 180 days.

Issued this 3rd day of September 2010.

David W. Mills,

Assistant Secretary of Commerce for Export Enforcement.

[FR Doc. 2010–23011 Filed 9–14–10; 8:45 am]

BILLING CODE 3510–DT–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XY91

Advisory Committee and Species Working Group Technical Advisor Appointments

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

[7] A party named or added to temporary denial order as a related person may appeal its inclusion as a related person, but not the underlying basis for the issuance of the TDO. *See* Section 766.23(c).

[8] A party named or added as a related person may not oppose the issuance or renewal of a temporary denial order, but may file an appeal in accordance with Section 766.23(c). See also note 7, *supra.*

ACTION: Nominations.

SUMMARY: NMFS is soliciting nominations to the Advisory Committee to the U.S. Section to the International Commission for the Conservation of Atlantic Tunas (ICCAT) as established by the Atlantic Tunas Convention Act of 1975 (ATCA). NMFS is also soliciting nominations for technical advisors to the Advisory Committee's species working groups.

DATES: Nominations must be received by October 15, 2010.

ADDRESSES: Nominations to the Advisory Committee or for technical advisors to a species working group should be sent to Ms. Rachel O'Malley, Office of International Affairs, National Marine Fisheries Service, NOAA, Room 9540, 1315 East-West Highway, Silver Spring, MD 20910. A copy should also be sent to Keith Cialino, Office of International Affairs, National Marine Fisheries Service, Room 12641, 1315 East-West Highway, Silver Spring, MD 20910. Nominations can also be provided via fax (301–713–2313) or e-mail (*Rachel.O'Malley@noaa.gov* and *Keith.Cialino@noaa.gov*).

FOR FURTHER INFORMATION CONTACT: Keith Cialino, 301–713–9090.

SUPPLEMENTARY INFORMATION: Section 971b of ATCA (16 U.S.C. 971 *et seq.*) requires that an advisory committee be established that shall be composed of: (1) Not less than five nor more than 20 individuals appointed by the U.S. Commissioners to ICCAT who shall select such individuals from the various groups concerned with the fisheries covered by the ICCAT Convention; and (2) the chairs (or their designees) of the New England, Mid-Atlantic, South Atlantic, Caribbean, and Gulf Fishery Management Councils. Each member of the Advisory Committee appointed under paragraph (1) shall serve for a term of 2 years and shall be eligible for reappointment. Members of the Advisory Committee may attend all public meetings of the ICCAT Commission, Council, or any Panel and any other meetings to which they are invited by the ICCAT Commission, Council, or any Panel. The Advisory Committee shall be invited to attend all nonexecutive meetings of the U.S. Commissioners to ICCAT and, at such meetings, shall be given the opportunity to examine and be heard on all proposed programs of investigation, reports, recommendations, and regulations of the ICCAT Commission. Members of the Advisory Committee shall receive no compensation for such services. The Secretary of Commerce and the Secretary of State may pay the necessary travel expenses of members of the Advisory Committee. There are currently 19 appointed Advisory Committee members. The terms of these members expire on December 31, 2010. New appointments will be made as soon as possible, but will not take effect until January 1, 2011.

Section 971b–1 of ATCA specifies that the U.S. Commissioners may establish species working groups for the purpose of providing advice and recommendations to the U.S. Commissioners and to the Advisory Committee on matters relating to the conservation and management of any highly migratory species covered by the ICCAT Convention. Any species working group shall consist of no more than seven members of the Advisory Committee and no more than four scientific or technical advisors, as considered necessary by the Commissioners. Currently, there are four species working groups advising the Committee and the U.S. Commissioners: a Bluefin Tuna Working Group, a Swordfish and Sharks Working Group, a Billfish Working Group, and a BAYS (Bigeye, Albacore, Yellowfin, and Skipjack) Tunas Working Group. Technical Advisors to the species working groups serve at the request of the U.S. Commissioners; therefore, the Commissioners can choose to alter appointments at any time.

Nominations to the Advisory Committee or to a species working group should include a letter of interest and a resume or curriculum vitae. Letters of recommendation are useful but not required. Self-nominations are acceptable. When making a nomination, please clearly specify which appointment (Advisory Committee member or technical advisor to a species working group) is being sought. Requesting consideration for placement on both the Advisory Committee and a species working group is acceptable. Those interested in a species working group technical advisor appointment should indicate which of the four working groups is preferred. Placement on the requested species working group, however, is not guaranteed.

Dated: September 7, 2010.

Rebecca Lent,

Director, Office of International Affairs, National Marine Fisheries Service.

[FR Doc. 2010–23015 Filed 9–14–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Census Bureau

Proposed Information Collection; Comment Request; Manufacturers' Shipments, Inventories, and Orders Benchmark Supplement

AGENCY: U.S. Census Bureau.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and Respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: To ensure consideration written comments must be submitted on or before November 15, 2010.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *DHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Chris Savage, U.S. Census Bureau, Room 7K071, Washington, DC 20233–6900, (301) 763–4832, or via the internet at *John.C.Savage@census.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The Manufacturers' Shipments, Inventories, and Orders (M3) survey collects monthly data on shipments, inventories, and orders from domestic manufacturing companies. The purpose of the M3 survey is to provide early broad-based monthly statistical data on current economic conditions and indications of future production commitments in the manufacturing sector. The orders, as well as the shipments and inventory data, are used widely and are valuable tools for analysis of business cycle conditions. Major data users include: Members of the Council of Economic Advisers, Bureau of Economic Analysis, Federal Reserve Board, Conference Board, Treasury Department, and the business community.

The monthly M3 Survey data reflect primarily the month-to-month changes of companies within the survey. The M3 survey collects data for 89 industry categories of which 13 provide non-

defense and defense allocations. Those industries include: Small Arms and Ordnance; Communications Equipment; Search and Navigation Equipment; Aircraft; Aircraft Engine and Parts; Missile, Space Vehicle, and Parts Manufacturing Defense; and Ship and Boat Building.

There is a clear need to perform a periodic benchmark of the M3 estimates to reflect the manufacturing universe levels. The Annual Survey of Manufactures (ASM) provides annual benchmarks for the shipments and inventory data for the M3 survey, however, the ASM does not distinguish between non-defense and defense activities. The U.S. Census Bureau plans a reinstatement to an expired collection "Manufacturers' Shipments, Inventories, and Orders to the Department of Defense Supplement: 2006–2007," (M–3DOD) to be renamed "Manufacturers' Shipments, Inventories, and Orders Benchmark Supplement" (MA–3001). This form will be cognitive tested before being mailed out in 2011, which may include a title change. After analyzing the results of the 2008 survey, the Census Bureau ascertained the need for an annual data collection for non-defense and defense manufacturing activities. The last collection instrument used to benchmark defense and non-defense data before the "Manufacturers' Shipments, Inventories, and Orders to the Department of Defense Supplement: 2006–2007" was the Shipments to Federal Agencies Benchmark Survey (MA–9675) conducted in 1992.

The "Manufacturers' Shipments, Inventories, and Orders Benchmark Supplement" will be used as a benchmark for the M3 Survey each year. The Census Bureau will use these data to develop an accurate defense/non-defense split among the 13 industry categories in the M3 Survey.

II. Method of Collection

To ease respondent burden, we permit companies to submit their data through an Internet Reporting System or by fax. Companies will be asked to respond to the survey within 30 days of receipt. Letters encouraging participation will be mailed to companies that have not responded by the designated time. Telephone follow-up will be conducted to obtain response from delinquent companies.

III. Data

OMB Control Number: 0607–0949.

Form Number: MA–3001.

Type of Review: Regular submission.

Affected Public: Businesses or other for-profit organizations.

Estimated Number of Respondents: 4,000.

Estimated Time per Response: 30 minutes.

Estimated Total Annual Burden Hours: 2,000.

Estimated Total Annual Cost: $64,840.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13, U.S.C., Sections 131 and 182.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: September 10, 2010.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–22968 Filed 9–14–10; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Proposed Information Collection; Comment Request; Broadband Technology Opportunities Program Post-Award Quarterly and Annual Performance Progress Reports

AGENCY: National Telecommunications and Information Administration, Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before November 15, 2010.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instruments and instructions should be directed to Anthony Wilhelm, Deputy Associate Administrator, Infrastructure Division, Office of Telecommunications and Information Applications, National Telecommunications and Information Administration, via the Internet at *btop@ntia.doc.gov* or by telephone at (202) 482–2048.

SUPPLEMENTARY INFORMATION:

I. Abstract

The American Recovery and Reinvestment Act of 2009 (Recovery Act) establishes and provides $4.7 billion for the Broadband Technology Opportunities Program (BTOP) and directs that these funds be awarded by September 30, 2010. Of these funds, at least $200 million will be made available for competitive grants to expand public computer center capacity; at least $250 million will be made available for competitive grants for innovative programs to encourage sustainable adoption of broadband service; and up to $350 million will be made available to fund the State Broadband Data and Development Grant Program (Broadband Mapping Program) authorized by the Broadband Data Improvement Act. The Broadband Mapping Program is designed to support the development and maintenance of a nationwide broadband map for use by policymakers and consumers.

The Office of Management and Budget requires agencies administrating grant programs to implement post-award financial and performance reporting for those programs. The Department of Commerce Uniform Administrative Requirements for Grants authorizes NTIA to require performance reports from BTOP grant recipients.

A general description of the performance reporting requirements for recipients of BTOP grants was included in the Notice of Funds Availability (NOFA) published on July 9, 2009 for the first round of funding and in the NOFA published on January 26, 2010, for the second round of funding.

The quarterly performance reports, submitted at the end of each quarter of

the year, ask a series of questions that broadly address project progress and monitoring needs of program personnel by getting baseline (planned) and actual information on quarterly and cumulative project and milestone progress, and potential project barriers, if any.

The annual performance reports, submitted at the end of each Federal fiscal year, ask a series of questions that broadly address BTOP programmatic objectives and outcomes, NOFA requirements, and the information needs of external audiences, such as OMB. This includes information on:

- Broadband Infrastructure and CCI—Subscribers passed and served, improved vs. new access for subscribers, pricing plans and broadband speeds available to subscribers, and community anchor institutions served.
- PCC—Hours of operation, speed of broadband service, average number of users per week, training provided, equipment deployed, workstations available.
- SBA—Awareness campaigns, training provided, equipment deployed, broadband subscription rates.

II. Method of Collection

NTIA will collect the information from BTOP grant recipients through post-award quarterly and annual performance progress reports.

III. Data

OMB Control Number: 0660–0037.

Title: Broadband Technology Opportunities Program Post-Award Quarterly and Annual Performance Progress Reporting Requirements.

Form Number(s): None.

Type of Review: Regular submission (extension of a currently approved information collection).

Affected Public: Business and other for-profit organizations; not-for-profit institutions; and State, local, and Tribal government organizations.

Burden

Infrastructure and Comprehensive Community Infrastructure Reports (Annually)

Number of Respondents: 150.

Estimated Number of Responses per Respondent: 5.

Estimated Number of Responses: 750.

Average Burden Hours per Response: 4.66.

Estimated Total Annual Burden Hours: 3,498.

Public Computer Center Reports (Annually)

Number of Respondents: 75.

Estimated Number of Responses per Respondent: 5.

Estimated Number of Responses: 375.

Average Burden Hours per Response: 4.07.

Estimated Total Annual Burden Hours: 1,527.

Sustainable Broadband Adoption Application Reports (Annually)

Number of Respondents: 75.

Estimated Number of Responses per Respondent: 5.

Estimated Number of Responses: 375.

Average Burden Hours per Response: 3.76.

Estimated Total Annual Burden Hours: 1,411.5.

Need and Uses: NTIA needs to collect performance progress information specific to Infrastructure and Comprehensive Community Infrastructure (CCI), Public Computer Center (PCC), and Sustainable Broadband Adoption (SBA) grant recipients in order to effectively monitor, manage and evaluate individual projects and the overall success of the program in achieving statutory goals and objectives.

IV. Request for Comments

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 (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this proposed revision of a currently approved collection of information. They will also become a matter of public record.

Dated: September 9, 2010.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–22913 Filed 9–14–10; 8:45 am]

BILLING CODE 3510–60–P

DEPARTMENT OF COMMERCE

Economics and Statistics Administration

Establishment of the Federal Economic Statistics Advisory Committee and Intention To Recruit New Members

AGENCY: Economics and Statistics Administration, Commerce.

ACTION: Notice of the Establishment of the Federal Economic Statistics Advisory Committee and Intention to Recruit New Members.

SUMMARY: The Secretary of Commerce is announcing the establishment of and intention to recruit new members of a Federal Advisory Committee. In accordance with the provisions of the Federal Advisory Committee Act, 5 U.S.C. App. 2, and the General Services Administration rule on Federal Advisory Committee Management, 41 CFR part 101–6.1001, the Secretary of Commerce has determined that the establishment of the Federal Economic Statistics Advisory Committee (the "Committee') within the Economics and Statistics Administration (ESA), is in the public interest in connection with the performance of duties imposed on the Department by law.

The Committee will advise the Directors of ESA's two statistical agencies, the Bureau of Economic Analysis (BEA) and the U.S. Census Bureau (Census), and the Commissioner of the Department of Labor's Bureau of Labor Statistics (BLS) on statistical methodology and other technical matters related to the collection, tabulation, and analysis of Federal economic statistics.

The Committee will function solely as an advisory committee to the senior officials of BEA, Census and BLS (the Agencies) in consultation with the Committee chairperson. Important aspects of the Committee's responsibilities include, but are not limited to:

a. Recommending research to address important technical problems arising in Federal economic statistics.

b. Identifying areas in which better coordination of the Agencies' activities would be beneficial.

c. Establishing relationships with professional associations with an interest in Federal economic statistics.

d. Coordinating, in its identification of agenda items, with other existing academic advisory committees chartered to provide agency-specific advice, for the purpose of avoiding duplication of effort.

The Committee will report to the Under Secretary for Economic Affairs who, as head of ESA, will coordinate and collaborate with the Agencies.

The Committee will consist of approximately fourteen members who serve at the pleasure of the Secretary of Commerce. Members shall be nominated by the Department of Commerce, in consultation with the Agencies, under the coordination of the Under Secretary for Economic Affairs, and appointed by the Secretary of Commerce. Committee members shall be economists, statisticians, survey methodologists, and behavioral scientists and will be chosen to achieve a balanced membership across those disciplines. Members shall be prominent experts in their fields, and recognized for their scientific and professional achievements and objectivity.

The Department intends to recruit new members of the Committee that meet these membership criteria through a separate **Federal Register** notice and application process in the near future.

The Committee will function solely as an advisory body, in compliance with the provisions of the Federal Advisory Committee Act. The Charter will be filed under the Federal Advisory Committee Act.

FOR FURTHER INFORMATION CONTACT: Barbara Atrostic, Center for Economic Studies, U.S. Census Bureau, 4600 Silver Hill Road, Suitland, Maryland, telephone: 301–763–6442, e-mail: *barbara.kathryn.atrostic@census.gov*.

Rebecca M. Blank,

Under Secretary for Economic Affairs.

[FR Doc. 2010–22985 Filed 9–14–10; 8:45 am]

BILLING CODE 3510–06–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–890]

Wooden Bedroom Furniture From the People's Republic of China: Extension of the Time Limit for the Preliminary Results of the Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: September 15, 2010.

FOR FURTHER INFORMATION CONTACT: Jeff Pedersen, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, *telephone:* (202) 482–2769.

SUPPLEMENTARY INFORMATION: On March 4, 2010, the Department of Commerce ("Department") published a notice of initiation of an administrative review of the antidumping duty order on wooden bedroom furniture from the People's Republic of China. *See Initiation of Administrative Review of the Antidumping Duty Order on Wooden Bedroom Furniture From the People's Republic of China,* 75 FR 9869 (March 4, 2010). The period of review is January 1, 2009, through December 31, 2009. The preliminary results of the administrative review are currently due no later than October 4, 2010.

Extension of Time Limit for Preliminary Results

Pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the "Act"), the Department shall make a preliminary determination in an administrative review of an antidumping duty order within 245 days after the last day of the anniversary month of the date of publication of the order. However, if it is not practicable to complete the review within this time period, section 751(a)(3)(A) of the Act allows the Department to extend the time period to a maximum of 365 days. Completion of the preliminary results of this review within the 245-day period is not practicable because the Department needs additional time to analyze information pertaining to the respondents' sales practices, factors of production, and corporate relationships, and to issue and review responses to supplemental questionnaires. Therefore, in accordance with section 751(a)(3)(A) of the Act, the Department is fully extending the time period for completing the preliminary results of the instant administrative review until January 30, 2011. However, January 30, 2011, falls on a Sunday, and it is the Department's long-standing practice to issue a determination on the next business day when the statutory deadline falls on a weekend. *See Notice of Clarification: Application of* "*Next Business Day*" *Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005). Accordingly, the deadline for completion of the preliminary results of the review is now no later than January 31, 2011. The final results continue to be due 120 days after the publication of the preliminary results.

This notice is published pursuant to sections 751(a) and 777(i) of the Act.

September 9, 2010.

Susan H. Kuhbach,

Acting Deputy Assistant Secretary, for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–23000 Filed 9–14–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

[Docket No. PTO–P–2010–0061]

Patent Examiner Technical Training Program

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice.

SUMMARY: The United States Patent and Trademark Office (USPTO) is seeking public assistance in providing technical training to patent examiners within all technology centers. The Patent Examiner Technical Training Program (PETTP) is intended to provide scientists and experts as lecturers to patent examiners in order to update them on technical developments, the state of the art, emerging trends, maturing technologies, and recent innovations in their fields. Such guest lecturers must have relevant technical knowledge, as well as familiarity with prior art and industry practices/standards in areas of technology where such lectures would be beneficial.

DATES: *Effective Date*: *September 15, 2010*.

FOR FURTHER INFORMATION CONTACT: Raul Tamayo, Legal Advisor, Office of Patent Legal Administration, Office of the Associate Commissioner for Patent Examination Policy, at (571) 272–7728.

Wynn Coggins, Director of Technology Center (TC) 3600, available at (571) 272–5350, will provide oversight of the Patent Examiner Technical Training Program.

SUPPLEMENTARY INFORMATION: The USPTO is seeking public assistance in providing technical training to patent examiners within all technology centers. The Patent Examiner Technical Training Program is intended to provide scientists and experts as lecturers to patent examiners in order to update them on technical developments, the state of the art, emerging trends, maturing technologies, and recent innovations in their fields. Such guest lecturers must have relevant technical knowledge, as well as familiarity with prior art and industry practices/standards in areas of technology where

such lectures would be beneficial. The Patent Examiner Technical Training Program is not intended as an opportunity for applicants to discuss pending applications or to circumvent normal communication between applicants or applicants' representatives and examiners or Supervisory Patent Examiners. In addition, Patent Examiner Technical Training Program participants are not to provide advice or recommendations to the USPTO. The Patent Examiner Technical Training Program is envisioned as an opportunity to provide patent examiners with necessary training from scientists and experts working directly in the various technologies throughout the USPTO. It is anticipated that lectures will last approximately two hours.

All participants in the Patent Examiner Technical Training Program must agree to serve without compensation and must fund their own expenses, including, but not limited to: travel to and from the USPTO, meals, and lodging arrangements. Webinars are an option for participants who elect not to travel. All offers for technical training made to the program will be tracked in a database to ensure that all offers for technical training are addressed. The USPTO reserves the right to refuse any request to participate in the program. Among other factors, whether a request to participate in the program is granted will depend on the appropriateness of the topic and the availability of resources. For granted requests, audience size will vary. If a participant is not satisfied with the program, the participant may contact Wynn Coggins, TC 3600 Director, who is overseeing the program.

The Patent Examiner Technical Training Program will be in effect as of the date noted above until further notice.

How to Participate: In order to participate in the Patent Examiner Technical Training Program, participants must fill in and submit the on-line form available at *http://www.uspto.gov/patents/pettp.jsp*, or send an e-mail to *Examiner_Technical_Training@uspto.gov* identifying the area of technical assistance that they can provide, their name and phone number, and other contact information as necessary. Once a participant fills in and submits the on-line form or sends the e-mail, the participant will receive a system generated e-mail response noting that the inquiry was received.

The participant thereafter should expect a telephone call from the point of contact within the specified area identified for technical assistance. During this initial telephone call, the participant will be informed of USPTO invited speaker requirements pursuant to Agency Administrative Order (AAO) 219–05. Also, the target audience will be identified and possible dates for the event discussed.

Prior to giving a presentation, all PETTP participants must sign the USPTO's Invited Speaker Conflict of Interest Policy Statement. In addition, PETTP presentations are sometimes recorded and made available to employees for viewing or listening at a later time. The Invited Speaker Conflict of Interest Policy Statement, as well as additional information on the PETTP, is available on the USPTO Web site at *http://www.uspto.gov/patents/pettp.jsp.*

Technical Areas: The USPTO believes patent examiner technical training on the technical areas identified below will be most beneficial. However, participants who wish to provide training in other technical areas may also contact the USPTO.

TC 1600—Biotechnology and Organic Chemistry: Formulation Chemistry; controlling drug release; drug targeting/conjugation and dosage form technology; drug delivery; nanotechnology (delivery of nucleic acids, antibodies, other molecules); statistical methods in validation of microarry data; personalized medicine, manufacture of carbon nanospheres, pharmaceutical/clinical chemistry for organic compounds, current animal models (emphasis on how they are being generated and used), advances in gene therapy, current methods in drug discovery (identifying current methods for the isolation and testing of natural products, and strategy for the modification of the isolated products into more potent/useful compounds).

TC 1700—Chemical and Materials Engineering: Analytical chemistry and lab apparatus, batteries, brazing, catalysts, chemical mechanical polishing, chemical process control, chemical reactors, detergents, dishwashers, distillation, electrochemical sensors, electroluminescent devices and processes of making, electro-osmosis, electrophoresis, electrophotography, electroplating, encapsulated circuitry/semiconductors, evaporation, fuel cells, gasification, glass/ceramics processing, growing monocrystals, hydrogen production, liquid and gas purification and separation, making nanotubes, microbiological apparatus, mixing, nanolithography, nanotechnology, perfumes, petroleum technology, photoelectric devices and processes, photolithography, pigments and inks, polymer chemistry, polymers, reformation, semiconductor cleaning techniques, solar cells, soldering, solid separators, thermoelectric, washing machines, and welding.

TC 2100—Computer Architecture and Software: Electrical Computers & Digital Data Processing Systems: Intrasystem Connection, Processing Access Control & Bus Interrupt Operation; Error Detection/Correction & Fault Detection/Recovery; Reliability; System Configuration/Timing/Power Control, Error Detection/Correction & Fault Detection/Recovery; Generic Control System, Apparatus or Process; Simulation & Modeling, Emulation of Computer Components; Artificial Intelligence (Neural Networks, Fuzzy Logic, Expert Systems, Rule based Systems); Database & File Management; Operator Interface (Windows, Menus, Icons, I/O user interaction, etc.); Document Processing (displaying, or processing for display, text, graphics, layouts); Processor Architecture & Instruction Processing; Computers: Memory Access & Control; Compilers & Software Development; Arithmetic Processing/Calculating; Interprogram/Interprocess Communications and Computer Task Management.

TC 2400—Networking, Multiplexing, Cable and Security: Wireless & Wired Comm Networks, LANs, WANs, OFDMA, CDMA, TDMA, Routing & Switching, Signaling, Network Mang., Flow Control, Congestion Control, Admission Control, Quality of Service, Queuing Systems, Interworking, VoIP, Label Switching, ATM, SONET, Mobile IP & 3G/4G Wireless Networks, computer conferencing, data streaming, data routing, client/server, computer conferencing, E-mail messaging, video distribution, remote data accessing, data transfer speed regulating, computer handshaking, computer data routing, Social Networks (Virtual Communities), Power Over Ethernet & Ethernet over Power lines, Digital VideoBroadcasting Standards MPEG4, ATSC, different video distribution on mobile devices, Internet Video distribution, New trends in electronic program guide, peer-to-peer video distribution, video sharing via cable distribution, wireless video distribution in home, HDMI, Biometric Devices, Elliptical Curves, Quantum Cryptography, Anti Viruses, Denial Services, AES—Advanced Encryption Standard, Social Network Security, Peer-to-Peer Security, DRM—Digital Right Management.

TC 2600—Communications: Spread spectrum, signal modulation, telemetry, electronic alarms, multiplexing, packet switching, optical communications, telephone systems, advanced intelligence networks, wireless communications, OFDMA, CDMA,

TDMA, echo cancellation, MIMO, WiMax, 802.11, MPLS, SC–FDMA, Mobile IP6, television, electronic imaging, digital cameras, electronic image signal processing, video displays, pattern recognition, panoramic processing, stereoscopic processing, MPEG, JPEG, Blu-Ray, DVD technology, image compression, image enhancement, color space transformation, RFID, halftone printing, speech signal processing, optical recording, dynamic information storage, information storage disks, computer graphics processing, LCD displays, plasma displays, basics of optics, DWDM essentials and networks, SONET/SDH, optical transport networks, audio signal processing and compression, noise cancellation, hearing aids, and loudspeakers.

TC 2800—Semiconductors, Electrical and Optical Systems and Components: Mixed signal design and architecture, flexible displays, OLED display technology, nitride semiconductors, compound semiconductors, nanodevices, power converters, image sensors, motor controls, CMOS technology, quantum electronics, analog to digital and digital to analog converters, organic semiconductors, micro-opto-electromechanical systems, ASIC design, spintronics and magnetic random access memory (MRAM), non-volatile memory devices, semiconductor and electronic packaging technologies, solar cells, digital logic circuits, laser and fiber optics, phase change memory, photolithography, thin film deposition, light emitting diodes, digital cameras, optical waveguides, antennas, printing technology, MEMs, multilevel interconnections, LCDs, x-ray applications, photonic crystals, green power generation technologies, and sensors.

TC 3600—Transportation, Construction, Electronic Commerce, Agriculture, National Security, and License & Review: e-Commerce applications including: Social networking, network management, wireless technologies/communications/protocols, market optimization, demand forecasting, interactive visualization and simulation, project and resource planning & scheduling, local search optimization, decision analysis, supply chain optimization and management, simulation and stochastic modeling, static & dynamic optimization, resource allocation/calendar staffing and scheduling, optimization/coordination of travel reservations/planning and specialized travel query processing, determining/optimizing prices for goods/services, local and distributed postage metering, shipping (*e.g.,* route planning, special handling, package tracking, RFID usage), transportation (*e.g.,* fare, parking, tolls), utility usage (*e.g.,* metering, pricing for consumed quantities of a utility), electronic trading, backend processing of financial trades, complex trading strategies of hedge funds (*e.g.,* desire/need for complex strategies and how hedge funds utilize technology to carry out these complex strategies), derivative trading (*e.g.,* credit default swaps). Mechanical and electrical applications including: Automobiles, transportation systems, building structures, firearms, aeronautics, material handling, radio and acoustic wave communications, earth boring, animal husbandry, plant husbandry.

TC 3700—Mechanical Engineering, Manufacturing and Products: Educational games; electric amusement devices; boot and shoe making; special receptacle or package; textiles; apparel; article carriers; tools; cutlery; metal working; manufacturing of electrical semiconductor, superconductor and nanotechnology; diagnostic medical imaging including MRI, X-Ray, ultrasound, visible and infrared imaging, nuclear and microwave imaging, and optical imaging; electronic controls for prosthetic devices (external prosthetics, gait analysis, etc.); exercise equipment; cell and tissue engineering; lung and heart-assist devices and fully implantable devices; internal combustion engines; heat engines; solar energy; turbochargers; exhaust gas treatment; catalytic converters; engine control systems; fluid power plants; refrigeration; heating systems for structures; electrical heating devices; valves and valve actuation; fluid handling; and pumps.

Dated: September 9, 2010.

David J. Kappos,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2010–23006 Filed 9–14–10; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of Petitions by Firms for Determination of Eligibility To Apply for Trade Adjustment Assistance

AGENCY: Economic Development Administration, Department of Commerce.

ACTION: Notice and Opportunity for Public Comment.

Pursuant to Section 251 of the Trade Act of 1974, as amended (19 U.S.C. 2341 *et seq.*), the Economic Development Administration (EDA) has received petitions for certification of eligibility to apply for Trade Adjustment Assistance from the firms listed below. Accordingly, EDA has initiated investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each of these firms contributed importantly to the total or partial separation of the firm's workers, or threat thereof, and to a decrease in sales or production of each petitioning firm.

LIST OF PETITIONS RECEIVED BY EDA FOR CERTIFICATION OF ELIGIBILITY TO APPLY FOR TRADE ADJUSTMENT ASSISTANCE

[7/29/2010 through 9/8/2010]

Firm name	Address	Date accepted for investigation	Products
Advanced Dental Technologies, Inc.	85 Maple Street, P.O. Box 80427, Stoneham, MA 02180.	8/31/2010	The firm produces dental prosthetics for dental patients. All products are patient specific and unique.
Air-Hydraulics, Inc	545 Hupp Avenue, Jackson, MI 49203.	8/31/2010	The firm manufactures hydraulic, air over oil and pneumatic presses, rotary index tables, pneumatic impact hammers, electric punches, and custom turnkey assembly and metal forming machinery.
Auburn Systems, LLC	8 Electronics Avenue, Danvers, MA 01923.	8/31/2010	The firm manufactures dust leak detectors.

LIST OF PETITIONS RECEIVED BY EDA FOR CERTIFICATION OF ELIGIBILITY TO APPLY FOR TRADE ADJUSTMENT ASSISTANCE—Continued

[7/29/2010 through 9/8/2010]

Firm name	Address	Date accepted for investigation	Products
Buffelen Woodworking Company.	1901 Taylor Way, Tacoma, WA 98421.	9/7/2010	The firm manufactures wooden doors.
C-Thru Ruler Company	6 Britton Drive, Bloomfield, CT 06002.	9/7/2010	The firm manufacturers various stencils, vinyl lettering and oil board lettering. The firm also manufactures rulers, drafting supplies, plastic rulers and various templates.
Custom Machine, LLC	30 Nashua Street, Woburn, MA 01801.	8/27/2010	The firm manufactures precision commercial, medical and alternative energy components and assemblies.
ES Products, LLC	280 Franklin Street, Bristol, RI 02809.	8/31/2010	The firm manufactures roofing fasteners for the attachment of an initial layer of a multi-layer membrane system to low slope, low density roof decks.
Exotic Rubber & Plastics Corporation, dba Exotic Automation & Supply.	34700 Grand River Avenue, Farmington Hills, MI 48335.	9/7/2010	The firm manufactures rubber and plastic molded parts and gaskets. The firm also distributes power units, cylinders, valves, servo controls, and fittings.
Fiber-Line, Inc	3050 Campus Drive #200, Hatfield, PA 19440.	9/7/2010	The firm manufactures coated fibers and FRP rods.
Heli Modified, Inc	P.O. Box 63820 Industrial Way, Cornish, ME 04020.	9/7/2010	The firm manufacturers ergonomically correct replacement motorcycle handlebar and risers.
NBC Solid Surfaces, Inc	200 Clinton Street, Springfield, VT 05156.	9/8/2010	The firm manufactures counter tops made with granite, corian, quartz, marble and wood.
OptiPro Systems, LLC	6368 Dean Parkway, Ontario, NY 14519.	9/3/2010	The firm manufactures optical grinding, polishing and measuring machines and performs government research. The firm also distributes machine tools, CAS/CAM software, and measuring systems.
Pacific Trail Manufacturing, Inc	6532 SE. Crosswhite Way, Portland, OR 97206.	9/3/2010	The firm fabricates specialized chain saws that cut full units of various wood products and paper rolls to shorter lengths than the originals.
Parlec, Inc	101 Perinton Parkway, Fairport, NY 14450.	7/29/2010	The firm manufactures machine tool accessories including tool holders, boring systems, tapping systems, and tool presetters,
Porta-Nails, Inc	4235 Hwy 421 N, Currie, NC 28435.	9/1/2010	The firm produces manual and pneumatic nail and staple guns.
Roylco, Inc	P.O. Box 13409, 3251 Abbeville Highway, Anderson, SC 29624.	9/7/2010	The firm produces educational and hobby/craft kits.

Any party having a substantial interest in these proceedings may request a public hearing on the matter. A written request for a hearing must be submitted to the Trade Adjustment Assistance for Firms Division, Room 7106, Economic Development Administration, U.S. Department of Commerce, Washington, DC 20230, no later than ten (10) calendar days following publication of this notice.

Please follow the requirements set forth in EDA's regulations at 13 CFR 315.9 for procedures to request a public hearing. The Catalog of Federal Domestic Assistance official number and title for the program under which these petitions are submitted is 11.313, Trade Adjustment Assistance for Firms.

Dated: September 9, 2010.

Miriam J. Kearse,

Program Team Lead.

[FR Doc. 2010–22956 Filed 9–14–10; 8:45 am]

BILLING CODE 3510–24–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–552–801]

Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Preliminary Results and Partial Rescission of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce ("Department") is conducting an administrative review and new shipper review of the antidumping duty order on certain frozen fish fillets from the Socialist Republic of Vietnam ("Vietnam"). *See Notice of Antidumping Duty Order: Certain Frozen Fish Fillets From the Socialist Republic of Vietnam,* 68 FR 47909 (August 12, 2003) ("*Order*"). The Department has preliminarily determined that Vinh Hoan Corporation ("Vinh Hoan"),[1] Vinh Quang Fisheries Corporation ("Vinh Quang") and CUU Long Fish Joint Stock Company ("CL-Fish") sold subject merchandise at less than normal value ("NV") during the period of review ("POR"), August 1, 2008, through July 31, 2009.

DATES: *Effective Date:* September 15, 2010.

FOR FURTHER INFORMATION CONTACT: Emeka Chukwudebe or Javier Barrientos, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and

[1] The Department is treating Vinh Hoan, Van Duc Food Export Joint Company ("Van Duc") and Van Duc Tien Giang ("VD TG") as a single entity. Section 351.401(f) of the Department's regulations define single entities as those affiliated producers who have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production. For further analysis, *see Affiliations and Collapsing* section below.

Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–0219 or (202) 482–2243, respectively.

SUPPLEMENTARY INFORMATION:

Case History

On July 31, 2009, pursuant to section 19 CFR 351.214(c), the Department received a new shipper review request from CL-Fish. On August 3, 2009, the Department published a notice of an opportunity to request an administrative review of the *Order. See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 74 FR 38397 (August 3, 2009). By August 31, 2009, the Department received review requests for 22 companies from Petitioners [2] and certain individual companies.

On September 22, 2009, the Department initiated an antidumping duty administrative review on frozen fish fillets from Vietnam covering the period, August 1, 2008, through July 31, 2009. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 74 FR 48224 (September 22, 2009) ("*Initiation Notice*"). The Department initiated this review with respect to 22 companies.[3]

On September 25, 2009, the Department initiated the sixth antidumping duty new shipper review covering the same period as the administrative review. For this POR, the company to be reviewed is CL-Fish. *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Initiation of New Shipper Review,* 74 FR 48908, (September 25, 2009).

On November 10, 2009, the Department issued a letter to all interested parties informing them of its decision to select as mandatory respondents QVD and Vinh Hoan, the two largest exporters of subject merchandise during the POR, based on U.S. Customs and Borders Protection ("CBP") import data. *See* Memorandum to the File from Javier Barrientos, Senior Analyst, through Alex Villanueva, Program Manager, Antidumping Duty Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam ("Vietnam"): Selection of Respondents for Individual Review ("First Respondent Selection Memo"), dated November 10, 2009. On January 7, 2010, QVD withdrew its request for an administrative review. On January 8, 2010, Anvifish JSC withdrew its request for an administrative review. On January 8, 2010, Petitioners partially withdrew their August 31, 2009, request for an administrative review for 13 companies including QVD.[4] On January 29, 2010, the Department determined to individually examine the voluntary respondent, Vinh Quang. *See* Memorandum to the File from Emeka Chukwudebe, Case Analyst, through Alex Villanueva, Program Manager, Antidumping Duty Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam ("Vietnam"): Replacement of Mandatory Respondent ("Second Respondent Selection Memo"), dated January 29, 2010.

Between October 13, 2009, and August 12, 2010, new shipper, CL-Fish, submitted responses to the original sections A, C, and D questionnaire and supplemental sections A, C, and D questionnaire. Between November 24, 2009, and August 12, 2010, Vinh Quang submitted responses to the original sections A, C, and D questionnaires and supplemental sections A, C, and D questionnaires. Between December 4, 2009, and August 12, 2010, Vinh Hoan submitted responses to the original sections A, C, and D questionnaires and supplemental sections A, C, and D questionnaires.

On January 29, 2010, the Department extended the deadline for parties to file surrogate country comments and surrogate value data. *See* Memorandum to the File, from Emeka Chukwudebe, Case Analyst, through Alex Villanueva, Program Manager, Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Extension Request for Surrogate Country Selection Comments and Surrogate Value Submissions, dated January 29, 2010. On February 12, 2010, the Department tolled all administrative deadlines, including these reviews, by one calendar week. *See* Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Snowstorm, dated February 12, 2010, ("Tolling Memo"). On March 9, 2010, the Department aligned the sixth new shipper review with the sixth administrative review. *See* Memorandum to the File, from Javier Barrientos, Senior Case Analyst, through Alex Villanueva, Program Manager, Alignment of 6th New Shipper Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam with the 6th Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, dated March 9, 2010. Between April 2, 2010, and July 9, 2010, the Department received surrogate country and value comments and rebuttal comments from interested parties. On April 22, 2010, the Department partially extended the deadline for the preliminary results in these reviews. *See* Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Extension of Time Limit for Preliminary Results of the 6th Antidumping Duty Administrative and 6th New Shipper Reviews, 75 FR 20983 (April 22, 2010).

On May 27, 2010, the Department partially rescinded the administrative review with respect to 13 companies.[5] See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Partial Rescission of the Sixth Antidumping Duty Administrative Review, 75 FR 29726 (May 27, 2010) ("*Partial Rescission Notice*"). Therefore, nine companies remain in this administrative review: (1) Agifish; (2) Acomfish; (3) Anvifish JSC; [6] (4) Binh An; (5) East Sea Seafoods Limited Liability Company (formerly known as East Sea Seafoods Joint Venture Co.,

[2] Catfish Farmers of America and individual U.S. catfish processors, America's Catch, Consolidated Catfish Companies, LLC dba Country Select Catfish, Delta Pride Catfish, Inc., Harvest Select Catfish, Inc., Heartland Catfish Company, Pride of the Pond, and Simmons Farm Raised Catfish, Inc.

[3] These companies include: (1) An Giang Fisheries Import and Export Joint Stock Company (aka Agifish or; AnGiang Fisheries Import and Export); (2) Anvifish Co., Ltd.; (3) Anvifish Joint Stock Company ("Anvifish JSC"); (4) Asia Commerce Fisheries Joint Stock Company (aka Acomfish JSC) ("Acomfish"); (5) Binh An Seafood Joint Stock Co. ("Binh An"); (6) Cadovimex II Seafood Import-Export and Processing Joint Stock Company; (aka Cadovimex II) ("Cadovimex II"); (7) CL–Fish; (8) East Sea Seafoods Limited Liability Company (formerly known as East Sea Seafoods Joint Venture Co., Ltd.) ("ESS LLC"); (9) East Sea Seafoods Joint Venture Co., Ltd. ("ESS JVC"); (10) Hiep Thanh Seafood Joint Stock Co. ("Hiep Thanh"); (11) Nam Viet Company Limited (aka NAVICO) ("NAVICO"); (12) NTSF Seafoods Joint Stock Company (aka NTSF) ("NTSF"); (13) Panga Mekong Co., Ltd. ("Panga Mekong"); (14) QVD Food Company, Ltd. ("QVD"); (15) QVD Dong Thap Food Co., Ltd. ("QVD DT"); (16) Saigon-Mekong Fishery Co., Ltd. (aka SAMEFICO) ("SAMEFICO"); (17) Southern Fishery Industries Company, Ltd. (aka South Vina); (18) Thien Ma Seafood Co., Ltd. ("Thien Ma"); (19) Thuan Hung Co., Ltd. (aka THUFICO) ("Thuan Hung"); (20) Vinh Hoan Corporation; (21) Vinh Hoan Company, Ltd.; and (22) Vinh Quang.

[4] These companies include: (1) Cadovimex II; (2) CL-Fish; (3) Hiep Thanh; (4) NAVICO; (5) NTSF; (6) Panga Mekong; (7) QVD; (8) SAMEFICO; (9) Thien Ma; (10) Thuan Hung; (11) Vinh Quang; (12) QVD DT, and; (13) Anvifish Co., Ltd. However, the Department continued the administrative review with respect to Vinh Quang as this company was chosen as a voluntary respondent. *See* Second Respondent Selection Memo.

[5] These companies include: (1) Cadovimex II; (2) CL-Fish; (3) Hiep Thanh; (4) NAVICO; (5) NTSF; (6) Panga Mekong; (7) QVD; (8) SAMEFICO; (9) Thien Ma; (10) Thuan Hung; (11) Vinh Quang; (12) QVD DT; and (13) Anvifish Co., Ltd.

[6] Although the Department noted on January 8, 2010, Anvifish JSC withdrew its request for an administrative review, in the *Partial Rescission Notice,* the Department stated there was no information on the record indicating Anvifish JSC was assigned a separate rate.

Ltd.); (6) Hiep Thanh; (7) South Vina; (8) Vinh Hoan; and (9) Vinh Quang.

On July 16, 2010, Anvifish JSC placed information on the record identifying its name change in the fourth administrative review from Anvifish Co., Ltd. to Anvifish JSC. On July 30, 2010, the Department published in the **Federal Register** a second notice fully extending the time period for issuing the preliminary results in these reviews. *See* Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Extension of Time Limit for Preliminary Results of the 6th Antidumping Duty Administrative and 6th New Shipper Reviews, 75 FR 44938 (July 30, 2010). The preliminary results are currently due on September 7, 2010, (inclusive of the seven day extension per the Tolling Memo).

Vietnam-Wide Entity

As discussed above, in this administrative review we limited the selection of respondents using CBP import data. *See* First Respondent Selection Memo at Attachment I. In this case, we made available to the companies who were not selected, the separate rates application and certification, which were put on the Department's Web site. *See Initiation Notice*. Those companies which did not apply for separate rates will continue to be part of the Vietnam-wide entity. Because some parties for which a review was requested did not apply for separate rate status, the Vietnam-wide entity is considered to be part of this review.

Preliminary Partial Rescission of Administrative Review

Acomfish and Binh An

Pursuant to 19 CFR 351.213(d)(3), the Department has preliminarily determined that Acomfish and Binh An made no shipments of subject merchandise during the POR of this administrative review. On October, 13, 2009, the Department received no-shipment certifications from Acomfish and Binh An. However, according to entry statistics obtained from CBP, and placed on the record, Binh An had an entry of subject merchandise during the POR. In the partial rescission of review notice, the Department stated that it would address this claim and any possible rescission in the preliminary results. *See Partial Rescission Notice.*

On January 13, 2010, the Department issued no-shipment inquiries to CBP requesting any information for merchandise manufactured and shipped by either Acomfish or Binh An during the POR. The Department did not receive any response from CBP, thus indicating that there were no entries of subject merchandise into the United States exported by these companies. On May 26, 2010, the Department issued a request for the complete entry package document for the shipment made by Binh An during the POR. In addition, on July 9, 2010, the Department issued a supplemental questionnaire to Binh An requesting additional information regarding the subject merchandise entered during the POR. On July 15, 2010, Binh An submitted a response stating that the shipment was for sampling purposes only. Furthermore, our analysis of the CBP entry package was consistent with Binh An's explanation. The Department therefore found no record evidence indicating that Binh An received financial consideration for this transaction. *Id.*

Consequently, as Acomfish did not export subject merchandise during the POR, and Binh An's transaction was not considered a sale because it was a sample transaction for no financial consideration, we are preliminarily rescinding the review, in part, with respect to Acomfish and Binh An.

Separate Rates

Agifish, Anvifish Co., Ltd., Vinh Hoan, QVD, South Vina, and CL-Fish

A designation as a non-market economy ("NME") remains in effect until it is revoked by the Department. *See* section 771(18)(C) of the Tariff Act of 1930, as amended ("the Act"). Accordingly, there is a rebuttable presumption that all companies within Vietnam are subject to government control and, thus, should be assessed a single antidumping duty rate. It is the Department's standard policy to assign all exporters of the merchandise subject to review in NME countries a single rate unless an exporter can affirmatively demonstrate an absence of government control, both in law (*de jure*) and in fact (*de facto*), with respect to exports. To establish whether a company is sufficiently independent to be entitled to a separate, company-specific rate, the Department analyzes each exporting entity in an NME country under the test established in the *Final Determination of Sales at Less than Fair Value: Sparklers from the People's Republic of China,* 56 FR 20588 (May 6, 1991) ("*Sparklers*"), as amplified by the *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China,* 59 FR 22585 (May 2, 1994) ("*Silicon Carbide*").

A. Absence of *De Jure* Control

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) An absence of restrictive stipulations associated with an individual exporter's business and export licenses; and (2) any legislative enactments decentralizing control of companies.

Although the Department has previously assigned a separate rate to all of the companies eligible for a separate rate in the instant proceeding, it is the Department's policy to evaluate separate rates questionnaire responses each time a respondent makes a separate rates claim, regardless of whether the respondent received a separate rate in the past. *See Manganese Metal from the People's Republic of China, Final Results and Partial Rescission of Antidumping Duty Administrative Review,* 63 FR 12440 (March 13, 1998).

In this review, Agifish, Anvifish Co., Ltd., Vinh Hoan, QVD, and South Vina submitted complete separate rate certifications and applications. CL-Fish provided separate rate information in its new shipper review questionnaire responses. The evidence submitted by these companies includes government laws and regulations on corporate ownership, business licenses, and narrative information regarding the companies' operations and selection of management. The evidence provided by these companies supports a finding of a *de jure* absence of government control over their export activities, based on: (1) An absence of restrictive stipulations associated with the exporter's business license; and (2) the legal authority on the record decentralizing control over the respondents.

B. Absence of *De Facto* Control

The absence of *de facto* government control over exports is based on whether the respondent: (1) Sets its own export prices independent of the government and other exporters; (2) retains the proceeds from its export sales and makes independent decisions regarding the disposition of profits or financing of losses; (3) has the authority to negotiate and sign contracts and other agreements; and (4) has autonomy from the government regarding the selection of management. *See Silicon Carbide,* 59 FR at 22587; *Sparklers,* 56 FR at 20589; *see also Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol from the People's Republic of China,* 60 FR 22544, 22545 (May 8, 1995).

In this review, Agifish, Anvifish Co., Ltd., Vinh Hoan, QVD, South Vina, and CL-Fish submitted evidence indicating an absence of *de facto* government control over their export activities. Specifically, this evidence indicates

that: (1) Each company sets its own export prices independent of the government and without the approval of a government authority; (2) each company retains the proceeds from its sales and makes independent decisions regarding the disposition of profits or financing of losses; (3) each company has a general manager, branch manager or division manager with the authority to negotiate and bind the company in an agreement; (4) the general managers are selected by the board of directors or company employees, and the general managers appoint the deputy managers and the manager of each department; and (5) there is no restriction on any of the companies' use of export revenues. Therefore, the Department preliminarily finds that Agifish, Anvifish Co., Ltd., Vinh Hoan, QVD, and South Vina have established that they qualify for separate rates under the criteria established by *Silicon Carbide* and *Sparklers.*

ESS LLC and ESS JVC

ESS LLC requested an administrative review of its entries and on November 24, 2009, submitted a separate rates questionnaire response. A review of CBP data indicated that ESS LLC had no entries during the POR under its own name; instead all of the entries came in under ESS JVC.[7]

In the prior administrative review, ESS LLC claimed it was a successor-in-interest to ESS JVC. In that review, the Department found that ESS LLC was not the successor-in-interest to ESS JVC, and as such, was not entitled to ESS JVC's rate.[8] This determination was upheld by the Court of International Trade.[9] The Department also found that ESS JVC ceased to exist on July 31, 2008.

In response to a supplemental questionnaire issued by the Department, ESS LLC explained that although its name does not appear on the CBP entry documents as the exporter, it is the entity that made those sales to the United Stated during the POR. Specifically, ESS LLC argues that the sales documents (*e.g.,* invoices, payment, etc.) were issued on behalf of ESS LLC during the POR. *See* ESS LLC's July 14, 2010 Submissions at 3, Exhibits 6–7. Therefore, record evidence supports a finding that the POR entries under ESS JVC's name were, in fact, ESS LLC sales and we will treat them accordingly.

Based on the same analysis described above for the other companies and ESS LLC's separate rate response, we preliminarily find that ESS LLC is entitled to a separate rate in this review. Furthermore, we intend to refer the issue of ESS LLC's claim that the ESS JVC entries are in fact ESS LLC's entries during the POR to CBP for further consideration.

Use of Facts Available

Vinh Quang

Section 776(a)(2) of the Tariff Act of 1930, as amended ("the Act"), provides that, if an interested party: (A) Withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested subject to sections 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

On July 13, 2010, in response to a supplemental questionnaire from the Department, Vinh Quang explained that it could not provide certain sales to the last unaffiliated U.S. customer because the affiliated U.S. customer stated that it did not have the records available to report the data for these U.S. sales. Although Vinh Quang attempted to collect the information on these sales, it notes that the volume of these sales was less than one percent of total U.S. sales during the POR through that affiliate.

For these preliminary results, in accordance with sections 776(a)(2)(B) of the Act, we have determined that the use of neutral facts available ("FA") is warranted for Vinh Quang because, even though it did not report these very limited downstream sales from its affiliate, the affiliate provided an explanation of why it wasn't able to link these very limited sales to purchases by the unaffiliated U.S. customers (*i.e.,* walk-in grocery store customers). *See* Vinh Quang's July 13, 2010, submission at 11–12. As partial neutral FA, we will use the weighted-average margin from the rest of the sales used to calculate the dumping margin as the margin for the sales observations in question. *See* Analysis of the Preliminary Results of the Antidumping Duty Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam Vinh Quang Fisheries Corporation ("Vinh Quang") dated September 7, 2010.

Rate for Non-Selected Companies

In this review there are three companies that are not presently selected for individual examination, ESS LLC, South Vina, and Agifish. The statute and the Department's regulations do not address the establishment of a rate to be applied to individual companies not selected for examination where the Department limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, we have looked to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for respondents we did not examine in an administrative review. For the exporters subject to this review that were determined to be eligible for separate rate status, but were not selected as mandatory respondents, the Department generally weight-averages the rates calculated for the mandatory respondents, excluding any rates that are zero, *de minimis,* or based entirely on FA.[10]

For this administrative review, the Department has calculated positive margins for both the single mandatory respondent, Vinh Hoan, and the voluntary respondent, Vinh Quang. However, it is the Department's practice to only include the rates calculated for the mandatory respondents when calculating the separate rate for exporters determined to be eligible for separate rate status.[11] Accordingly, consistent with our practice for these preliminary results, the Department has preliminarily established a margin for the separate rate respondents based on the rate calculated for the single mandatory respondent, Vinh Hoan. The rate established for the separate rate respondents is a per-unit rate of $4.22 dollars per kilogram. Entities receiving this rate are identified by name in the "Preliminary Results of Review" section of this notice.

Scope of the Order

The product covered by this *Order* is frozen fish fillets, including regular, shank, and strip fillets and portions

[7] *See* First Respondent Selection Memo at attachment I.

[8] *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews,* 75 FR 12726 (March 17, 2010) ("*5th AR and 4th NSR Final*").

[9] *East Sea Seafoods LLC,* v. *United States and Catfish Farmers of America,* Court No. 10–00102, Slip Op. 10–62 at 10 (CIT May 27, 2010). ESS LLC has filed a notice of appeal in that case.

[10] *See, e.g., Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Results of New Shipper Review and Partial Rescission of Administrative Review,* 73 FR 8273, 8279 (February 13, 2008) (unchanged in *Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review,* 73 FR 49162 (August 20, 2008)).

[11] *See Id.*

thereof, whether or not breaded or marinated, of the species *Pangasius Bocourti, Pangasius Hypophthalmus* (also known as *Pangasius Pangasius*), and *Pangasius Micronemus*. Frozen fish fillets are lengthwise cuts of whole fish. The fillet products covered by the scope include boneless fillets with the belly flap intact ("regular" fillets), boneless fillets with the belly flap removed ("shank" fillets), boneless shank fillets cut into strips ("fillet strips/finger"), which include fillets cut into strips, chunks, blocks, skewers, or any other shape. Specifically excluded from the scope are frozen whole fish (whether or not dressed), frozen steaks, and frozen belly-flap nuggets. Frozen whole dressed fish are deheaded, skinned, and eviscerated. Steaks are bone-in, cross-section cuts of dressed fish. Nuggets are the belly-flaps. The subject merchandise will be hereinafter referred to as frozen "basa" and "tra" fillets, which are the Vietnamese common names for these species of fish. These products are classifiable under tariff article codes 1604.19.4000, 1604.19.5000, 0305.59.4000, 0304.29.6033 (Frozen Fish Fillets of the species *Pangasius* including basa and tra) of the Harmonized Tariff Schedule of the United States ("HTSUS").[12] This *Order* covers all frozen fish fillets meeting the above specification, regardless of tariff classification. Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of the *Order* is dispositive.

Non-Market Economy Country Status

In every case conducted by the Department involving Vietnam, Vietnam has been treated as a NME country. In accordance with section 771(18)(C)(i) of the Act ("the Act"), any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. *See Notice of Final Results of Administrative Review: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam,* 73 FR 15479 (March 17, 2008) and accompanying Issues and Decision Memorandum ("*3rd AR Final Results*"). None of the parties to this proceeding have contested such treatment. Accordingly, we calculated NV in accordance with section 773(c) of the Act, which applies to NME countries.

Surrogate Country and Surrogate Values

On December 18, 2009, the Department sent interested parties a letter setting a deadline to submit comments on surrogate country selection and information pertaining to valuing factors of production ("FOPs"). Between April, 8, 2010, and August 16, 2010, Vinh Hoan, CL-Fish, the Vietnam Association of Seafood Exporters and Producers ("VASEP"), and/or Petitioners submitted surrogate country comments, surrogate value data and rebuttal comments.

Surrogate Country

When the Department is investigating imports from an NME country, section 773(c)(1) of the Act directs it to base NV, in most circumstances, on the NME producer's FOPs, valued in a surrogate market economy country or countries considered to be appropriate by the Department. In accordance with section 773(c)(4) of the Act, in valuing the FOPs, the Department shall utilize, to the extent possible, the prices or costs of FOPs in one or more market economy countries that are: (1) At a level of economic development comparable to that of the NME country; and (2) significant producers of comparable merchandise.

The Department determined that Bangladesh, Pakistan, India, Sri Lanka, the Philippines and Indonesia are countries comparable to Vietnam in terms of economic development.[13]

As we have stated in prior administrative review determinations, there is no world production data of *Pangasius* frozen fish fillets available on the record with which the Department can identify producers of identical merchandise. Therefore, absent world production data, the Department's practice is to compare, wherever possible, data for comparable merchandise and establish whether any economically comparable country was a significant producer.[14] In this case, we have determined to use the broader category of frozen fish fillets data as the basis for identifying producers of comparable merchandise. Therefore, consistent with cases that have similar circumstances as are present here, we obtained export data for each country identified in the surrogate country list. Based on export data from U.N. Comtrade in 2007,[15] Bangladesh, the Philippines, Indonesia, India, Sri Lanka, and Pakistan are exporters of frozen fish fillets, and, thus, significant producers.

After applying the first two selection criteria, if more than one country remains, it is the Department's practice to select an appropriate surrogate country based on the availability and reliability of data from those countries. *See* Department Policy Bulletin No. 04.1: Non-Market Economy Surrogate Country Selection Process (March 1, 2004) ("Surrogate Country Policy Bulletin"). In this case, the whole fish input is the most significant input because it accounts for the largest percentage of normal value ("NV") as fish fillets are produced directly from the whole live fish. As such, we must consider the availability and reliability of the surrogate values for whole fish on the record. This record does not contain any data for whole live fish for Indonesia, India, Sri Lanka, and Pakistan. Therefore, these countries will not be considered for primary surrogate country purposes at this time. However, this record does contain whole fish surrogate value data from both Bangladesh and the Philippines.

Bangladesh

In the most recently completed segment involving a new shipper review, the Department selected Bangladesh as the surrogate country due to the superior quality of the Bangladeshi data available in the Economics of Aquaculture Feeding Practices in Selected Asian Countries: FAO Technical Paper 505 (Rome, 2007) ("FAO Report"). *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, Final Results of Fifth New Shipper Review,* 75 38985 (July 7, 2010) and accompanying Issues and Decision Memorandum at Comment 1 ("*5th NSR Final*"). In the *5th NSR Final,* we found that the whole fish input data from the FAO Report were the best information available to value the fish input because they satisfied the surrogate value selection criteria (*e.g.,* are publicly

[12] Until July 1, 2004, these products were classifiable under tariff article codes 0304.20.60.30 (Frozen Catfish Fillets), 0304.20.60.96 (Frozen Fish Fillets, NESOI), 0304.20.60.43 (Frozen Freshwater Fish Fillets) and 0304.20.60.57 (Frozen Sole Fillets) of the HTSUS. Until February 1, 2007, these products were classifiable under tariff article code 0304.20.60.33 (Frozen Fish Fillets of the species *Pangasius* including basa and tra) of the HTSUS.

[13] *See* Memorandum from Kelley Parkhill, Acting Director, Office of Policy, to Alex Villanueva, Program Manager, AD/CVD Enforcement, Office 9: Request for a list of Surrogate Countries for a New Shipper Review of the Antidumping Duty Order on Certain Frozen Fish Fillets ("Fish Fillets") from the Socialist Republic of Vietnam, dated October 15, 2009.

[14] *See Certain Magnesia Carbon Bricks From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 75 FR 11847 (March 12, 2010), unchanged for the final determination, 75 FR 45468 (August 2, 2010).

[15] U.N. Comtrade data from 2006 and 2007 are the only years in which all countries have data for comparison. 2008 and 2009 data contains gaps preventing the Department from making appropriate comparisons. World Trade Atlas data shares a similar problem. See Surrogate Value Memo at Attachment I.

available, represent a broad market average, are from an approved surrogate country, are specific to the input in question and are tax exclusive),[16] even though they are not contemporaneous with the POR. The information on this record with respect to the FAO Report data remains unchanged from the prior new shipper review.

The Philippines

In the fifth administrative review and fourth new shipper reviews, the Department was concerned with the public availability of the whole fish surrogate data from the Philippines. *See 5th AR Final* at Comment 1. Subsequent to that segment, the Department again evaluated the public availability of the Philippines data and found that although Petitioners supplemented the record with additional information and documentation, serious concerns remained (*e.g.,* not an official government publication in and of itself, an affidavit not made on behalf of the Philippines government, no discussion of public dissemination, *etc.*).[17] On the record of this review however, Petitioners submitted information clearly generated by a Philippine government agency, on official Philippines government letterhead, and with an explanation of the data collection methods. In addition, they provided a complete copy of the *Fisheries Statistics of the Philippines, 2006–2008, published by the Bureau of Agricultural Statistics, Department of Agriculture,* ("*Fisheries Statistics*") published in November 2009, which links the Philippines data provided in this and prior segments to an official Philippines government publication. Therefore, the Department no longer has concerns with the public availability of the Philippines data in this segment.

Analysis

First, we note that both the FAO Report data and the Fisheries Statistics data are publicly available, tax- and duty-exclusive, and from an approved surrogate country. Therefore, we examined each source with respect to the broad market average, specificity, and contemporaneity. With respect to the broad market average, we find that the data from both the FAO Report and the Fisheries Statistics are considered broad market averages. As we have stated in prior reviews, the FAO Report data were obtained directly from 60 fish farmers from a region that produces fish in Bangladesh. However, the *FAO Report* does state why this particular region was selected (*i.e.,* importance of this region in *Pangas* farming, the availability of hatchery produced fry, availability of ponds, warm climate, cheap and abundant labor). *See FAO Report* at 38. Similarly, the Philippines data were collected from 34 respondents (*i.e.,* "farmers, operators, or caretakers. Other possible respondents are aqua farm traders and persons knowledgeable of aquaculture production in the locality.") *See* Petitioners' July 9, 2010 Submission at Attachment 1, page 2. Although we recognize that the Philippines data volume is only 12 metric tons, while the Bangladeshi data is 178 metric tons, for these preliminary results, we find that both of these sources are significant broad market averages because they represent national level data of similar quality using similar collection methods (*i.e.,* interviews, questionnaires, *etc.*).

With respect to specificity, the Bangladeshi data in the FAO Report specifically identify the whole live fish examined as *Pangasianodon Hypopthalmus,* which is one of the fish fillets species identified in the scope of the *Order.* The Philippines data in the *Fisheries Statistics* are identified as *Pangasius,* which is the genus name for the fish fillets subject to the *Order.* First, we note that *Pangasius* is a genus name and *Pangasianodon Hypopthalmus* is a species in that genus. In prior reviews, we used whole fish surrogate value data identified as *Pangas* and found it comparable to the fish input used by Respondents. *See 3rd AR Final Results* at Comment 4. In this case, although the whole fish data from Bangladesh are more specific to the input used by the Respondents in producing fish fillets, we note that the record does not contain any information that would lead us to preliminarily determine that any difference between the two sources would necessarily generate a difference in price. Moreover, *Pangasianodon Hypopthalmus* is considered a component of *Pangasius* so it is reasonable to find that the *Pangasius* price from the Philippines in the *Fisheries Statistics* is likely to include *Pangasianodon Hypopthalmus* and other comparable species names also listed in the *Order.*

Finally, with respect to contemporaneity, we find that the Philippine data are contemporaneous with the POR as they are based on data collected in calendar year 2008. *See* Petitioners' July 9, 2010 Submission at Attachment 1, page 3. The Bangladeshi data in the FAO Report are from calendar year 2005. Therefore, the Philippines data are contemporaneous with the POR, while the Bangladeshi data are not.

After examining all the factors considered in selecting the surrogate value for fish as part of our surrogate country analysis, we find that the data available from the Philippines for the whole live fish represent the best surrogate values for these preliminary results. Given that Philippines data are contemporaneous, as equally a broad market average as the Bangladeshi data and of a similar genus of the fish used by the Respondents to produce fish fillets, we preliminarily select the Philippines as the most appropriate surrogate country. However, we hereby invite parties to submit additional comments and data from Bangladesh and the Philippines with respect to fish farming and fisheries that can be considered for the final results.

Affiliations and Collapsing

Section 771 (33) of the Act provides that:

The following persons shall be considered to be 'affiliated' or 'affiliated persons':

(A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants;

(B) Any officer of director of an organization and such organization;

(C) Partners;

(D) Employer and employee;

[16] *See e.g., Fresh Garlic from the People's Republic of China: Final Results and Final Rescission, In Part, of New Shipper Reviews,* 74 FR 50952 (October 2, 2009), and accompanying Issues and Decision Memorandum at Comment 5; *see also Third Administrative Review of Frozen Warmwater Shrimp From the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review,* 74 FR 46565 (September 10, 2009), and accompanying Issues and Decision Memorandum at Comment 3.

[17] In the most recently completed segment, we stated that "In analyzing the Fish Pond Report, the Department has serious concerns about the public availability of the data. By Petitioners' own admission, the data are not published as the Fish Pond Report per se, but rather, the Fish Pond Report represents source data to be used in a yet-to-be-determined manner for official publication in the Fisheries Situationer. Therefore, the Fish Pond Report is not an official government publication in and of itself, nor is it even an interim government publication. Accordingly, we do not find the Fish Pond Report to be public information. Moreover, we find our concerns in this regard amplified by the observation that the affidavit is not made on behalf of the Philippine government, further underscoring our concerns about the public availability of this information.* * *

Furthermore, the document has a hand written title and appears to be incomplete in some of the data fields as discussed below. There is no mention in the affidavit that the data is regularly disseminated in the Fish Pond Report format or whether the affiant is responsible for providing this data to the public. There is no explanation as to whether the affiant provides this data as a regular part of her government job, reducing the likelihood the data as released were subject to the ordinary review and analysis accompanying their inclusion in the Fisheries Situationer. Given these concerns, the Department does not find that this data is publicly available." *See 5th NSR Final* at Comment 1.

(E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization;

(F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person;

(G) Any person who controls any other person and such other person.

Additionally, section 771 (33) of the Act stipulates that: "For purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restrain or direction over the other person."

Finally, according to 19 CFR 351.401(f)(1) and (2), two or more companies may be treated as a single entity for antidumping duty purposes if: (1) The producers are affiliated, (2) the producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities, and (3) there is a significant potential for manipulation of price or production. *See* 19 CFR 351.401(f)(1) and (2).

Vinh Hoan

In the final results of the fifth antidumping duty administrative review, the Department determined that Vinh Hoan and Van Duc Food Export Joint Company ("Van Duc") should be treated as a single entity. *See 5th AR Final,* and accompanying Issues and Decision Memorandum at Comment 4. The Department did not collapse Vinh Hoan Feed 1 Company ("Vinh Hoan Feed") with these other companies, however, because Vinh Hoan Feed lacked a critical capital component (freezing machines) in order to produce comparable merchandise. *Id.*

Based on evidence submitted by Vinh Hoan in this administrative review, the Department finds that Vinh Hoan is affiliated with Vinh Hoan Feed, Vinh Hoan USA, Van Duc, and another entity, Van Duc Tien Giang ("VD TG") pursuant to section 771 (33) of the Act. *See* Vinh Hoan's March 2, 2010, submission at 2–8. Furthermore, based on evidence on the record, the Department preliminarily finds that Vinh Hoan, Van Duc, and VD TG should be treated as a single entity for purposes of this administrative review. *See* 19 CFR 351.401(f)(1) and (2). All three companies have the ability to produce and/or export subject merchandise. Furthermore, the companies are under the common control of Ms. Truong and her family by virtue of ownership, common board members or managers. As such, there is significant potential for manipulation of price or production. The Department still determines, however, that Vinh Hoan Feed lacks the critical capital component (freezing machines) in order to produce comparable merchandise. Therefore, pursuant to 19 CFR 351.401(f)(1) and (2), the Department preliminary finds that Vinh Hoan, Van Duc, and VD TG but not Vinh Hoan Feed, should be treated as a single entity (collectively, the "Vinh Hoan Group") in these preliminary results.

Vinh Quang

With regard to Vinh Quang, the Department preliminarily finds that Vinh Quang is affiliated with the following customers that resold the subject merchandise in the United States: (1) H&N Foods International ("H&N"); (2) Blue River Seafood Inc. ("Blue River") (dba Joe Pucci & Sons ("Pucci")); (3) Expack Seafoods, Inc. ("Expack"); and, (4) Clemente Seafood Center, Inc. ("Clemente") (collectively "CEP Entities"). The Department also finds Vinh Quang to be affiliated with H&N, Blue River/Pucci and Clemente under Section 771(33)(A) of the Act because members of the Lam Family [18] own directly or indirectly (with their husbands) the majority of these entities and are in a position to control them. *See* Vinh Quang July 13, 2010, submission at 2–9. Finally, the Department determines that Expack is affiliated with H&N (and indirectly to Vinh Quang) under 771(33)(E) and (F) of the Act because H&N is the majority owner of Expack and because the Lam Family members (one of the Lam sisters, her husband and children) are in a position to directly or indirectly control Expack. *Id.*

Therefore, for these preliminary results the Department will use the constructed export price ("CEP") price paid to H&N, Blue River/Pucci, and Expack by their first unaffiliated U.S. customers of subject merchandise during the POR. For Clemente, please *see Facts Available* section below.

Fair Value Comparisons

To determine whether sales of the subject merchandise made by Vinh Hoan, Vinh Quang or CL-Fish to the United States were at prices below NV, we compared each company's export price ("EP") or CEP, where appropriate, to NV, as described below.

U.S. Price

For Vinh Hoan's and CL-Fish's EP sales, we used the EP methodology, pursuant to section 772(a) of the Act, because the first sale to an unaffiliated purchaser was made prior to importation and CEP was not otherwise warranted by the facts on the record. We calculated EP based on the free-on-board foreign port price to the first unaffiliated purchaser in the United States. For the EP sales, we also deducted foreign inland freight, foreign cold storage, foreign brokerage and handling, foreign containerization, and international ocean freight from the starting price (or gross unit price), in accordance with section 772(c) of the Act.

In accordance with section 772(b) of the Act, we used the CEP methodology when the first sale to an unaffiliated purchaser occurred after importation of the merchandise into the United States. In this instance, we calculated CEP for Vinh Hoan's and Vinh Quang's U.S. sales through its respective U.S. affiliates, Vinh Hoan USA and the Vinh Quang's CEP Entities, respectively, to unaffiliated customers.

For Vinh Hoan's and Vinh Quang's CEP sales, we made adjustments to the gross unit price, where applicable, for billing adjustments, rebates, foreign inland freight, international freight, foreign cold storage, foreign containerization, foreign brokerage and handling, U.S. marine insurance, U.S. inland freight, U.S. warehousing, U.S. inland insurance, other U.S. transportation expenses, and U.S. customs duties. In accordance with section 772(d)(1) of the Act, we also deducted those selling expenses associated with economic activities occurring in the United States, including commissions, credit expenses, advertising expenses, indirect selling expenses, inventory carrying costs, and U.S. re-packing costs. We also made an adjustment for profit in accordance with section 772(d)(3) of the Act.

Where movement expenses were provided by NME-service providers or paid for in NME currency, we valued these services using surrogate values from Descartes Carrier Rate Retrieval Database ("Descartes") Web site. *See* Surrogate Value Memo. Where applicable, we used the actual reported expense for those movement expenses provided by ME suppliers and paid for in ME currency.

New Shipper Review Bona Fide Analysis

Consistent with the Department's practice, we investigated the *bona fide* nature of the sales made by CL-Fish in the new shipper review. We found that the new shipper sales by CL-Fish were

[18] These individuals include Quang Lam and his three blood sisters and their children.

made on a *bona fide* basis.[19] Based on our investigation into the *bona fide* nature of the sales, the questionnaire responses submitted by CL-Fish, as well as the company's eligibility for separate rates (*see Separate Rates Determination* section above), we preliminarily determine that CL-Fish has met the requirements to qualify as a new shipper during this POR. Therefore, for the purposes of these preliminary results of review, we are treating CL-Fish's sales of subject merchandise to the United States as appropriate transactions for this new shipper review.

Normal Value

Section 773(c)(1) of the Act provides that, in the case of an NME, the Department shall determine NV using an FOP methodology if the merchandise is exported from an NME and the information does not permit the calculation of NV using home-market prices, third-country prices, or constructed value under section 773(a) of the Act. Because information on the record does not permit the calculation of NV using home-market prices, third-country prices, or constructed value and no party has argued otherwise, we calculated NV based on FOPs reported by Vinh Hoan, Vinh Quang, and CL-Fish, pursuant to sections 773(c)(3) and (4) of the Act and 19 CFR 351.408(c).

As the basis for NV, Vinh Hoan, Vinh Quang, and CL-Fish provided FOPs used in each of the stages for processing frozen fish fillets. The Department's general policy, consistent with section 773(c)(1)(B) of the Act, is to value the FOPs that a respondent uses to produce the subject merchandise.

To calculate NV, the Department valued Vinh Hoan's, Vinh Quang's, and CL-Fish's reported per-unit factor quantities using publicly available Philippine, Bangladeshi, Indian, and Indonesian surrogate values. The Philippines was our first surrogate country source from which to obtain data to value inputs, and when data were not available from there, we used Bangladeshi, Indian, or Indonesian sources. In selecting surrogate values, we considered the quality, specificity, and contemporaneity of the available values. As appropriate, we adjusted the value of material inputs to account for delivery costs. Specifically, we added surrogate freight costs to surrogate values using the reported distances from the Vietnam port to the Vietnam factory or from the domestic supplier to the factory, where appropriate. This adjustment is in accordance with the decision of the CAFC in *Sigma Corp.* v. *United States,* 117 F.3d 1401, 1407–1408 (Fed. Cir. 1997). For those values not contemporaneous with the POR, we adjusted for inflation using data published in the International Monetary Fund's International Financial Statistics.

In accordance with the *OTCA 1988* legislative history, the Department continues to apply its long-standing practice of disregarding surrogate values if it has a reason to believe or suspect the source data may be subsidized.[20] In this regard, the Department has previously found that it is appropriate to disregard such prices from India, Indonesia, South Korea and Thailand because we have determined that these countries maintain broadly available, non-industry specific export subsidies.[21] Based on the existence of these subsidy programs that were generally available to all exporters and producers in these countries at the time of the POR, the Department finds that it is reasonable to infer that all exporters from India, Indonesia, South Korea and Thailand may have benefitted from these subsidies.

Additionally, we disregarded prices from NME countries. Finally, imports that were labeled as originating from an "unspecified" country were excluded from the average value, because the Department could not be certain that they were not from either an NME country or a country with general export subsidies. For further detail, *see* Surrogate Values Memo.

As a consequence of the CAFC's ruling in *Dorbest II,*[22] the Department is no longer relying on the regression-based wage rate described in 19 CFR 351.408(c)(3). The Department is continuing to evaluate options for determining labor values in light of the recent CAFC decision. For these preliminary results, we have calculated an hourly wage rate to use in valuing the reported labor input by averaging earnings and/or wages in countries that are economically comparable to Vietnam and that are significant producers of comparable merchandise. For further information on the calculation of the wage rate, please *see* the Surrogate Value Memo.

Currency Conversion

Where necessary, the Department made currency conversions into U.S. dollars, in accordance with section 773A(a) of the Act, based on the exchange rates in effect on the dates of the U.S. sales, as certified by the Federal Reserve Bank.

Preliminary Results of the Review

As a result of our review, we preliminarily find that the following margins exist for the period August 1, 2008, through July 31, 2009.

CERTAIN FROZEN FISH FILLETS FROM VIETNAM

Manufacturer/Exporter	Weighted-average margin (Dollars per kilogram)
(1) Vinh Hoan[23]	4.22
(2) Vinh Quang	2.44
(3) Agifish	4.22
(4) ESS LLC	4.22
(5) South Vina	4.22
Vietnam-Wide Rate[24]	2.11

As a result of the new-shipper review, the Department preliminarily determines that a weighted-average dumping margin of $0.93 per kilogram exists for merchandise produced and exported by CL-Fish for the period August 1, 2008, through July 31, 2009.

With respect to Anvifish JSC, although there is now evidence on the record of this review that Anvifish Co., Ltd. underwent a name change to become Anvifish JSC during the fourth administrative review,[25] there is still insufficient information to determine if Anvifish JSC is in fact the successor in interest to Anvifish Co., Ltd. Therefore, the Department will issue a post-preliminary supplemental questionnaire

[19] *See* Memorandum from Javier Barrientos, Case Analyst, Office 9, through Alex Villanueva, Program Manager, Office 9: Bona Fide Nature of the Sales in the Antidumping Duty New Shipper Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Cuu Long Fish Joint Stock Company, dated September 7, 2010.

[20] *See Omnibus Trade and Competitiveness Act of 1988, Conf. Report to Accompany H.R. 3, H.R. Rep. No. 576, 100th Cong.,* 2nd Sess. (1988) ("*OTCA 1988*") at 590.

[21] *See, e.g., Expedited Sunset Review of the Countervailing Duty Order on Carbazole Violet Pigment 23 from India,* 75 FR 13257 (March 19, 2010) and accompanying Issues and Decision Memorandum at pages 4–5; *Expedited Sunset Review of the Countervailing Duty Order on Certain Cut-to-Length Carbon Quality Steel Plate from Indonesia,* 70 FR 45692 (August 8, 2005) and accompanying Issues and Decision Memorandum at page 4; *See Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review,* 74 FR 2512 (January 15, 2009) and accompanying Issues and Decision Memorandum at pages 17, 19–20; *See Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Countervailing Duty Determination,* 66 FR 50410 (October 3, 2001) and accompanying Issues and Decision Memorandum at page 23.

[22] *See Dorbest Ltd.* v. *United States,* 604 F.3d 1363 (CAFC 2010).

[23] This rate is applicable to the Vinh Hoan Group which includes Vinh Hoan, Van Duc, and VD TG.

[24] This rate is applicable to Anvifish JSC.

[25] *See* Anvifish JSC's submission, dated July 16, 2010.

to determine if Anvifish JSC is the successor to Anvifish Co., Ltd. and if Anvifish JSC is entitled to use the rate assigned to Anvifish Co., Ltd. Until the Department determines otherwise, Anvifish JSC will remain part of the Vietnam-wide entity.

Public Comment

The Department will disclose to parties of this proceeding the calculations performed in reaching the preliminary results within five days of the date of announcement of the preliminary results. *See* 19 CFR 351.224(b). An interested party may request a hearing within 30 days of publication of the preliminary results. *See* 19 CFR 351.310(c). Interested parties may submit written comments (case briefs) within 30 days of publication of the preliminary results and rebuttal comments (rebuttal briefs), which must be limited to issues raised in the case briefs, within five days after the time limit for filing case briefs. *See* 19 CFR 351.309(c)(1)(ii) and 19 CFR 351.309(d). Parties who submit arguments are requested to submit with the argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities. Further, the Department requests that parties submitting written comments provide the Department with a diskette containing the public version of those comments. Unless the deadline is extended pursuant to section 751(a)(3)(A) of the Act, the Department will issue the final results of this administrative review, including the results of our analysis of the issues raised by the parties in their comments, within 120 days of publication of the preliminary results. The assessment of antidumping duties on entries of merchandise covered by this review and future deposits of estimated duties shall be based on the final results of this review.

Assessment Rates

Upon completion of this administrative review, pursuant to 19 CFR 351.212(b), the Department will calculate an assessment rate on all appropriate entries. For the mandatory respondents, Vinh Hoan and Vinh Quang, and new shipper, CL-Fish, we will calculate importer-specific duty assessment rates on a per-unit basis.[26] Where the assessment rate is *de minimis,* we will instruct CBP to assess no duties on all entries of subject merchandise by that importer. We will instruct CBP to liquidate entries containing merchandise from the Vietnam-wide entity at the Vietnam-wide rate we determine in the final results of review. We intend to issue assessment instructions to CBP 15 days after the date of publication of the final results of review.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For the exporters listed above, except for CL-Fish (*see* below), the cash deposit rate will be that established in the final results of this review (except, if the rate is zero or *de minimis,* the cash deposit will be zero); (2) for previously investigated or reviewed Vietnam and non-Vietnam exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all Vietnam exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the Vietnam-wide rate of $2.11 per kilogram; and (4) for all non-Vietnam exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the Vietnam exporters that supplied that non-Vietnam exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

The following cash deposit requirements will be effective upon publication of the final results of this review for all shipments of subject merchandise from new shipper CL-Fish entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For subject merchandise produced and exported by CL-Fish, the cash deposit rate will be the rate established in the final results; (2) for subject merchandise exported by CL-Fish but not manufactured by CL-Fish, the cash deposit rate will continue to be the Vietnam-wide rate (*i.e.,* $2.11 per kilogram); and (3) for subject merchandise manufactured by CL-Fish, but exported by any other party, the cash deposit rate will be the rate applicable to the exporter. If the cash deposit rate calculated in the final results is zero or *de minimis,* no cash deposit will be required where CL-Fish is the exporter and manufacturer. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Interested Parties

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing this determination in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: September 7, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

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[26] We divided the total dumping margins (calculated as the difference between NV and EP or CEP) for each importer by the total quantity of subject merchandise sold to that importer during the POR to calculate a per-unit assessment amount. We will direct CBP to assess importer-specific assessment rates based on the resulting per-unit (*i.e.,* per-kilogram) rates by the weight in kilograms of each entry of the subject merchandise during the POR.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–909]

Certain Steel Nails From the People's Republic of China: Notice of Preliminary Results and Preliminary Rescission, in Part, of the Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce ("Department") is conducting the first administrative review of the antidumping duty order on certain steel nails ("nails") from the People's Republic of China ("PRC") for the period of review ("POR") January 23, 2008, through July 31, 2009. The Department has preliminarily determined that sales have been made below normal value ("NV") with respect to certain exporters who participated fully and are entitled to a separate rate in this administrative review. If these preliminary results are adopted in our final results of this review, the Department will instruct U.S. Customs and Border Protection

("CBP") to assess antidumping duties on all appropriate entries of subject merchandise during the POR. Interested parties are invited to comment on these preliminary results.

DATES: *Effective Date:* September 15, 2010.

FOR FURTHER INFORMATION CONTACT: Emeka Chukwudebe or Matthew Renkey, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–0219 or (202) 482–2312, respectively.

SUPPLEMENTARY INFORMATION:

Case Timeline

On September 22, 2009, the Department published in the **Federal Register** a notice of initiation of an administrative review of nails from the PRC, for 158 companies. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 74 FR 48224 (September 22, 2009) ("Initiation"). As explained in the memorandum from the Deputy Assistant Secretary for Import Administration, the Department has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from February 5, through February 12, 2010. *See* Memorandum to the Record regarding "Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Snowstorm," dated February 12, 2010. Thus, all deadlines in this segment of the proceeding have been extended by seven days. Also, on March 26, 2010, the Department published a notice extending the time period for issuing the preliminary results by 120 days to September 7, 2010. *See Certain Steel Nails from the People's Republic of China: Extension of Time Limit for the Preliminary Results of the First Antidumping Duty Administrative Review,* 75 FR 14568 (March 26, 2010).

On July 23, 2010, the Department published a notice rescinding the administrative review with respect to 31 companies, due to withdrawals of requests for review. *See Certain Steel Nails from the People's Republic of China: Notice of Partial Rescission of the First Antidumping Duty Administrative Review,* 75 FR 43149 (July 23, 2010) ("Partial Rescission Notice").

Respondent Selection

Section 777A(c)(1) of the Tariff Act of 1930, as amended ("Act") directs the Department to calculate individual dumping margins for each known exporter or producer of the subject merchandise. However, section 777A(c)(2) of the Act gives the Department discretion to limit its examination to a reasonable number of exporters or producers if it is not practicable to examine all exporters or producers involved in the review.

The Department initiated a review for the 158 companies for which it received a timely request for review. *See Initiation,* 74 FR 48224. On September 24, 2009, the Department released CBP data for entries of the subject merchandise during the POR under administrative protective order ("APO") to all interested parties with access to the APO, inviting comments regarding the CBP data and respondent selection. Between September 24, 2009, and October 26, 2009, Certified Products International, Inc. ("CPI"), Stanley [1] and Petitioner [2] submitted comments on the respondent selection process.

After assessing its resources, the Department issued on November 6, 2009, its respondent selection memorandum. In it, the Department determined that the number of companies (*i.e.,* 158) was too large a number for individual reviews and that the Department could reasonably examine two exporters subject to this review. Pursuant to section 777A(c)(2)(B) of the Act, the Department selected Stanley and CPI as mandatory respondents, while noting that CPI had submitted evidence, arguing that it had no shipments of subject merchandise during the POR.[3] On December 3, 2009, after receiving a no-shipments response from CPI and evaluating further comments submitted by CPI and Petitioner, the Department selected Tianjin Xiantong Material & Trade Co., Ltd. ("Tianjin Xiantong") as a mandatory respondent in place of CPI, noting that we would continue to gather additional information to investigate CPI's claims that it had no shipments during the POR.[4] On January 26, 2010, Tianjin Xiantong filed a letter stating that it would not be participating as an individually-examined respondent in this review.[5] Also on January 26, 2010, Petitioner submitted additional comments regarding respondent selection. On February 4, 2010, the Department selected Shandong Minmetal Co., Ltd. ("Shandong Minmetal") as a mandatory respondent in place of Tianjin Xiantong.[6]

On November 17, 2009, the Department issued its original antidumping duty questionnaire to Stanley. Between December 18, 2009, and July 12, 2010, Stanley submitted responses to the Department's original and supplemental questionnaires. On January 28, 2010, the Department issued a supplemental questionnaire to CPI regarding its no-shipments status, and CPI responded on February 25, 2010. On February 16, 2010, the Department issued its original antidumping duty questionnaire to Shandong Minmetal. Between March 18, 2010, and August 20, 2010, Shandong Minmetal submitted responses to the Department's original and supplemental questionnaires.

Preliminary Partial Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(3), we have preliminarily determined that the following companies made no shipments of subject merchandise during the POR: Besco Machinery Industry (Zhejiang) Co., Ltd.; CPI; CYM (Nanjing) Nail Manufacture Co., Ltd., ("CYM Nanjing"); Dagang Zhitong Metal Products Co., Ltd.; Hebei Super Star Pneumatic Nails Co., Ltd.; Hong Kong Yu Xi Co., Ltd.; Senco-Xingya Metal Products (Taicang) Co., Ltd.; Shanghai Chengkai Hardware Product Co., Ltd.; Shanghai March Import & Export Company Ltd.; Shaoxing Chengye Metal Production Co., Ltd.; Suzhou Yaotian Metal Products Co., Ltd.; Tianjin Chentai International Trading Co., Ltd.; Tianjin Jurun Metal Products Co., Ltd. ("Tianjin Jurun"); Tianjin Longxing (Group) Huanyu Imp. & Exp. Co., Ltd.; Tianjin Port Free Trade Zone Xiangtong Intl. Industry & Trade Corp.; Tianjin

[1] The Stanley Works (Langfang) Fastening Systems Co., Ltd. and the Stanley Works/Stanley Fastening Systems, LP (collectively "Stanley").

[2] Mid Continent Nail Corporation.

[3] *See* Memorandum to James C. Doyle, Office 9 Director, through Alex Villanueva, Office 9 Program Manager, from Matthew Renkey, Senior Case Analyst and Emeka Chukwudebe, Case Analyst, dated November 6, 2009, First Antidumping Duty Administrative Review of Certain Steel Nails from the People's Republic of China ("PRC"): Selection of Respondents for Individual Review ("First Respondent Selection Memo").

[4] *See* Memorandum to the File, through Alex Villanueva, Office 9 Program Manager, from Emeka Chukwudebe, Case Analyst, dated December 3, 2009, First Antidumping Duty Administrative Review of Certain Steel Nails from the People's Republic of China ("PRC"): Selection of Second Respondent for Individual Review ("Second Respondent Selection Memo").

[5] The Department also rescinded the review of Tianjin Xiantong because Petitioner withdrew its request for review with respect to this company. *See Partial Rescission Notice.*

[6] Memorandum to the File, through Alex Villanueva, Office 9 Program Manager, from Emeka Chukwudebe, Case Analyst, dated December 3, 2009, First Antidumping Duty Administrative Review of Certain Steel Nails from the People's Republic of China ("PRC"): Replacement of Respondent Selected for Individual Examination ("Third Respondent Selection Memo").

Shenyuan Steel Production Group Co., Ltd.; Wuhu Shijie Hardware Co., Ltd. ("Wuhu Shijie"); and Wuxi Chengye Metal Products Co., Ltd., (collectively, the "No Shipments Respondents"). The Department received no-shipment certifications from the aforementioned companies.

The Department also issued no-shipment inquiries to CBP, asking it to provide any information contrary to our preliminary findings of no entries of subject merchandise for merchandise manufactured and shipped by the aforementioned companies. For most companies, we did not receive any response from CBP, thus indicating that there were no entries of subject merchandise into the United States exported by these companies. CBP did indicate potential entries of nails during the POR for those companies, so the Department requested CBP entry packages for such instances. For a more detailed explanation of our preliminary no-shipments determinations, which concludes that neither CPI, CYM Nanjing, Tianjin Jurun, nor Wuhu Shijie had POR shipments of subject merchandise to the United States, *see* Memorandum to James C. Doyle, Office 9 Director, through Alex Villanueva, Office 9 Program Manager, from Matthew Renkey, Senior Case Analyst and Emeka Chukwudebe, Case Analyst, dated September 7, 2010, First Antidumping Duty Administrative Review of Certain Steel Nails from the People's Republic of China ("PRC"): Partial Rescission of the First Antidumping Duty Administrative Review ("No Shipments Rescission Memo"). Consequently, as none of the above companies had shipments of subject merchandise to the United States during the POR, we are preliminarily rescinding the reviews with respect to the No Shipments Respondents.

Yitian Nanjing Hardware Co., Ltd. ("Yitian Nanjing") also reported that it had no shipments of subject merchandise during the POR. However, the Department has noted that CBP entry documentation indicates that Yitian Nanjing did in fact have POR shipments of subject merchandise to the United States. Therefore, we are not preliminarily rescinding this review with respect to Yitian Nanjing. Furthermore, as Yitian Nanjing submitted only a no-shipments response and did not submit a separate rate application or certificate certification, we consider it part of the PRC-wide entity for these preliminary results. *See* Memorandum to the File, from Emeka Chukwudebe, Case Analyst, dated September 7, 2010, First Antidumping Duty Administrative Review of Certain Steel Nails from the People's Republic of China ("PRC"): CBP Entry Documentation for Yitian Nanjing Hardware Co., Ltd. However, given that we have not yet released the CBP entry documentation to Yitian Nanjing, we will provide Yitian Nanjing with an opportunity to address the CBP entry documentation in a post-preliminary supplemental questionnaire.

Surrogate Country and Surrogate Value Data

On April 1, 2010, the Department sent interested parties a letter inviting comments on surrogate country selection and surrogate value data. No parties provided comments with respect to selection of a surrogate country. On June 15, 2010, the Department received surrogate value information from Petitioner, and on June 25, 2010, certain separate rate respondents filed rebuttal comments on Petitioner's surrogate value information. All the surrogate values placed on the record were obtained from sources in India. Between August 10, 2010, and August 24, 2010, parties submitted additional arguments and data regarding the selection and calculation of the surrogate values.

Scope of the Order

The merchandise covered by this order includes certain steel nails having a shaft length up to 12 inches. Certain steel nails include, but are not limited to, nails made of round wire and nails that are cut. Certain steel nails may be of one piece construction or constructed of two or more pieces. Certain steel nails may be produced from any type of steel, and have a variety of finishes, heads, shanks, point types, shaft lengths and shaft diameters. Finishes include, but are not limited to, coating in vinyl, zinc (galvanized, whether by electroplating or hot-dipping one or more times), phosphate cement, and paint. Head styles include, but are not limited to, flat, projection, cupped, oval, brad, headless, double, countersunk, and sinker. Shank styles include, but are not limited to, smooth, barbed, screw threaded, ring shank and fluted shank styles. Screw-threaded nails subject to this proceeding are driven using direct force and not by turning the fastener using a tool that engages with the head. Point styles include, but are not limited to, diamond, blunt, needle, chisel and no point. Finished nails may be sold in bulk, or they may be collated into strips or coils using materials such as plastic, paper, or wire. Certain steel nails subject to this proceeding are currently classified under the Harmonized Tariff Schedule of the United States ("HTSUS") subheadings 7317.00.55, 7317.00.65 and 7317.00.75.

Excluded from the scope of this proceeding are roofing nails of all lengths and diameter, whether collated or in bulk, and whether or not galvanized. Steel roofing nails are specifically enumerated and identified in ASTM Standard F 1667 (2005 revision) as Type I, Style 20 nails. Also excluded from the scope of this proceeding are corrugated nails. A corrugated nail is made of a small strip of corrugated steel with sharp points on one side. Also excluded from the scope of this proceeding are fasteners suitable for use in powder-actuated hand tools, not threaded and threaded, which are currently classified under HTSUS 7317.00.20 and 7317.00.30. Also excluded from the scope of this proceeding are thumb tacks, which are currently classified under HTSUS 7317.00.10.00. Also excluded from the scope of this proceeding are certain brads and finish nails that are equal to or less than 0.0720 inches in shank diameter, round or rectangular in cross section, between 0.375 inches and 2.5 inches in length, and that are collated with adhesive or polyester film tape backed with a heat seal adhesive. Also excluded from the scope of this proceeding are fasteners having a case hardness greater than or equal to 50 HRC, a carbon content greater than or equal to 0.5 percent, a round head, a secondary reduced-diameter raised head section, a centered shank, and a smooth symmetrical point, suitable for use in gas-actuated hand tools.

While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Non-Market Economy ("NME") Country Status

In every case conducted by the Department involving the PRC, the PRC has been treated as an NME country. In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. *See, e.g., Brake Rotors from the People's Republic of China: Final Results and Partial Rescission of the 2004/2005 Administrative Review and Notice of Rescission of 2004/2005 New Shipper Review,* 71 FR 66304 (November 14, 2006). None of the parties to this proceeding have contested such treatment. Accordingly, the Department calculated NV in accordance with section 773(c) of the Act, which applies to NME countries.

Surrogate Country

When the Department reviews imports from an NME country and the available information does not permit the Department to determine NV pursuant to section 773(a) of the Act, then pursuant to section 773(c)(4) of the Act, the Department bases NV on an NME producer's factors of production ("FOPs") to the extent possible in one or more market-economy countries that (1) are at a level of economic development comparable to that of the NME country, and (2) are significant producers of comparable merchandise. The Department has determined that India, Philippines, Indonesia, Ukraine, Thailand, and Peru are countries comparable to the PRC in terms of economic development. *See* April 1, 2010, Letter to All Interested Parties, regarding "Antidumping Duty Administrative Review of Certain Steel Nails from the People's Republic of China: Surrogate Country List," attaching February 16, 2010, Memorandum to Alex Villanueva, Program Manager, Office 9, AD/CVD Operations, from Kelly Parkhill, Acting Director, Office for Policy, regarding "Request for List of Surrogate Countries for an Administrative Review of the Antidumping Duty Order on Certain Steel Nails from the People's Republic of China" ("Surrogate Country List").

Based on publicly available information placed on the record, the Department determines India to be a reliable source for surrogate values because India is at a comparable level of economic development, pursuant to section 773(c)(4) of the Act, is a significant producer of comparable merchandise, and has publicly available and reliable data with which to value FOPs. Furthermore, all the surrogate values placed on the record by the parties were obtained from sources in India. Accordingly, the Department has selected India as the surrogate country for purposes of valuing the FOPs because it meets the Department's criteria for surrogate country selection.

Separate Rates

In proceedings involving NME countries, there is a rebuttable presumption that all companies within the country are subject to government control and thus should be assessed a single antidumping duty rate. *See, e.g., Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 73 FR 55039, 55040 (September 24, 2008) ("PET Film"). Exporters can demonstrate this independence through the absence of both *de jure* and *de facto* government control over export activities. *Id.* The Department analyzes each entity exporting the subject merchandise under a test arising from the *Notice of Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China,* 56 FR 20588, 20589 (May 6, 1991) ("Sparklers"), as further developed in *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China,* 59 FR 22585, 22586–87 (May 2, 1994) ("Silicon Carbide"). However, if the Department determines that a company is wholly foreign-owned or located in a market economy, then a separate rate analysis is not necessary to determine whether it is independent from government control. *See, e.g., PET Film.* In addition to the two mandatory respondents, Stanley and Shandong Minmetal, the Department received separate rate applications ("SRAs") or certifications ("SRCs") from 26 companies ("Separate-Rate Applicants").[7] Because Stanley is wholly foreign-owned, a separate-rate analysis is not necessary to determine whether it is independent from government control, so we preliminarily grant Stanley a separate rate. Additionally, because Shandong Minmetal and the Separate-Rate Applicants have all stated that they are either joint ventures between Chinese and foreign companies, or are wholly Chinese-owned companies, the Department must analyze whether these companies can demonstrate the absence of both de jure and de facto governmental control over export activities.

(1) Absence of De Jure Control

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) An absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) other formal measures by the government decentralizing control of companies. *See Sparklers,* 56 FR at 20589.

The evidence provided by Shandong Minmetal and the Separate-Rate Applicants supports a preliminary finding of *de jure* absence of governmental control based on the following: (1) An absence of restrictive stipulations associated with the individual exporter's business and export licenses; (2) applicable legislative enactments decentralizing control of the companies; and (3) other formal measures by the government decentralizing control of companies, *i.e.,* each company's SRA, SRC, and/or Section A response, dated October 22, 2010, through March 18, 2010, where each individually-reviewed or separate-rate respondent stated that it had no relationship with any level of the PRC government with respect to ownership, internal management, and business operations.

2. Absence of De Facto Control

Typically the Department considers four factors in evaluating whether each respondent is subject to *de facto* governmental control of its export functions: (1) Whether the export prices are set by or are subject to the approval of a governmental agency; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses. *See Silicon Carbide,* 59 FR at 22586–87; *see also Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From the People's Republic of China,* 60 FR 22544, 22545 (May 8, 1995). The Department has determined that an analysis of de facto control is critical in determining whether respondents are, in fact, subject to a degree of governmental control which would preclude the Department from assigning separate rates.

We determine that, for the individually-reviewed respondents and Separate-Rate Applicants, the evidence on the record supports a preliminary finding of *de facto* absence of

[7] Those companies include: (1) Aironware (Shanghai) Co., Ltd.; (2) Chiieh Yung Metal Ind. Corp.; (3) China Staple Enterprise (Tianjin) Co., Ltd.; (4) Dezhou Hualude Hardware Products Co., Ltd.; (5) Faithful Engineering Products Co., Ltd.; (6) Hengshui Mingyao Hardware & Mesh Products Co., Ltd.; (7) Huanghua Jinhai Hardware Products Co., Ltd.; (8) Huanghua Xionghua Hardware Products Co., Ltd.; (9) Jisco Corporation; (10) Koram Panagene Co., Ltd.; (11) Nanjing Yuechang Hardware Co., Ltd.; (12) Qidong Liang Chyuan Metal Industry Co., Ltd.; (13) Qingdao D & L Group Ltd.; (14) Rizhao Handuk Fasteners Co., Ltd.; (15) Romp (Tianjin) Hardware Co., Ltd.; (16) Shandong Dinglong Import & Export Co., Ltd.; (17) Shanghai Jade Shuttle Hardware Tools Co., Ltd.; (18) Shouguang Meiqing Nail Industry Co., Ltd.; (19) Tianjin Jinchi Metal Products Co., Ltd.; (20) Tianjin Jinghai County Hongli Industry & Business Co., Ltd.; (21) Tianjin Zhonglian Metals Ware Co., Ltd.; (22) Wintime Import & Export Corporation Limited of Zhongshan; (23) Wuxi Qiangye Metalwork Production Co., Ltd.; and (24) Zhejiang Gem-Chun Hardware Accessory Co., Ltd.

governmental control based on record statements and supporting documentation showing the following: (1) Each exporter sets its own export prices independent of the government and without the approval of a government authority; (2) each exporter retains the proceeds from its sales and makes independent decisions regarding disposition of profits or financing of losses; (3) each exporter has the authority to negotiate and sign contracts and other agreements; and (4) each exporter has autonomy from the government regarding the selection of management. *See, e.g.,* each company's SRA, SRC, and/or Section A response, dated October 22, 2010, through March 18, 2010.

The evidence placed on the record of this investigation by the individually-reviewed respondents and the Separate Rate Applicants demonstrates an absence of *de jure* and *de facto* government control with respect to each of the exporter's exports of the merchandise under investigation, in accordance with the criteria identified in *Sparklers* and *Silicon Carbide.* As a result, we have preliminarily determined that it is appropriate to grant the Separate Rate Applicants a margin based on the experience of the individually-reviewed respondents. In calculating this margin, for the purposes of this preliminary determination we are excluding any *de minimis* or zero rates or rates based on total adverse facts available ("AFA").

Calculation of Separate Rate

The statute and our regulations do not address directly how we should establish a rate to apply to imports from companies which we did not select for individual examination in accordance with section 777A(c)(2) of the Act in an administrative review. Generally, we have used section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, as guidance when we establish the rate for respondents not examined individually in an administrative review. *See Notice of Final Results and Partial Rescission Antidumping Duty Administrative Review: Certain Frozen Warmwater Shrimp from the People's Republic of China,* 75 FR 49460 (August 13, 2010); *Certain Pasta from Italy: Notice of Final Results of the Twelfth Administrative Review,* 75 FR 6352 (February 9, 2010), and the accompanying I&D Memo at Comment 2. Section 735(c)(5)(A) of the Act provides that "the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, * * *"

Because using the weighted-average margin based on the calculated net U.S. sales values for Stanley and Shandong Minmetal would allow these two respondents to deduce each other's business-proprietary information and thus cause an unwarranted release of such information, we cannot assign to the separate rate companies the weighted-average margin based on the calculated net U.S. sales values from these two respondents.

For these preliminary results, we determine that using the ranged total U.S. sales values Stanley and Shandong Minmetal reported in the public versions of their Section A responses (dated August 25, 2010) to our request for information concerning the quantity and value of their exports to the United States, is more appropriate than applying a simple average. These publicly available figures provide the basis on which we can calculate a margin which is the best proxy for the weighted-average margin based on the calculated net U.S. sales values of Stanley and Shandong Minmetal. We find that this approach is more consistent with the intent of section 735(c)(5)(A) of the Act and our use of section 735(c)(5)(A) of the Act as guidance when we establish the rate for respondents not examined individually in an administrative review.

Because the calculated net U.S. sales values for Stanley and Shandong Minmetal are business-proprietary figures, we find that 13.31 percent, which we calculated using the publicly available figures of U.S. sales values for these two firms, is the best reasonable proxy for the weighted-average margin based on the calculated net U.S. sales values of Stanley and Shandong Minmetal. *See* Memorandum to the File from Emeka Chukwudebe, to the File: Calculation of Separate Rate, dated September 7, 2010.

PRC-Wide Entity

As discussed above, in this administrative review we limited the selection of respondents using CBP import data. *See* First, Second and Third Respondent Selection Memos at Attachment I. In this case, we made available to the companies who were not selected, the separate rates application and certification, which were put on the Department's Web site. *See Initiation.* Because some parties for which a review was requested did not apply for separate rate status, the PRC-Wide entity is considered to be part of this review. The following companies did not apply for separate rates and will continue to be part of the PRC-wide entity:

(1) Beijing Daruixing Global Trading Co., Ltd.
(2) Beijing Tri-Metal Co., Ltd.
(3) Beijing Yonghongsheng Metal Products Co., Ltd.
(4) Cana (Tiajin) Hardware Ind., Co., Ltd.
(5) China Silk Trading & Logistics Co., Ltd.
(6) Chongqing Hybest Nailery Co., Ltd.
(7) Dingzhou Ruili Nail Production Co. Ltd.
(8) Dong'e Fuqiang Metal Products Co., Ltd.
(9) Haixing Hongda Hardware Production Co., Ltd.
(10) Haixing Linhai Hardware Products Factory
(11) Handuk Industrial Co., Ltd.
(12) Hilti (China) Limited
(13) Huadu Jin Chuan Manufactory Co., Ltd.
(14) Huanghua Huarong Hardware Products Co., Ltd.
(15) Huanghua Jinhai Metal Products Co., Ltd.
(16) Huanghua Shenghua Hardware Manufactory Factory
(17) Huanghua Xinda Nail Production Co., Ltd.
(18) Huanghua Yufutai Hardware Products Co., Ltd.
(19) Jinding Metal Products Ltd.
(20) Joto Enterprise Co., Ltd.
(21) Kyung Dong Corp.
(22) Maanshan Longer Nail Product Co., Ltd.
(23) Nanjing Dayu Pneumatic Gun Nails Co., Ltd.
(24) Qingdao Denarius Manufacture Co. Limited
(25) Qingdao International Fastening Systems Inc.
(26) Qingdao Sino-Sun International Trading Company Limited
(27) Qingyuan County Hongyi Hardware Products Factory
(28) Qingyun Hongyi Hardware Factory
(29) Rizhao Changxing Nail-Making Co., Ltd.
(30) Rizhao Qingdong Electric Appliance Co., Ltd.
(31) Shandong Minimetals Co., Ltd.
(32) Shandong Oriental Cherry Hardware Group, Ltd.
(33) Shanghai Curvet Hardware Products Co., Ltd.
(34) Shanghai Nanhui Jinjun Hardware Factory
(35) Shanghai Tengyu Hardware Tools Co., Ltd.
(36) Sinochem Tianjin Imp & Exp Shenzhen Corp
(37) Tianjin Baisheng Metal Products Co., Ltd.
(38) Tianjin Bosai Hardware Tools Co., Ltd.

(39) Tianjin City Dagang Area Jinding Metal Products Factory
(40) Tianjin City Daman Port Area Jinding Metal Products Factory
(41) Tianjin City Jinchi Metal Products Co., Ltd.
(42) Tianjin Dagang Dongfu Metallic Products Co., Ltd.
(43) Tianjin Dagang Hewang Nail Factory
(44) Tianjin Dagang Hewang Nails Manufacture Plant.
(45) Tianjin Dagang Huasheng Nailery Co., Ltd.
(46) Tianjin Dagang Jingang Nail Factory
(47) Tianjin Dagang Jingang Nails Manufacture Plant.
(48) Tianjin Dagang Linda Metallic Products Co., Ltd.
(49) Tianjin Dagang Longhua Metal Products Plant.
(50) Tianjin Dagang Shenda Metal Products Co., Ltd.
(51) Tianjin Dagang Yate Nail Co., Ltd.
(52) Tianjin Foreign Trade (Group) Textile & Garment Co., Ltd.
(53) Tianjin Hewang Nail Making Factory
(54) Tianjin Huapeng Metal Company
(55) Tianjin Huachang Metal Products Co., Ltd.
(56) Tianjin Huasheng Nails Production Co., Ltd.
(57) Tianjin Jieli Hengyuan Metallic Products Co., Ltd.
(58) Tianjin Jietong Hardware Products Co., Ltd.
(60) Tianjin Jin Gang Metal Products Co., Ltd.
(61) Tianjin Jishili Hardware Co., Ltd.
(62) Tianjin JLHY Metal Products Co., Ltd.
(63) Tianjin Kunxin Hardware Co., Ltd.
(64) Tianjin Kunxin Metal Products Co., Ltd.
(65) Tianjin Linda Metal Company
(66) Tianjin Qichuan Metal Products Co., Ltd.
(67) Tianjin Ruiji Metal Products Co., Ltd.
(68) Tianjin Shishun Metal Product Co., Ltd.
(69) Tianjin Shishun Metallic Products Co., Ltd.
(70) Tianjin Xiantong Fucheng Gun Nail Manufacture Co., Ltd.
(71) Tianjin Xinyuansheng Metal Products Co., Ltd.
(72) Tianjin Yihao Metallic Products Co., Ltd.
(73) Tianjin Yongchang Metal Product Co., Ltd.
(74) Tianjin Yongxu Metal Products Co., Ltd.
(75) Tianjin Yongyi Standard Parts Production Co., Ltd.
(76) Unicatch Industrial Co., Ltd.
(77) Wuqiao County Huifeng Hardware Products Factory
(78) Wuqiao County Xinchuang Hardware Products Factory
(79) Wuqiao Huifeng Hardware Production Co., Ltd.
(80) Wuxi Baolin Nail-Making Machinery Co., Ltd.
(81) Zhangjiagang Longxiang Packing Materials Co., Ltd.
(82) Zhongshan Junlong Nail Manufactures Co., Ltd.

Date of Sale

The date of sale is generally the date on which the parties agree upon all substantive terms of the sale, which normally includes the price, quantity, delivery terms and payment terms. *See Carbon and Alloy Steel Wire Rod from Trinidad and Tobago: Final Results of Antidumping Duty Administrative Review,* 72 FR 62824 (November 7, 2007) and accompanying Issues and Decision Memorandum at Comment 1; *see also Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon Quality Steel Products from Turkey,* 65 FR 15123 (March 21, 2000) and accompanying Issues and Decision Memorandum at Comment 2.

19 CFR 351.401(i) states that, "{i}n identifying the date of sale of the merchandise under consideration or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer's records kept in the normal course of business. The Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale." *See* 19 CFR 351.401(i); *see also Allied Tube & Conduit Corp.* v. *United States,* 132 F. Supp. 2d 1087, 1090–1092 (CIT 2001) ("Allied Tube"). However, as noted by the Court of International Trade ("CIT") in *Allied Tube,* a party seeking to establish a date of sale other than invoice date bears the burden of establishing that " 'a different date better reflects the date on which the exporter or producer establishes the material terms of sale.' " *See Allied Tube,* 132 F. Supp. 2d at 1090 (quoting 19 CFR 351.401(i)).

Shandong Minmetal reported that its date of sale was determined by the invoice issued by it to the unaffiliated United States customer. In this case, as the Department found no evidence contrary to Shandong Minmetal's claims that invoice date was the appropriate date of sale upon which all substantive terms of sale were agreed upon, the Department used invoice date as the date of sale for these preliminary results. *See, e.g.,* Shandong Minmetal's August 9, 2010 submission at 1.

Stanley reported that the earlier of invoice date or shipment date is the appropriate date of sale. *See, e.g.,* Stanley's December 18, 2009 submission at 23–24. As the Department found no evidence on the record contrary to Stanley's claims, for these preliminary results, the Department used the invoice date as the date of sale. For those sales where shipment date preceded invoice date, the Department used the shipment date as the date of sale.

Fair Value Comparison

In accordance with section 751(a)(2)(A) of the Act, to determine whether sales of nails to the United States by Stanley or Shandong Minmetal were made at less than normal value, we compared the export price ("EP") or constructed export price ("CEP"), as appropriate, to NV, as described in the "U.S. Price," and "Normal Value" sections of this notice.

U.S. Price

A. EP

For Shandong Minmetal, in accordance with section 772(a) of the Act, we based the U.S. price for certain sales on EP because the first sale to an unaffiliated purchaser in the United States was made prior to importation, and the use of CEP was not otherwise warranted. In accordance with section 772(c) of the Act, we calculated EP by deducting the applicable movement expenses and adjustments from the gross unit price. We based these movement expenses on surrogate values where a PRC company provided the service and was paid in Renminbi ("RMB") (*see* "Factors of Production" section below for further discussion). For details regarding our EP calculations, *see* Memorandum to the File, through Alex Villanueva, Program Manager, Office 9, from Emeka Chukwudebe, Analyst, "First Antidumping Duty Administrative of Certain Steel Nails from the People's Republic of China: Shandong Minmetal Co., Ltd.," dated concurrently with this notice ("Shandong Minmetal Prelim Analysis Memo").

B. CEP

In accordance with section 772(b) of the Act, we based the U.S. price for Stanley's sales on CEP because the first sale to an unaffiliated customer was made by Stanley's U.S. affiliate. In accordance with section 772(c)(2)(A) of the Act, we calculated CEP by deducting the applicable expenses from the gross unit price charged to the first

unaffiliated customer in the United States. Further, in accordance with section 772(d)(1) of the Act and 19 CFR 351.402(b), where appropriate, we deducted from the starting price the applicable selling expenses associated with economic activities occurring in the United States. In addition, pursuant to section 772(d)(3) of the Act, we made an adjustment to the starting price for CEP profit. We based movement expenses on either surrogate values or actual expenses, where appropriate. For details regarding our CEP calculations, and for a complete discussion of the calculation of the U.S. price for Stanley, *see* Memorandum to the File, through Alex Villanueva, Program Manager, Office 9, from Matthew Renkey, Senior Analyst, "First Antidumping Duty Administrative of Certain Steel Nails from the People's Republic of China: Stanley," dated concurrently with this notice ("Stanley Prelim Analysis Memo").

Normal Value

Section 773(c)(1) of the Act provides that the Department shall determine NV using a FOP methodology if the merchandise is exported from an NME and the information does not permit the calculation of NV using home-market prices, third-country prices, or constructed value under section 773(a) of the Act. The Department bases NV on FOPs because the presence of government controls on various aspects of NMEs renders price comparisons and the calculation of production costs invalid under the Department's normal methodologies. *See, e.g., Preliminary Determination of Sales at Less Than Fair Value, Affirmative Critical Circumstances, In Part, and Postponement of Final Determination: Certain Lined Paper Products from the People's Republic of China,* 71 FR 19695, 19703 (April 17, 2006) ("CLPP") unchanged in *Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China,* 71 FR 53079 (September 8, 2006).

Factor Valuation Methodology

In accordance with section 773(c) of the Act, we calculated NV based on FOP data reported by the respondents. To calculate NV, we multiplied the reported per-unit factor-consumption rates by publicly available surrogate values. In selecting surrogate values, the Department is tasked with using the best available information on the record. *See* section 773(c) of the Act. To satisfy this statutory requirement, we compared the quality, specificity, and contemporaneity of the potential surrogate value data. *See, e.g., Fresh Garlic From the People's Republic of China: Final Results of Antidumping Duty New Shipper Review,* 67 FR 72139 (December 4, 2002) and accompanying Issues and Decision Memorandum at Comment 6; and *Final Results of First New Shipper Review and First Antidumping Duty Administrative Review: Certain Preserved Mushrooms From the People's Republic of China,* 66 FR 31204 (June 11, 2001) and accompanying Issues and Decision Memorandum at Comment 5.

The Department's practice is to select, to the extent practicable, surrogate values which are: publicly available; representative of non-export, broad market average values; contemporaneous with the POI; product-specific; and exclusive of taxes and import duties. *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam,* 69 FR 42672, 42682 (July 16, 2004), unchanged in *Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam,* 69 FR 71005 (December 8, 2004). As appropriate, we adjusted input prices by including freight costs to make them delivered prices. Specifically, we added to the surrogate values derived from Indian Import Statistics a surrogate freight cost using the shorter of the reported distance from the domestic supplier to the factory or the distance from the nearest seaport to the factory where appropriate. This adjustment is in accordance with the Court of Appeals for the Federal Circuit's decision in *Sigma Corp.* v. *United States,* 117 F.3d 1401, 1407–08 (Fed. Cir. 1997). For a detailed description of all surrogate values selected in this preliminary determination, *see* Memorandum to the File through Alex Villanueva, Program Manager, Office 9, from Tim Lord, Analyst, "First Antidumping Duty Administrative Review of Certain Steel Nails from the People's Republic of China: Surrogate Values for the Preliminary Results," dated concurrently with this notice ("Surrogate Values Memo").

For these preliminary results, we concluded that data from Indian Import Statistics and other publicly available Indian sources constitute the best available information on the record for the surrogate values for respondents' raw materials, packing, by-products, energy, and the surrogate financial ratios. The record shows that data in the Indian Import Statistics, as well as those from the other publicly available Indian sources, are contemporaneous with the POI, product-specific, tax-exclusive, and represent a broad market average. *See* Surrogate Values Memo. In those instances where we could not obtain publicly available information contemporaneous with the POI, consistent with our practice, we adjusted the surrogate values using, where appropriate, the Indian Wholesale Price Index ("WPI") as published in the *International Financial Statistics* of the International Monetary Fund. *See, e.g., Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty New Shipper Reviews,* 69 FR 46498, 46500 (August 3, 2004).

As a consequence of the CAFC's ruling in *Dorbest Limited et. al.* v. *United States,* 2009–1257, –1266, CAFC (May 14, 2010), the Department is no longer relying on the regression-based wage rate described in 19 CFR 351.408(c)(3). The Department is continuing to evaluate options for determining labor values in light of the recent CAFC decision. For these preliminary results, we have calculated an hourly wage rate to use in valuing respondents' reported labor input by averaging earnings and/or wages in countries that are economically comparable to the PRC and that are significant producers of comparable merchandise. To calculate the hourly wage rate we used the International Labor Organization ("ILO") wage rate data. Specifically, we averaged the ILO wage rate data from the following countries found to be economically comparable to the PRC: Albania, Ecuador, Egypt Arab Rep., El Salvador, Fiji, Guatemala, Guyana, Honduras, India, Indonesia, Jordan, Nicaragua, Paraguay, Peru, Philippines, Sri Lanka, Thailand, and Ukraine. For a further explanation of the Department's calculation of the surrogate value for labor, *see* the Surrogate Values Memo.

In accordance with the *OTCA 1988* legislative history, the Department continues to apply its long-standing practice of disregarding surrogate values if it has a reason to believe or suspect the source data may be subsidized.[8] In this regard, the Department has previously found that it is appropriate to disregard such prices from *e.g.,*

[8] Omnibus Trade and Competitiveness Act of 1988, Conf. Report to Accompany H.R. 3, H.R. Rep. No. 576, 100th Cong., 2nd Sess. (1988) ("OTCA 1988") at 590.

Indonesia, South Korea and Thailand, because we have determined that these countries maintain broadly available, non-industry specific export subsidies.[9] Based on the existence of these subsidy programs that were generally available to all exporters and producers in these countries at the time of the POI, the Department finds that it is reasonable to infer that all exporters from Indonesia, South Korea and Thailand may have benefitted from these subsidies.

Additionally, we disregarded prices from NME countries. Finally, imports that were labeled as originating from an "unspecified" country were excluded from the average value, because the Department could not be certain that they were not from either an NME country or a country with general export subsidies.

Currency Conversion

Where necessary, the Department made currency conversions into U.S. dollars, in accordance with section 773A(a) of the Act, based on the exchange rates in effect on the dates of the U.S. sales, as certified by the Federal Reserve Bank.

Preliminary Results of Review

The Department preliminarily determines that the following weighted-average dumping margins exist:

CERTAIN STEEL NAILS FROM THE PEOPLE'S REPUBLIC OF CHINA

Manufacturer/exporter	Weighted average margin (percent)
(1) The Stanley Works (Langfang) Fastening Systems Co., Ltd.	6.48
(2) Shandong Minmetal Co., Ltd.	51.25
(3) Aironware (Shanghai) Co., Ltd.	13.31
(4) Chiieh Yung Metal Ind. Corp.	13.31
(5) China Staple Enterprise (Tianjin) Co., Ltd.	13.31
(6) Dezhou Hualude Hardware Products Co., Ltd.	13.31
(7) Faithful Engineering Products Co., Ltd.	13.31
(8) Hengshui Mingyao Hardware & Mesh Products Co., Ltd.	13.31
(9) Huanghua Jinhai Hardware Products Co., Ltd.	13.31
(10) Huanghua Xionghua Hardware Products Co., Ltd.	13.31
(11) Jisco Corporation	13.31
(12) Koram Panagene Co., Ltd.	13.31
(13) Nanjing Yuechang Hardware Co., Ltd.	13.31
(14) Qidong Liang Chyuan Metal Industry Co., Ltd.	13.31
(15) Qingdao D & L Group Ltd.	13.31
(16) Rizhao Handuk Fasteners Co., Ltd.	13.31
(17) Romp (Tianjin) Hardware Co., Ltd.	13.31
(18) Shandong Dinglong Import & Export Co., Ltd.	13.31
(19) Shanghai Jade Shuttle Hardware Tools Co., Ltd.	13.31
(20) Shouguang Meiqing Nail Industry Co., Ltd.	13.31
(21) Tianjin Jinchi Metal Products Co., Ltd.	13.31
(22) Tianjin Jinghai County Hongli Industry & Business Co., Ltd.	13.31
(23) Tianjin Zhonglian Metals Ware Co., Ltd.	13.31
(24) Wintime Import & Export Corporation Limited of Zhongshan	13.31
(25) Wuxi Qiangye Metalwork Production Co., Ltd.	13.31
(26) Zhejiang Gem-Chun Hardware Accessory Co., Ltd.	13.31
PRC-Wide Rate	118.04

Disclosure and Public Hearing

The Department will disclose to parties the calculations performed in connection with these preliminary results within five days of the date of publication of this notice. *See* 19 CFR 351.224(b).

In accordance with 19 CFR 351.301(c)(3)(ii), for the final results of this administrative review, interested parties may submit publicly available information to value FOPs within 20 days after the date of publication of these preliminary results. Interested parties must provide the Department with supporting documentation for the publicly available information to value each FOP. Additionally, in accordance with 19 CFR 351.301(c)(1), for the final results of this administrative review, interested parties may submit factual information to rebut, clarify, or correct factual information submitted by an interested party less than ten days before, on, or after, the applicable deadline for submission of such factual information. However, the Department notes that 19 CFR 351.301(c)(1) permits new information only insofar as it rebuts, clarifies, or corrects information recently placed on the record. The Department generally cannot accept the submission of additional, previously absent-from-the-record alternative surrogate value information pursuant to 19 CFR 351.301(c)(1). *See Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Rescission, in Part,* 72 FR 58809 (October 17, 2007) and accompanying Issues and Decision Memorandum at Comment 2.

Interested parties may submit case briefs and/or written comments no later

[9] *See, e.g., Expedited Sunset Review of the Countervailing Duty Order on Carbazole Violet Pigment 23 from India,* 75 FR 13257 (March 19, 2010) and accompanying Issues and Decision Memorandum at pages 4–5; *Expedited Sunset Review of the Countervailing Duty Order on Certain Cut-to-Length Carbon Quality Steel Plate from Indonesia,* 70 FR 45692 (August 8, 2005) and accompanying Issues and Decision Memorandum at page 4; *See Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review,* 74 FR 2512 (January 15, 2009) and accompanying Issues and Decision Memorandum at pages 17, 19–20; *See Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Countervailing Duty Determination,* 66 FR 50410 (October 3, 2001) and accompanying Issues and Decision Memorandum at page 23.

than 30 days after the date of publication of these preliminary results of review. *See* 19 CFR 351.309(c). Rebuttal briefs and rebuttals to written comments, limited to issues raised in such briefs or comments may be filed no later than five days after the deadline for filing case briefs. *See* 19 CFR 351.309(d). The Department urges interested parties to provide an executive summary of each argument contained within the case briefs and rebuttal briefs.

The Department will issue the final results of this administrative review, which will include the results of its analysis of issues raised in any such comments, within 120 days of publication of these preliminary results, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon issuance of the final results, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review. The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review excluding any reported sales that entered during the gap period. In accordance with 19 CFR 351.212(b)(1), we calculated exporter/importer (or customer)-specific assessment rates for the merchandise subject to this review. Because we do not have entered values for all U.S. sales, we calculated an *ad valorem* assessment rate by aggregating the antidumping duties due for all U.S. sales to each importer (or customer) and dividing this amount by the total quantity sold to that importer (or customer). *See* 19 CFR 351.212(b)(1). To determine whether the duty assessment rates are *de minimis,* in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we calculated importer (or customer)-specific *ad valorem* ratios based on the estimated entered value. Where an importer (or customer)-specific *ad valorem* rate is zero or *de minimis,* we will instruct CBP to liquidate appropriate entries without regard to antidumping duties. *See* 19 CFR 351.106(c)(2).

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For the exporter listed above, the cash deposit rate will be established in the final results of this review (except, if the rate is zero or *de minimis, i.e.,* less than 0.5 percent, no cash deposit will be required for that company); (2) for all PRC exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC-wide rate of 118.04 percent; and (3) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporters that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) 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 Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

These preliminary results are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221(b)(4).

Dated: September 7, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–23002 Filed 9–14–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Federal Advisory Committee; Defense Acquisition University Board of Visitors

AGENCY: Office of the Assistant Secretary of Defense, Defense.

ACTION: Meeting notice.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces that the Defense Acquisition University Board of Visitors will meet on September 15, 2010, in Huntsville, AL.

DATES: The meeting will be held on September 15, 2010, from 9 a.m.–2 p.m.

ADDRESSES: The meeting will be held at 7115 Old Madison Pike, Huntsville, AL 35806.

FOR FURTHER INFORMATION CONTACT: Christen Goulding, Protocol Director, DAU, *Phone:* 703–805–5134, *Fax:* 703–805–5940, *E-mail: christen.goulding@dau.mil.*

Committee's Designated Federal Officer or Point of Contact: Ms. Kelley Berta, 703–805–5412.

SUPPLEMENTARY INFORMATION: Due to internal DoD difficulties, beyond the control of the Defense Acquisition University Board of Visitors or its Designated Federal Officer, the Government was unable to process the **Federal Register** notice for the September 15, 2010 meeting of the Defense Acquisition University Board of Visitors as required by 41 CFR 102–3.150(a). Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

Purpose of the Meeting

The purpose of this meeting is to report back to the BoV on continuing items of interest.

Agenda

9 a.m. Welcome and approval of minutes.

9:10 a.m. DAU South Region Highlights.

9:45 a.m. Services Acquisition Training.

10:30 a.m. Contingency Contracting Testimony.

11:15 a.m. Facilities Tour of DAU South Region Campus.

12:15 p.m. DAU Strategic Planning Discussion Open Forum.

Public's Accessibility to the Meeting

Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and the availability of space, this meeting is open to the public. However, because of space limitations, allocation of seating will be made on a first-come, first served basis. Persons desiring to attend the meeting should call Ms. Christen Goulding at 703–805–5134.

Dated: September 10, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–23005 Filed 9–14–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DOD–2010–OS–0122]

Privacy Act of 1974; System of Records

AGENCY: National Security Agency/Central Security Service, DoD.

ACTION: Notice to amend a system of records.

SUMMARY: The National Security Agency/Central Security Service is proposing to amend a system of records notice in its existing inventory of records systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: The changes will be effective on October 15, 2010, unless comments are received that would result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

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

* *Mail:* Federal Docket Management System Office, Room 3C843 Pentagon, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Anne Hill at (301) 688–6527.

SUPPLEMENTARY INFORMATION: The National Security Agency/Central Security Service systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the National Security Agency/Central Security Service, Freedom of Information Act and Privacy Act Office, 9800 Savage Road, Suite 6248, Ft. George G. Meade, MD 20755–6248.

The specific changes to the records system being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendments are not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: September 10, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

GNSA 24

SYSTEM NAME:

NSA/CSS Pre-Publication Review Records. (February 13, 2008; 73 FR 8297).

CHANGES:

* * * * *

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with "Individual's full name, home telephone number, address, employment history, and level of education (type of degree), case number, manuscripts and other writings submitted for pre-publication review, correspondence on pre-publication requests and appeals, and resumes."

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with "National Security Agency Act of 1959, Public Law 86–36 (50 U.S.C. 402 note, National Security Council); 50 U.S.C. 403–1, Responsibilities and Authority of the Director National Intelligence; DoD Directive 5230.09, Clearance of DoD Information for Public Release; E.O. 12333, as amended, United States Intelligence Activities; E.O. 13526, Classified National Security Information; and NSA/CSS Policy 1–30, Review of NSA/CSS Information for Public Dissemination."

* * * * *

RETRIEVABILITY:

Delete entry and replace with "Individual's name, title of the pre-publication document, and the case number assigned to the pre-publication review request."

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with "Deputy Associate Director for Policy and Records, National Security Agency/Central Security Service, 9800 Savage Road, Ft. George G. Meade, MD 20755–6000."

NOTIFICATION PROCEDURE:

Delete entry and replace with "Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the National Security Agency/Central Security Service, Freedom of Information Act/Privacy Act Office, 9800 Savage Road, Suite 6248, Ft. George G. Meade, MD 20755–6248.

Written inquiries should contain the individual's full name, address and telephone number."

RECORD ACCESS PROCEDURES:

Delete entry and replace with "Individuals seeking access to information about themselves contained in this system should address written inquiries to the National Security Agency/Central Security Service, Freedom of Information Act/Privacy Act Office, 9800 Savage Road, Suite 6248, Ft. George G. Meade, MD 20755–6248.

Written inquiries should contain the individual's full name, address and telephone number."

CONTESTING RECORD PROCEDURES:

Delete entry and replace with "The NSA/CSS rules for contesting contents and appealing initial determinations are published at 32 CFR part 322 or may be obtained by written request addressed to the National Security Agency/Central Security Service, Freedom of Information Act/Privacy Act Office, 9800 Savage Road, Suite 6248, Ft. George G. Meade, MD 20755–6248."

* * * * *

GNSA 24

SYSTEM NAME:

NSA/CSS Pre-Publication Review Records.

SYSTEM LOCATION:

National Security Agency/Central Security Service, Ft. George G. Meade, MD 20755–6000.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current and former NSA/CSS employee, advisor, military assignee, or Agency contractor; other authors obligated to submit writings or oral presentations for pre-publication review; and individuals involved in pre-publication review.

CATEGORIES OF RECORDS IN THE SYSTEM:

Individual's full name, home telephone number, address, employment history, and level of education (type of degree), case number, manuscripts and other writings submitted for pre-publication review, correspondence on pre-publication requests and appeals, and resumes.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

National Security Agency Act of 1959, Public Law 86–36 (50 U.S.C. 402 note, National Security Council); 50 U.S.C. 403–1, Responsibilities and Authority of the Director National Intelligence; DoD

Directive 5230.09, Clearance of DoD Information for Public Release; E.O. 12333, as amended, United States Intelligence Activities; E.O. 13526, Classified National Security Information; and NSA/CSS Policy 1–30, Review of NSA/CSS Information for Public Dissemination.

PURPOSE(S):

To maintain records relating to the pre-publication review of official NSA/CSS information intended for public dissemination.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To Federal agencies involved in a classification review of information containing National Security Agency as well as other agency and/or government information.

The DoD 'Blanket Routine Uses' published at the beginning of the NSA/CSS's compilation of record systems also apply to this record system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders and electronic media.

RETRIEVABILITY:

Individual's name, title of the pre-publication document, and the case number assigned to the pre-publication review request.

SAFEGUARDS:

Secured by a series of guarded pedestrian gates and checkpoints. Access to facilities is limited to security-cleared personnel and escorted visitors only. With the facilities themselves, access to paper and computer printouts are controlled by limited-access facilities and lockable containers. Access to electronic means is controlled by computer password protection.

RETENTION AND DISPOSAL:

Records are permanently retained and will be transferred to the NSA/CSS Archives when no longer needed for operations.

SYSTEM MANAGER(S) AND ADDRESS:

Deputy Associate Director for Policy and Records, National Security Agency/Central Security Service, 9800 Savage Road, Ft. George G. Meade, MD 20755–6000.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the National Security Agency/Central Security Service, Freedom of Information Act/Privacy Act Office, 9800 Savage Road, Suite 6248, Ft. George G. Meade, MD 20755–6248.

Written inquiries should contain the individual's full name, address and telephone number.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the National Security Agency/Central Security Service, Freedom of Information Act/Privacy Act Office, 9800 Savage Road, Suite 6248, Ft. George G. Meade, MD 20755–6248.

Written inquiries should contain the individual's full name, address and telephone number.

CONTESTING RECORD PROCEDURES:

The NSA/CSS rules for contesting contents and appealing initial determinations are published at 32 CFR part 322 or may be obtained by written request addressed to the National Security Agency/Central Security Service, Freedom of Information Act/Privacy Act Office, 9800 Savage Road, Suite 6248, Ft. George G. Meade, MD 20755–6248.

RECORD SOURCE CATEGORIES:

Individuals and other NSA personnel involved in the publications review process.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2010–22969 Filed 9–14–10; 8:45 am]

BILLING CODE 5001–06–P

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

Sunshine Act Notice

AGENCY: Defense Nuclear Facilities Safety Board.

ACTION: Notification of Change in Meeting Location.

SUMMARY: Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given of the Defense Nuclear Facilities Safety Board's public hearing and meeting.

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 75 FR 43495 (July 26, 2010).

PREVIOUSLY ANNOUNCED MEETING LOCATION: Room 133, Richland Federal Building, 825 Jadwin Avenue, Richland, Washington 99352.

CHANGES IN THE MEETING: The public meeting will now be held at Three Rivers Convention Center, 7016 W. Grandridge Boulevard, Kennewick, Washington 99336, (509) 737–3700.

TIME AND DATE OF MEETING: Session I: 9 a.m.–1 p.m., October 7, 2010; Session II: 5 p.m.–9 p.m., October 7, 2010; Session III: 8 a.m.–12 p.m., October 8, 2010.

CONTACT PERSON FOR MORE INFORMATION: Brian Grosner, General Manager, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901, (800) 788–4016. This is a toll-free number.

Dated: September 13, 2010.

Peter S. Winokur,

Chairman.

[FR Doc. 2010–23158 Filed 9–13–10; 4:15 pm]

BILLING CODE 3670–01–P

DEPARTMENT OF DEFENSE

Department of the Army

Corps of Engineers

Intent To Prepare a Draft Programmatic Environmental Impact Statement (PEIS) for the Development of a Multi-Decadal Shoreline Protection Plan, Known as the Bogue Banks Beach Master Nourishment Plan (Master Plan), for the 25-Mile Ocean Shoreline of Bogue Banks in Carteret County, NC

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent.

SUMMARY: The U.S. Army Corps of Engineers (USACE), Wilmington District, Wilmington Regulatory Field Office has received a request for Department of the Army authorization, pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbor Act, from Carteret County to develop and implement, under an inter-local agreement between the towns on Bogue Banks barrier island, a multi-decadal Master Plan that would provide ocean shoreline protection to approximately 25 miles of beach over a minimum period of 30 years.

DATES: A public scoping meeting for the Draft PEIS will be held at Crystal Coast Civic Center near the Carteret County Community College, located at 3505 Arendell Street in Morehead City, on September 30, 2010 at 6 p.m. Written comments will be received until October 15, 2010.

ADDRESSES: Copies of comments and questions regarding scoping of the Draft PEIS may be submitted to: U.S. Army Corps of Engineers, Wilmington District, Regulatory Division. *Attn:* File Number 2009–0293, 69 Darlington Avenue, Wilmington, NC 28403.

FOR FURTHER INFORMATION CONTACT: Questions about the proposed action and Draft PEIS can be directed to Mr. Mickey Sugg, Project Manager, Wilmington Regulatory Field Office, *telephone:* (910) 251–4811.

SUPPLEMENTARY INFORMATION: 1. Project Description. As a result of significant hurricane activity in the 1990's, the County and many of the municipalities on Bogue Banks have implemented several interim beach nourishment activities in order to curb ocean shoreline erosion and to help improve protection against future storms. For the past 10 years, the County has been in a cost share agreement with the USACE, currently in the Reconnaissance Study phase, to conduct a federal 50-year Shore Protection Project for Bogue Banks to help sustain the island long term. However, with the uncertainties of the federal long-term plan, the County and the beach municipalities have determined the need to reevaluate their long-term beach nourishment solutions for Bogue Banks. The development of the Master Plan will involve review all of the previous nourishment efforts and current plans and formulation of a multi-decadal all inclusive nourishment plan for the entire barrier island of Bogue Banks.

The Master Plan and PEIS will include a comprehensive review of present-day beach conditions, a review of Carteret County's and the USACE's previous beach nourishment/beneficial use projects, and the development of a multi-decadal plan based on volumetric/beach elevation thresholds for Fort Macon/Atlantic Beach, Pine Knoll Shores, Indian Beach/Salter Path, and Emerald Isle. The Master Plan will address all anticipated beach nourishment/maintenance activities including but not limited to; Atlantic Intracoastal Waterway (AIWW) dredging with concurrent beach disposal, beneficial use dredging projects/ opportunities, FEMA reimbursement projects, and other potential sand placement or beach maintenance activities (beach bulldozing, *etc.*). Potential sand source locations to be evaluated in the Draft PEIS could include the Ocean Dredged Material Disposal Site (ODMDS) located offshore of Beaufort Inlet, the USACE nearshore placement area, Bogue Inlet, AIWW reaches, preliminary USACE offshore borrow locations, previously permitted Carteret County offshore borrow locations, and upland sources. The Master Plan will: (a) Establish acceptable ranges of in-situ beach volumes and elevations, (b) establish beach volumetric and elevation triggers for nourishment events, (c) continue a basis for FEMA reimbursement qualifications, (d) conform to the North Carolina Division of Coastal Management's (NCDCM) rules for static vegetation line exceptions, and (e) establish a programmatic approach facilitating the authorization and scheduling of Bogue Banks' nourishment/maintenance events.

Natural resource studies and investigations which may be conducted in support of the plan formulation include: (1) Identification and biological characterization of estuarine habitat types (salt marsh, shellfish, submerged aquatic vegetation) in a defined project area using aerial mapping and/or groundtruth investigations; (2) pre-project monitoring of, and/or use of existing data, on threatened and endangered species and their associated habitats as determined through coordination with project stakeholders; (3) development and/or implementation of project monitoring and mitigation plans based on the project impact assessment, and 4) the development of a cumulative impact assessment.

2. Issues. There are several potential environmental issues that will be addressed in the PEIS. Additional issues may be identified during the scoping process. Issues initially identified as potentially significant include:

a. Potential impacts to marine biological resources (benthic organisms, passageway for fish and other marine life) and Essential Fish Habitat.

b. Potential impacts to threatened and endangered marine mammals, birds, fish, and plants.

c. Potential impacts associated with using inlets as a sand source.

d. Potential impacts to public lands, such as adjacent State Parks (Hammocks Beach and Forth Macon) and Federal lands (Cape Lookout National Seashore).

e. Potential impacts to Navigation, commercial and recreational.

f. Potential impacts to the long-term management.

g. Potential effects on regional sand sources and how it relates to sand management practices.

h. Potential effects of shoreline protection.

i. Potential impacts on public health and safety.

k. Potential impacts to recreational and commercial fishing.

l. The compatibility of the material for nourishment.

m. Potential impacts to cultural resources.

n. Cumulative impacts of past, present, and foreseeable future dredging and nourishment activities.

3. Alternatives. Several alternatives and sand sources are being considered for the development of the management plan. These alternatives will be further formulated and developed during the scoping process and an appropriate range of alternatives, including the no federal action alternative, will be considered in the PEIS.

4. Scoping Process. A public scoping meeting (*see* **DATES**) will be held to receive public comment and assess public concerns regarding the appropriate scope and preparation of the Draft PEIS. Participation in the public meeting by federal, state, and local agencies and other interested organizations and persons is encouraged.

The USACE will consult with the U.S. Fish and Wildlife Service under the Endangered Species Act and the Fish and Wildlife Coordination Act; with the National Marine Fisheries Service under the Magnuson-Stevens Fishery Conservation and Management Act and the Endangered Species Act; and with the North Carolina State Historic Preservation Office under the National Historic Preservation Act. The USACE will also coordinate with the Bureau of Ocean Energy Management, Regulation and Enforcement, formerly known as Minerals Management Service (MMS), to ensure the plan complies with the Outer Continental Shelf Lands Act (OCSLA). Additionally, the USACE will coordinate the PEIS with the North Carolina Division of Water Quality (NCDWQ) to assess the potential water quality impacts pursuant to Section 401 of the Clean Water Act, and with the North Carolina Division of Coastal Management (NCDCM) to determine the projects consistency with the Coastal Zone Management Act. The USACE will closely work with NCDCM and NCDWQ in the development of the PEIS to ensure the process complies with all State Environmental Policy Act (SEPA) requirements. It is the intention of both the USACE and the State of North Carolina to consolidate the NEPA and SEPA processes thereby eliminating duplication.

6. Availability of the Draft PEIS. The Draft PEIS is expected to be published and circulated by August 2011. A public hearing may be held after the publication of the Draft PEIS.

Dated: September 3, 2010.

S. Kenneth Jolly,

Chief, Regulatory Division.

[FR Doc. 2010–22708 Filed 9–14–10; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC10–725E–001]

Commission Information Collection Activities (FERC–725E); Comment Request; Submitted for OMB Review

September 3, 2010.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice.

SUMMARY: In compliance with the requirements of section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507, the Federal Energy Regulatory Commission (Commission or FERC) has submitted the information collection described below to the Office of Management and Budget (OMB) for review of the information collection requirements. Any interested person may file comments directly with OMB and should address a copy of those comments to the Commission as explained below. The Commission issued a Notice in the **Federal Register** (75 FR 35002, 6/21/2010) requesting public comments. FERC received no comments on the FERC–725E and has made this notation in its submission to OMB.

DATES: Comments on the collection of information are due by October 15, 2010.

ADDRESSES: Address comments on the collection of information to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Federal Energy Regulatory Commission Desk Officer. Comments to Created by OMB should be filed electronically, c/o *oira__submission@omb.eop.gov* and include the OMB Control Number 1902–0246 for reference. The Desk Officer may be reached by telephone at 202–395–4638.

A copy of the comments should also be sent to the Federal Energy Regulatory Commission and should refer to Docket No. IC10–725E–001. Comments may be filed either electronically or in paper format. Those persons filing electronically do not need to make a paper filing. Documents filed electronically via the Internet must be prepared in an acceptable filing format and in compliance with the Federal Energy Regulatory Commission submission guidelines. Complete filing instructions and acceptable filing formats are available at *http://www.ferc.gov/help/submission-guide/electronic-media.asp.* To file the document electronically, access the Commission's Web site and click on Documents & Filing, E–Filing (*http://www.ferc.gov/docs-filing/efiling.asp*), and then follow the instructions for each screen. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgement to the sender's e-mail address upon receipt of comments.

For paper filings, the comments should be submitted to the Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426, and should refer to Docket No. IC10–725E–001.

Users interested in receiving automatic notification of activity in FERC Docket Number IC10–725E may do so through eSubscription at *http://www.ferc.gov/docs-filing/esubscription.asp.* All comments may be viewed, printed or downloaded remotely via the Internet through FERC's homepage using the "eLibrary" link. For user assistance, contact *ferconlinesupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

FOR FURTHER INFORMATION: Ellen Brown may be reached by e-mail at *DataClearance@FERC.gov,* by telephone at (202) 502–8663, and by fax at (202) 273–0873.

SUPPLEMENTARY INFORMATION:

Action: The Commission is requesting a three-year extension of the information collected by the FERC–725E (OMB Control No. 1902–0246). The information is required to implement the statutory provisions of section 215 of the Federal Power Act (FPA) (16 U.S.C. 824o). Section 215 of the FPA buttresses the Commission's efforts to strengthen the reliability of the interstate grid through the granting of authority to provide for a system of mandatory Reliability Standards developed by the Electric Reliability Organization (ERO). Reliability Standards that the ERO proposes to the Commission may include Reliability Standards that are proposed to the ERO by a Regional Entity.[1] A Regional Entity is an entity that has been approved by the Commission to enforce Reliability Standards under delegated authority from the ERO.[2] On June 8, 2008 in an adjudicatory order, the Commission approved eight regional Reliability Standards submitted by the ERO as proposed by the Western Electricity Coordinating Council (WECC).[3]

WECC is responsible for coordinating and promoting electric system reliability. In addition to promoting a reliable electric power system in the Western Interconnection, WECC supports efficient competitive power markets, ensures open and non-discriminatory transmission access among members, and provides a forum for resolving transmission access disputes plus the coordination of operating and planning activities of its members. WECC and the eight other regional reliability councils were formed due to a national concern regarding the reliability of the interconnected bulk power systems, the ability to operate these systems without widespread failures in electric service and the need to foster the preservation of reliability through a formal organization. The eight regional Reliability Standards are translations of existing reliability criteria and are now binding on the applicable subset of users, owners and operators of the Bulk Power System in the United States portion of the Western Interconnection. The Commission's reporting requirements are found in 18 CFR Part 40.

The eight Reliability Standards do not require responsible entities to file information with the Commission. However, the standards do require responsible entities to file periodic reports with WECC and to develop and maintain certain information for a specified period of time, subject to inspection by WECC. Specifically the eight Reliability Standards require the following:

WECC–BAL–STD–002–0—balancing authorities and reserve sharing groups are to submit to WECC quarterly reports on operating reserves as well as reports after any instance of non-compliance.

WECC–IRO–STD–006–0—transmission operators, balancing authorities and loadserving entities are to document and report to WECC actions taken in response to direction to mitigate unscheduled flow. The standard also requires transmission operators to document required actions that are and are not taken by responsible entities.

WECC- PRC–STD–001–1—certain transmission operators are to submit to WECC annual certifications of protective equipment.

[1] 16 U.S.C. 824o(e)(4).

[2] 16 U.S.C. 824o(a)(7) and (e)(4).

[3] 72 FR 33462, June 18, 2007.

WECC–PRC–STD–003–1—certain transmission operators are to report to WECC any misoperation of relays and remedial action schemes.

WECC–PRCSTD–005–1—certain transmission operators are to maintain, in stated form, maintenance and inspection records pertaining to their transmission facilities. The standard also requires operators to certify to WECC that the operator is maintaining the required records.

WECCTOP–STD–007–0—certain transmission operators are to submit to WECC quarterly reports on transfer capability data and compliance as well as reports after an instance of non-compliance.

WECC–VAR–STD–002a–1 and WECC–VAR–STD–002b–1—certain generators are to submit quarterly reports to WECC on automatic voltage control and power system stabilizers. All of the foregoing regional Reliability Standards require the reporting entity to retain relevant data in electronic form for one year or for a longer period if the data is relevant to a dispute or potential penalty, except that WECC–PRC–STD–005–1 requires retention of maintenance and inspection records for five years and retention of other data for four years.

The Commission uses the data to participate in North American Electric Reliability Council's (NERC's) Reliability readiness reviews of balancing authorities, transmission operators and reliability coordinators in North America to determine their readiness to maintain safe and reliable operations. In addition, FERC's Office of Electric Reliability uses the data to engage in studies and other activities to assess the longer-term and strategic needs and issues related to power grid reliability.

Burden Statement: The estimated annual burden follows.

FERC data collection	Number of respondents (1)	Average No. of reponses per respondent (2)	Average burden hours per response (3)	Total burden hours (1)×(2)×(3)
FERC–725E Reporting:				
Balancing Authorities	34	1	20	680
Generator Operators	206	1	10	2,060
Load-Serving Entities	149	1	10	1,490
Transmission Operators/Owners	83	[1]	40	3,320
Subtotal				7,550
Record-keeping	Balancing Authorities			68
	Generator Operators			206
	Load-Serving Entities			149
	Transmission Owners/Operators			332
Totals				755

[1] 1–7 each (total of 83).

Total Annual hours for the Information Collection: 7,550 reporting hours + 755 recordkeeping = 8,305 hours.

The total estimated annual cost burden to respondents is $ 936,200.[4]

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

The estimate of cost for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) Whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden of the proposed collections of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.* permitting electronic submission of responses.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–22936 Filed 9–14–10; 8:45 am]

BILLING CODE 6717–01–P

[4] Reporting = 7,550 hours @ $120/hour = $906,000, Recordkeeping = 755 hours @ $40/hour = $30,200. Total Costs = Reporting ($906,000) + Recordkeeping ($30,200) = $936,200

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP10–493–000; PF10–5–000]

Empire Pipeline, Inc.; Notice of Application

September 3, 2010.

Take notice that on August 26, 2010, Empire Pipeline, Inc. (Empire), 6363 Main Street, Williamsville, New York 14221, filed an application in Docket No. CP10–493–000 pursuant to sections 7(b) and 7(c) of the Natural Gas Act (NGA) and Part 157 of the Commission's Regulations, for a certificate of public convenience and necessity to construct and operate its Tioga County Extension Project. Specifically, the Tioga County Extension Project consists of (1) approximately 16 miles of 24-inch diameter natural gas pipeline extending Empire's existing system from its interconnection with the facilities of Millennium Pipeline Company, L.P. in Corning, New York to new producer interconnections in Tioga County, Pennsylvania; (2) a new interconnection with Tennessee Gas Pipeline Company in Hopewell, New York; (3) replacement of approximately 1.3 miles of Empire's existing pipeline in Victor, New York, and (4) modifications to its Oakfield Compressor Station to permit bi-directional flow on its system.[1] Empire states that the project will result in additional firm capacity of 350,000 Dth per day. The estimated cost of the Tioga County Extension Project is approximately $45.9 million. A more detailed description of the project is available in the application which is on file with the Commission and open for public inspection.

This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "e-Library" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676, or for TTY, (202) 502–8659. Any questions regarding this application should be directed to David W. Reitz, counsel for Empire, 6363 Main Street, Williamsville, New York 14221, (716) 857–7949, or *reitzd@natfuel.com.*

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify Federal and State agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all Federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

On January 28, 2010, the Commission staff granted Empire's request to utilize the Pre-Filing Process and assigned Docket No. PF10–5 to staff activities involved with the Tioga County Extension Project. Now, as of the filing of this application on August 26, 2010, the NEPA Pre-Filing Process for this project has ended. From this time forward, this proceeding will be conducted in Docket No. CP10–493, as noted in the caption of this notice.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

Protests and interventions may be filed electronically via the Internet in lieu of paper; *see,* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Comment Date: September 24, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–22935 Filed 9–14–10; 8:45 am]

BILLING CODE 6717–01–P

[1] In Docket No. CP10–136, Empire requested authorization under Section 3 of the NGA to allow the exportation of gas using its existing border facilities.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR10–91–000; Docket No. PR10–92–000; Docket No. PR10–93–000; Docket No. PR10–94–000; Docket No. PR10–95–000; Docket No. PR10–97–000; Docket No. PR10–99–000; Docket No. PR10–100–000; Docket No. PR10–101–000; Docket No. PR10–102–000; (Not Consolidated)]

Michigan Consolidated Gas Company; Enterprise Texas Pipeline LLC; Enogex LLC; Public Service Company of Colorado; Enogex LLC; Enstor Grama Ridge Storage and Transportation, LLC; American Midstream (Alabama Intrastate), LLC; American Midstream (Louisiana Intrastate), LLC; Enstor Katy Storage and Transportation, L.P.; Hattiesburg Industrial Gas Sales, L.L.C.; Notice of Baseline Filings

September 8, 2010.

Take notice that on August 27, 2010, August 30, 2010, August 31, 2010, September 1, 2010, September 2, 2010, and September 3, 2010 respectively the applicants listed above submitted their baseline filing of its Statement of Operating Conditions for services provided under section 311 of the Natural Gas Policy Act of 1978 (NGPA).

Any person desiring to participate in this rate proceeding must file a motion to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern time on Wednesday, September 15, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–22941 Filed 9–14–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings # 1

September 8, 2010.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG10–65–000

Applicants: Top of the World Wind Energy, LLC

Description: Application of Top of the World Wind Energy, LLC for Exempt Wholesale Generator status.

Filed Date: 09/07/2010

Accession Number: 20100907–5157

Comment Date: 5 p.m. Eastern Time on Tuesday, September 28, 2010.

Docket Numbers: EG10–66–000

Applicants: Kit Carson Windpower, LLC

Description: Application of Kit Carson Windpower, LLC for Exempt Wholesale Generator status.

Filed Date: 09/07/2010

Accession Number: 20100907–5158

Comment Date: 5 p.m. Eastern Time on Tuesday, September 28, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1520–001

Applicants: Occidental Power Services, Inc.

Description: Occidental Power Services, Inc. submits tariff filing per 35: Change in Status to be effective 9/8/2010.

Filed Date: 09/07/2010

Accession Number: 20100907–5132

Comment Date: 5 p.m. Eastern Time on Tuesday, September 28, 2010.

Docket Numbers: ER10–1521–001

Applicants: Occidental Power Marketing, L.P.

Description: Occidental Power Marketing, L.P. submits tariff filing per 35: Change in Status to be effective 9/8/2010.

Filed Date: 09/07/2010

Accession Number: 20100907–5125

Comment Date: 5 p.m. Eastern Time on Tuesday, September 28, 2010.

Docket Numbers: ER10–1522–001

Applicants: Occidental Chemical Corporation

Description: Notice of Change in Status of Occidental Chemical Corporation.

Filed Date: 09/07/2010

Accession Number: 20100907–5159

Comment Date: 5 p.m. Eastern Time on Tuesday, September 28, 2010.

Docket Numbers: ER10–1580–002

Applicants: Saguaro Power Company LP

Description: Saguaro Power Company LP submits tariff filing per 35: Saguaro Power—FERC Electric Tariff Compliance Filing to be effective 9/8/2010.

Filed Date: 09/08/2010

Accession Number: 20100908–5038

Comment Date: 5 p.m. Eastern Time on Wednesday, September 29, 2010.

Docket Numbers: ER10–1581–002

Applicants: Long Beach Peakers LLC

Description: Long Beach Peakers LLC submits tariff filing per 35: Long Beach Peakers FERC Electric Tariff Compliance Filing to be effective 9/8/2010.

Filed Date: 09/08/2010

Accession Number: 20100908–5037

Comment Date: 5 p.m. Eastern Time on Wednesday, September 29, 2010.

Docket Numbers: ER10–1674–001

Applicants: Deseret Generation & Transmission Co-op

Description: Deseret Generation & Transmission Co-operative, Inc. submits tariff filing per 35: Triennial Market Power Update to be effective 7/1/2010.

Filed Date: 09/08/2010

Accession Number: 20100908–5074

Comment Date: 5 p.m. Eastern Time on Wednesday, September 29, 2010.

Docket Numbers: ER10–2552–000

Applicants: Southern California Edison Company

Description: Southern California Edison Company submits their Amended Interconnection Facilities Agreement with the City of Riverside, First Revised Service Agreement No 59, to be effective 11/8/2010.

Filed Date: 09/08/2010

Accession Number: 20100908–5001

Comment Date: 5 p.m. Eastern Time on Wednesday, September 29, 2010.

Docket Numbers: ER10–2553–000

Applicants: Black Hills Power, Inc.

Description: Black Hills Power, Inc. submits tariff filing per 35.12: Gen Dispatch and Energy Mgmt Agmt between Black Hills Power and Gillette, Wy to be effective 9/9/2010.

Filed Date: 09/08/2010

Accession Number: 20100908–5055

Comment Date: 5 p.m. Eastern Time on Wednesday, September 29, 2010.

Docket Numbers: ER10–2554–000

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii): G477 Termination to be effective 11/8/2010.

Filed Date: 09/08/2010

Accession Number: 20100908–5073

Comment Date: 5 p.m. Eastern Time on Wednesday, September 29, 2010.

Docket Numbers: ER10–2555–000

Applicants: Green Mountain Energy Company

Description: Green Mountain Energy Company submits tariff filing per 35.12: Baseline Tariff Filing to be effective 9/8/2010.

Filed Date: 09/08/2010

Accession Number: 20100908–5075

Comment Date: 5 p.m. Eastern Time on Wednesday, September 29, 2010.

Docket Numbers: ER10–2557–000

Applicants: Cleco Power LLC

Description: Cleco Power LLC submits tariff filing per 35.12: LEPA SA 92/93 to be effective 9/8/2010.

Filed Date: 09/08/2010

Accession Number: 20100908–5087

Comment Date: 5 p.m. Eastern Time on Wednesday, September 29, 2010.

Docket Numbers: ER10–2558–000

Applicants: Caithness Long Island, LLC

Description: Caithness Long Island, LLC submits tariff filing per 35.12: Caithness Long Island, LLC MBR Tariff to be effective 9/8/2010.

Filed Date: 09/08/2010

Accession Number: 20100908–5091

Comment Date: 5 p.m. Eastern Time on Wednesday, September 29, 2010.

Docket Numbers: ER10–2559–000

Applicants: Cleco Power LLC

Description: Cleco Power LLC submits tariff filing per 35.15: LEPA SA92/93 Termination to be effective 9/8/2010.

Filed Date: 09/08/2010

Accession Number: 20100908–5092

Comment Date: 5 p.m. Eastern Time on Wednesday, September 29, 2010.

Docket Numbers: ER10–2560–000

Applicants: California Independent System Operator Corporation

Description: California Independent System Operator Corporation submits tariff filing per 35: 2010–09–08 CAISO Multi-Stage Generation Resource Compliance to be effective 8/2/2010.

Filed Date: 09/08/2010

Accession Number: 20100908–5094

Comment Date: 5 p.m. Eastern Time on Wednesday, September 29, 2010.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

As it relates to any qualifying facility filings, the notices of self-certification [or self-recertification] listed above, do not institute a proceeding regarding qualifying facility status. A notice of self-certification [or self-recertification] simply provides notification that the entity making the filing has determined the facility named in the notice meets the applicable criteria to be a qualifying facility. Intervention and/or protest do not lie in dockets that are qualifying facility self-certifications or self-recertifications. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant to 18 CFR 292.207(d)(iii). Intervention and protests may be filed in response to notices of qualifying facility dockets other than self-certifications and self-recertifications.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–22950 Filed 9–14–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings # 1

September 07, 2010.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC10–93–000.

Applicants: Macquarie Infrastructure Partners Inc., MIP II Biopower LLC.

Description: Application of Macquarie Infrastructure Partners Inc. and MIP II Biopower LLC for Authorization Under Section 203 of the FPA.

Filed Date: 09/02/2010.

Accession Number: 20100902–5187.

Comment Date: 5 p.m. Eastern Time on Thursday, September 23, 2010.

Docket Numbers: EC10–94–000.

Applicants: Tyr Keenan II, LLC, Tyr Wind, LLC, EFS Keenan II, LLC, CPV Keenan II Renewable Energy Company.

Description: Joint Application of CPV Keenan II Renewable Energy Company, LLC, *et al.* for Authorization Under FPA Section 203 for Disposition of Jurisdictional Facilities.

Filed Date: 09/03/2010.

Accession Number: 20100903–5227.

Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER99–3502–011.

Applicants: Berkshire Power Company, LLC.

Description: Berkshire Power Company, LLC Notice of Non-Material Change of Status.

Filed Date: 09/02/2010.

Accession Number: 20100902–5109.
Comment Date: 5 p.m. Eastern Time on Thursday, September 23, 2010.

Docket Numbers: ER08–912–012; ER07–460–014; ER04–94–024; ER05–1146–024; ER09–1723–008.
Applicants: Iberdrola Renewables; Shiloh I Wind Project LLC; Dillon Wind LLC; Dry Lake Wind Power, LLC.
Description: Southwest Seller submits supplement to notice of category 1 of seller status and Order 697 compliance filing.
Filed Date: 09/03/2010.
Accession Number: 20100907–0004.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–1599–001.
Applicants: Invenergy Cannon Falls LLC.
Description: Invenergy Cannon Falls LLC submits tariff filing per 35: Supplement to Category 1 Exemption Filing to be effective 11/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5087.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–1601–001.
Applicants: Hardee Power Partners Limited.
Description: Hardee Power Partners Limited submits tariff filing per 35: Supplement to Category 1 Exemption Filing to be effective 11/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5084.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–1603–001.
Applicants: Grand Ridge Energy LLC.
Description: Grand Ridge Energy LLC submits tariff filing per 35: Supplement to Category 1 Exemption Filing to be effective 11/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5107.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–1604–001.
Applicants: Grand Ridge Energy II LLC.
Description: Grand Ridge Energy II LLC submits tariff filing per 35: Supplement to Category 1 Exemption Filing to be effective 11/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5071.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–1605–001.
Applicants: Grand Ridge Energy III LLC.
Description: Grand Ridge Energy III LLC submits tariff filing per 35: Supplement to Category 1 Exemption Filing to be effective 11/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5082.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–1608–001.
Applicants: Invenergy TN LLC.
Description: Invenergy TN LLC submits tariff filing per 35: Supplement to Category 1 Exemption Filing to be effective 11/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5089.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–1609–001.
Applicants: Judith Gap Energy LLC.
Description: Judith Gap Energy LLC submits tariff filing per 35: Supplement to Category 1 Exemption Filing to be effective 11/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5098.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–1610–001.
Applicants: Wolverine Creek Energy LLC.
Description: Wolverine Creek Energy LLC submits tariff filing per 35: Supplement to Category 1 Exemption Filing to be effective 11/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5095.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–1611–001.
Applicants: Grays Harbor Energy LLC.
Description: Grays Harbor Energy LLC submits tariff filing per 35: Supplement to Category 1 Exemption Filing to be effective 11/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5101.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–1612–001.
Applicants: Spring Canyon Energy LLC.
Description: Spring Canyon Energy LLC submits tariff filing per 35: Supplement to Category 1 Exemption Filing to be effective 11/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5090.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–1613–001.
Applicants: Spindle Hill Energy LLC.
Description: Spindle Hill Energy LLC submits tariff filing per 35: Supplement to Category 1 Exemption Filing to be effective 11/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5086.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–1614–001.
Applicants: Sheldon Energy LLC.
Description: Sheldon Energy LLC submits tariff filing per 35: Supplement to Category 1 Filing to be effective 11/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5070.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–1615–001.
Applicants: Willow Creek Energy LLC.
Description: Willow Creek Energy LLC submits tariff filing per 35: Supplement to Category 1 Exemption Filing to be effective 11/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5069.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–1692–001.
Applicants: California Independent System Operator Corporation.
Description: California Independent System Operator Corporation submits tariff filing per 35: 2010–09–03 CAISO CRR Credit Policy Compliance Filing to be effective 9/1/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5175.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–1750–001.
Applicants: Stream Energy Pennsylvania, LLC.
Description: Stream Energy Pennsylvania, LLC *et al.* submits additional information requested by FERC Staff for Attachments A and B to the pending market-based rate applications.
Filed Date: 09/02/2010.
Accession Number: 20100902–0217.
Comment Date: 5 p.m. Eastern Time on Thursday, September 23, 2010.

Docket Numbers: ER10–1751–001.
Applicants: SGE Energy Sourcing, LLC.
Description: Stream Energy Pennsylvania, LLC *et al.* submits additional information requested by FERC Staff for Attachments A and B to the pending market-based rate applications.
Filed Date: 09/02/2010.
Accession Number: 20100902–0217.
Comment Date: 5 p.m. Eastern Time on Thursday, September 23, 2010.

Docket Numbers: ER10–1805–002.
Applicants: Public Service Company of New Hampshire.
Description: Public Service Company of New Hampshire submits tariff filing per 35: Certificate of Concurrence to be effective 7/19/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5204.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–1809–001.
Applicants: RED–Scotia, LLC.
Description: RED–Scotia, LLC submits tariff filing per 35.17(b): Supplement to Market-Based Rate Application of RED–Scotia, LLC to be effective 7/19/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5187.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–2120–001.
Applicants: Virginia Electric and Power Company.
Description: Virginia Electric and Power Company submits tariff filing per 35.17(b): Amendment to WMBR Tariff to be effective 6/30/2010.
Filed Date: 09/02/2010.
Accession Number: 20100902–5163.
Comment Date: 5 p.m. Eastern Time on Thursday, September 23, 2010.

Docket Numbers: ER10–2522–000.
Applicants: Top of the World Wind Energy, LLC.
Description: Top of the World Wind Energy, LLC submits their Initial Market-Based Rate Application and Tariff Filing, to be effective 9/3/2010.
Filed Date: 09/02/2010.
Accession Number: 20100902–5130.
Comment Date: 5 p.m. Eastern Time on Thursday, September 23, 2010.

Docket Numbers: ER10–2523–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii): MidAmerican-NIPCO IA to be effective 9/7/2010.
Filed Date: 09/02/2010.
Accession Number: 20100902–5155.
Comment Date: 5 p.m. Eastern Time on Thursday, September 23, 2010.

Docket Numbers: ER10–2524–000.
Applicants: Midwest Independent Transmission System.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii): Cap X–Fargo T–T (SA 2236) to be effective 9/3/2010.
Filed Date: 09/02/2010.
Accession Number: 20100902–5160.
Comment Date: 5 p.m. Eastern Time on Thursday, September 23, 2010.

Docket Numbers: ER10–2525–000.
Applicants: California Independent System Operator Corporation.
Description: California Independent System Operator Corporation submits tariff filing per 35: 2010–09–03 CAISO Service Agreement 798 to be effective 9/1/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5001.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–2526–000.
Applicants: Lighthouse Energy Trading Company, Inc.
Description: Lighthouse Energy Trading Company, Inc. submits tariff filing per 35.12: Lighthouse Energy—FERC Electric Tariff, Volume No. 1 to be effective 9/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5015.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–2527–000.
Applicants: Allegheny Ridge Wind Farm, LLC.
Description: Allegheny Ridge Wind Farm, LLC submits tariff filing per 35.12: Baseline Market-Based Rates to be effective 9/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5060.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–2528–000.
Applicants: Aragonne Wind LLC.
Description: Aragonne Wind LLC submits tariff filing per 35.12: Baseline Market-Based Rates to be effective 9/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5061.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–2529–000.
Applicants: Buena Vista Energy, LLC.
Description: Buena Vista Energy, LLC submits tariff filing per 35.12: Baseline Market-Based Rates to be effective 9/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5062.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–2530–000.
Applicants: Caprock Wind LLC.
Description: Caprock Wind LLC submits tariff filing per 35.12: Baseline Market-Based Rates to be effective 9/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5063.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–2531–000.
Applicants: Cedar Creek Wind Energy, LLC.
Description: Cedar Creek Wind Energy, LLC submits tariff filing per 35.12: Baseline Market-Based Rates to be effective 9/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5064.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–2532–000.
Applicants: Crescent Ridge LLC.
Description: Crescent Ridge LLC submits tariff filing per 35.12: Baseline Market-Based Rates to be effective 9/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5065.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–2533–000.
Applicants: GSG, LLC.
Description: GSG, LLC submits tariff filing per 35.12: Baseline Market-Based Rates to be effective 9/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5066.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–2534–000.
Applicants: Kumeyaay Wind LLC.
Description: Kumeyaay Wind LLC submits tariff filing per 35.12: Baseline Market-Based Rates to be effective 9/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5067.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–2535–000.
Applicants: Mendota Hills, LLC.
Description: Mendota Hills, LLC submits tariff filing per 35.12: Baseline Market-Based Rates to be effective 9/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5068.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–2536–000.
Applicants: Westar Energy, Inc.
Description: Westar Energy, Inc. submits tariff filing per 35.13(a)(2)(iii): Westar Energy, Electric Interconnection Agreement, Addendum No. 5 to be effective 1/1/2011.
Filed Date: 09/03/2010.
Accession Number: 20100903–5074.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–2537–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii): ATSI–FE Nuclear IA to be effective 9/4/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5110.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–2538–000.
Applicants: Panoche Energy Center, LLC.
Description: Panoche Energy Center, LLC submits tariff filing per 35.12: Panoche Energy Center, LLC FERC Electric Tariff No. 1 to be effective 9/3/2010.
Filed Date: 09/03/2010.

Accession Number: 20100903–5114.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–2539–000.
Applicants: New York Independent System Operator, Inc.
Description: New York Independent System Operator submits tariff filing per 35.13(a)(2)(iii): GADS sanctions to be effective 11/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5134.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–2540–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii): NIPSCO–Horizon FCA to be effective 9/4/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5171.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–2541–000.
Applicants: Maple Analytics, LLC.
Description: Maple Analytics, LLC submits tariff filing per 35.12: Maple Analytics, LLC 205 to be effective 10/3/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5212.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–2542–000.
Applicants: New York Independent System Operator.
Description: New York Independent System Operator submits tariff filing per 35.13(a)(2)(iii): Site/Interconnection Agreements between O&R and AER NY–Gen to be effective 9/9/2010.
Filed Date: 09/03/2010.
Accession Number: 20100903–5218.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–2543–000.
Applicants: Verso Androscoggin LLC.
Description: Verso Androscoggin LLC submits its baseline tariff filing FERC Electric Tariff, Volume No. 1, to be effective 9/7/2010.
Filed Date: 09/07/2010.
Accession Number: 20100907–5014.
Comment Date: 5 p.m. Eastern Time on Tuesday, September 28, 2010.

Docket Numbers: ER10–2544–000.
Applicants: RMH Energy, LP.
Description: RMH Energy, LP submits tariff filing per 35.12: RMH Energy—FERC Electric Tariff Volume No. 1 to be effective 9/7/2010.
Filed Date: 09/07/2010.
Accession Number: 20100907–5015.
Comment Date: 5 p.m. Eastern Time on Tuesday, September 28, 2010.

Docket Numbers: ER10–2545–000.
Applicants: Commonwealth Edison Company.
Description: Commonwealth Edison Company submits filing to add a new schedule to ComEd's Attachments H913—Attachments H–13C, Determination of Capacity Peak Contributions and Network Service Peak Load Contributions, *etc.*
Filed Date: 09/03/2010.
Accession Number: 20100907–0205.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–2547–000.
Applicants: PJM Interconnection, LLC.
Description: PJM Interconnection, LLC submits an executed interconnection service agreement *etc.*
Filed Date: 09/03/2010.
Accession Number: 20100907–0207.
Comment Date: 5 p.m. Eastern Time on Friday, September 24, 2010.

Docket Numbers: ER10–2548–000.
Applicants: Interstate Power and Light Company.
Description: Interstate Power and Light Company *et al.,* submits the proposed Local Balancing Area Operations Coordination Agreement with Pioneer Prairie Wind, to be effective 9/8/2010.
Filed Date: 09/07/2010.
Accession Number: 20100907–5017.
Comment Date: 5 p.m. Eastern Time on Tuesday, September 28, 2010.

Docket Numbers: ER10–2549–000.
Applicants: Kit Carson Windpower, LLC.
Description: Kit Carson Windpower, LLC submits tariff filing per 35.12: Initial Market Based-Rate Application and Tariff Filing to be effective 11/7/2010.
Filed Date: 09/07/2010.
Accession Number: 20100907–5119.
Comment Date: 5 p.m. Eastern Time on Tuesday, September 28, 2010.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–22951 Filed 9–14–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PF10–19–000]

Equitrans, L.P.; Notice of Intent To Prepare an Environmental Assessment for the Planned Sunrise Pipeline Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meeting

September 3, 2010.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Sunrise Pipeline Project (Project) involving construction and operation of facilities by Equitrans, L.P. (Equitrans) in Doddridge, Wetzel, Harrison, Marion

and Taylor Counties, West Virginia, and Greene County, Pennsylvania. This EA will be used by the Commission in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process that the Commission will use to gather input from the public and interested agencies on the project. Your input will help the Commission staff determine what issues need to be evaluated in the EA. Please note that the scoping period will close on October 4, 2010.

Comments may be submitted in written form or verbally. Further details on how to submit written comments are provided in the Public Participation section of this notice. In lieu of or in addition to sending written comments, you are invited to attend the public scoping meetings scheduled as follows:

Date and time	Location
September 28, 2010, 7 p.m. EDT	Falcon Center, Fairmont State University, 1201 Locust Avenue, Fairmont, WV 26554. *Telephone:* 304–333–3777.
September 29, 2010, 7 p.m. EDT	Alumni Hall (Miller Hall 3rd Floor), Waynesburg University, Main Campus, 51 West College Street, Waynesburg, PA 15370. *Telephone:* 800–225–7393.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives are asked to notify their constituents of this planned project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, you may be contacted by a pipeline company representative about the acquisition of an easement to construct, operate, and maintain the planned facilities. The pipeline company would seek to negotiate a mutually acceptable agreement. However, if the Project is approved by the Commission, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings where compensation would be determined in accordance with state or federal law.

A fact sheet prepared by the FERC entitled "An Interstate Natural Gas Facility on My Land? What Do I Need To Know?" is available for viewing on the FERC Web site (*http://www.ferc.gov*). This fact sheet addresses a number of typically-asked questions, including the use of eminent domain and how to participate in the Commission's proceedings.

Summary of the Proposed Project

Equitrans has announced its plans to construct and operate approximately 95 miles of 24-inch-diameter pipeline and 14 miles of 16-inch-diameter pipeline and other facilities in northern West Virginia and southwestern Pennsylvania. The Sunrise Project would expand its existing mainline transmission system to address infrastructure constraints associated with the rapid development of natural gas from the Marcellus Shale Formation in the central Appalachian Basin. Equitrans has indicated that the Project would provide additional firm capacity and offer producers a cost effective option to transport natural gas to the Mid-Atlantic and Northeastern markets and storage.

The Sunrise Pipeline Project would consist of the following:

- Installation of four pipeline segments including:
- *H–302*—Installation of 70.8 miles of 24-inch-diameter pipeline with portions of the line paralleling existing Equitrans pipelines (H–527, H–515, H–512, H–111) and a Columbia Gas Transmission pipeline. This segment would be located in Greene County, Pennsylvania and Doddridge and Wetzel Counties, West Virginia.
- *H–306*—Installation of 24.5 miles of 24-inch pipeline, paralleling the existing Equitrans pipelines: H–557, H–558, H–560, H–561 and H–562. This segment would be located in Harrison, Marion, and Wetzel Counties, West Virginia.
- *H–307*—Installation of 11.5 miles of 16-inch-diameter pipeline, with a portion of the line paralleling the existing Equitrans H–558 pipeline and a portion of the line paralleling an existing Allegheny Power electrical transmission right-of-way. The pipeline would be located in Taylor and Harrison Counties, West Virginia.
- *H–308*—Installation of 2.1 miles of 16-inch-diameter pipeline, paralleling the existing Equitrans H–558 pipeline and connecting at Equitrans' Lumberport Station to the H–508 and H–509 pipelines. This segment would be located in Harrison County, West Virginia.
- Construction of construction of two new compressor stations:
- *Jefferson Compressor Station*—Approximately 41,000 horsepower (hp) of compression would be installed in Jefferson Borough, Greene County, Pennsylvania. Up to four separate turbine-driven compressor units would be installed. Discharge piping would interconnect with the Texas Eastern Transmission and Dominion Transmission Systems.
- Shinnston Compressor Station—Approximately 16,000 hp of compression would be installed near the Harrison Power Station in the town of Shinnston in Harrison County, West Virginia. Up to five separate electric-powered reciprocating compressor units would be installed.
- Construction or modification of other aboveground facilities including five delivery meter and receipt meter facilities, 10 pig [1] launcher/receivers; and 18 mainline block valves.

The general location of the project facilities is shown in appendix 1.[2]

Land Requirements for Construction

Equitrans is still in the planning phase for the Sunrise Pipeline Project, and workspace requirements have not been finalized at this time. As currently planned, construction would disturb approximately 1,492 acres of land for the aboveground facilities and the pipeline. Following construction, about 377 acres would be used for permanent operation of the project's facilities. The remaining acreage would be restored and allowed to revert to former uses. As planned, the Project would mostly parallel existing pipeline systems or linear corridors along about 105.4 miles or approximately 97 percent of the route.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a

[1] A pig is an internal tool that can be used to clean and dry a pipeline and/or to inspect for damage and corrosion.

[2] The appendices referenced in this notice are not being printed in the **Federal Register**. Copies of appendices were sent to all those receiving this notice in the mail and are available at *http://www.ferc.gov* using the link called "eLibrary" or from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the last page of this notice.

Certificate of Public Convenience and Necessity. NEPA also requires us [3] to discover and address concerns the public may have about proposals. This process is referred to as scoping. The main goal of the scoping process is to focus the analysis in the EA on important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. All comments received will be considered during the preparation of the EA.

In the EA, we will discuss impacts that could occur as a result of the construction and operation of the planned project under these general headings:

- Geology and soils;
- Land use;
- Water resources, fisheries, and wetlands;
- Cultural resources;
- Vegetation and wildlife;
- Air quality and noise;
- Endangered and threatened species; and
- Public safety.

We will also evaluate possible alternatives to the planned project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

Although no formal application has been filed, we have already initiated our NEPA review under the Commission's pre-filing process. The purpose of the pre-filing process is to encourage early involvement of interested stakeholders and to identify and resolve issues before an application is filed with the FERC. As part of our pre-filing review, we have begun to contact some federal and state agencies to discuss their involvement in the scoping process and the preparation of the EA.

Our independent analysis of the issues will be presented in the EA. The EA will be placed in the public record and, depending on the comments received during the scoping process, may be published and distributed to the public. A comment period will be allotted if the EA is published for review. We will consider all comments on the EA before we make our recommendations to the Commission. To ensure your comments are considered, please carefully follow the instructions in the Public Participation section on page 6.

With this notice, we are asking agencies with jurisdiction and/or special expertise with respect to environmental issues to formally cooperate with us in the preparation of the EA. These agencies may choose to participate once they have evaluated the proposal relative to their responsibilities. Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

Consultations Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Reservation Act, we are using this notice to initiate consultation with applicable State Historic Preservation Offices (SHPO), and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.[4] We will define the project-specific Area of Potential Effects (APE) in consultation with the SHPOs as the project is further developed. On natural gas facility projects, the APE at a minimum encompasses all areas subject to ground disturbance (examples include construction right-of-way, contractor/pipe storage yards, compressor stations, and access roads). Our EA for this project will document our findings on the impacts on historic properties and summarize the status of consultations under section 106.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send your comments so that they will be received in Washington, DC on or before October 4, 2010.

For your convenience, there are four methods you can use to submit your comments to the Commission. In all instances, please reference the project docket number (PF10–19) with your submission. The Commission encourages electronic filing of comments and has expert eFiling staff available to assist you at (202) 502–8258 or *efiling@ferc.gov.*

(1) You may file your comments electronically by using the *eComment* feature, which is located on the Commission's Web site at *www.ferc.gov* under the link to *Documents and Filings.* An eComment is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You may file your comments electronically by using the *eFiling* feature, which is located on the Commission's Web site at *www.ferc.gov* under the link to *Documents and Filings.* With eFiling you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on "*eRegister.*" You will be asked to select the type of filing you are making. A comment on a particular project is considered a "Comment on a Filing";

(3) You may attend and provide comments at the public scoping meetings. A transcript of each meeting will be made so that your comments will be accurately recorded which will be included in the public record; or

(4) You may file a paper copy of your comments at the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, those whose property may be used temporarily for project purposes or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the planned project.

If the EA is published for distribution, copies will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the compact disc version or would like to remove your name from the mailing

[3] "We", "us", and "our" refer to the environmental staff of the Commission's Office of Energy Projects (OEP).

[4] The Advisory Council on Historic Preservation's regulations are at Title 36 of the Code of Federal Regulations, Part 800. Historic properties are defined in those regulations as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register for Historic Places.

list, please return the attached Information Request (appendix 2).

Becoming an Intervenor

Once Equitrans files its application with the Commission, you may want to become an "intervenor" which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are included in the User's Guide under the "e-filing" link on the Commission's Web site. Please note that the Commission will not accept requests for intervenor status at this time. You must wait until a formal application for the project is filed with the Commission.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs at (866) 208–FERC, or on the FERC Web site (*http://www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on "General Search" and enter the docket number, excluding the last three digits in the Docket Number field (*i.e.,* PF10–19). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *http://www.ferc.gov/esubscribenow.htm.*

Any public meetings or site visits will be posted on the Commission's calendar located at *http://www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Finally, to request additional information on the project or to provide comments directly to the project sponsor, you can contact Equitrans directly by calling toll free at 1–866–687–5427 or by e-mail at *sunrise@eqt.com.* Also, Equitrans has established an Internet Web site at *http://www.sunrise.eqt.com* with additional information about the project.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–22939 Filed 9–14–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR10–96–000]

Hattiesburg Industrial Gas Sales, L.L.C; Notice of Filing

September 8, 2010.

Take notice that on September 1, 2010, Hattiesburg Industrial Gas Sales, L.L.C. (Hattiesburg) filed a revised Statement of Operating Conditions (SOC) for its Storage Services and Transportation Services, proposing administrative updates and miscellaneous housekeeping changes as more fully detailed in the application.

Any person desiring to participate in this rate filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on Wednesday, September 15, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–22943 Filed 9–14–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13351–000]

Notice Modifying Restricted Service List for a Programmatic Agreement for Managing Properties Included in or Eligible for Inclusion in the National Register of Historic Places; Marseilles Land and Water Company

September 3, 2010.

On June 22, 2010, the Commission issued a *Notice of Proposed Restricted Service List for a Programmatic Agreement for Managing Properties Included in or Eligible for Inclusion in the National Register of Historic Places* for the proposed Marseilles Lock and Dam Project No. 13351, located on the Illinois River in the town of Marseilles in La Salle County, Illinois. On July 7, 2010, the City of Marseilles filed a motion on behalf of itself and Marseilles Hydro Power, its development agent, requesting that the Commission include them on the restricted service list. On July 22, 2010, Marseilles Land and Water Company, the license applicant, filed an answer in opposition to the City's motion.

Rule 2010 of the Commission's Rules of Practice and Procedure provides that a restricted service list should contain the names of each person on the service list who, in the judgment of the decisional authority establishing the list, is an active participant with respect to the phase or issue in the proceeding for which the list is established.[1] The City states that it has an interest in the treatment of historic properties within its boundaries, and that Marseilles Hydro owns lands on which the proposed project would be constructed, as well as historic properties adjacent to the site. Accordingly, these entities are active participants with respect to

[1] 18 CFR 385.2010(d)(2) (2010).

historic preservation issues and will be added to the restricted service list.[2]

The following is an addition to the restricted service list established in the notice issued on June 22, 2010:

William H. Pickrell, North American Hydro Holdings, Inc., 116 State Street, 695 Garland Ave., Winnetka, IL 60093.

Donald H. Clarke, Law Offices of GKRSE, 1500 K Street, NW., Suite 330, Washington, DC 20005.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–22937 Filed 9–14–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR09–1–002]

Eagle Rock Desoto Pipeline, LP; Notice of Motion for Extension of Rate Case Filing Deadline

September 8, 2010.

Take notice that on September 8, 2010, Eagle Rock Desoto Pipeline, L.P. (Eagle Rock) filed a request to extend the date for filing its next rate case to May 1, 2012. Eagle Rock states that in Order No. 735 the Commission modified its policy concerning periodic reviews of rates charges by section 311 and Hinshaw pipelines to extend the cycle for such reviews from three to five years.[1] Therefore, Eagle Rock requests that the date for Eagle Rock's next rate filing be extended to May 1, 2012, which is five years from the date of Eagle Rock's most recent rate filing with this Commission.

Any person desiring to participate in this rate proceeding must file a motion to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on Monday, September 13, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–22940 Filed 9–14–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13828–000]

FFP Mass 1, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

September 3, 2010.

On August 9, 2010, FFP Mass 1, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Cape Cod Tidal Energy Project to be located in the Cape Cod Canal and a portion of the Hog Island Channel, between Cape Cod Bay and Buzzards Bay, in Plymouth and Barnstable Counties, Massachusetts. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project will consist of the following: (1) 2,000 hydrokinetic tidal devices consisting of a turbine blade assembly and an integrated 10-kilowatt generator for a combined capacity of 20 megawatts; (2) a mooring system; (3) submersible cables connecting the turbine-generating units to a shore station; (4) an approximately 15-mile-long transmission line connecting the shore station to an existing distribution line; and (5) appurtenant facilities. The estimated annual generation of the Cape Cod Tidal Energy Project would be 53 gigawatt-hours.

Applicant Contact: Ramya Swaminathan, Vice President of Development, Free Flow Power Corporation, 33 Commercial Street, Gloucester, MA 01930; *phone:* (978) 283–2822.

FERC Contact: Michael Watts (202) 502–6123.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the "eLibrary" link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13828–000) in the docket number field to access the document. For

[2] As set forth in the City's motion to intervene (filed February 25, 2009) and service list correction (filed February 27, 2009), the City's designated representatives for service in these proceedings are William H. Pickrell, North American Hydro Holdings, Inc., and Donald H. Clarke, Law Offices of GKRSE (counsel for Marseilles Hydro Power LLC and development agent for the City of Marseilles).

[1] Contract Reporting Requirements of Intrastate Natural Gas Companies, Order No. 735, 131 FERC ¶ 61,150 (May 20, 2010).

assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–22938 Filed 9–14–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

[DOE–EIS 0398]

Delta-Mendota Canal Intertie Project

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of Record of Decision and Floodplain Statement of Findings.

SUMMARY: The U.S. Department of Energy (DOE), Western Area Power Administration (Western), plans to authorize a new interconnection and design, construct, own, operate, and maintain a new 69-kilovolt (kV) transmission line and fiber optic cable for delivery of project use power as part of the Department of the Interior, Bureau of Reclamation, Mid-Pacific Region's (Reclamation) Delta-Mendota Canal (DMC)/California Aqueduct Intertie (Intertie) project. The Intertie, including the interconnection to Western's system and transmission line and fiber optic cable, was analyzed in a Reclamation Environmental Impact Statement (EIS) with the Final EIS dated and released in November 2009. The EIS was developed in compliance with the National Environmental Policy Act (NEPA).

Reclamation issued a Record of Decision (ROD) dated December 28, 2009, to proceed with the Intertie, described as its Proposed Action in the EIS. The Intertie would be located in Alameda County, California, and involves constructing and operating a pumping plant, a pipeline connection between the DMC and the California Aqueduct at Mile 7.2 of the DMC and Mile 9 of the California Aqueduct, a switchyard, access roads, and the transmission line. Reclamation served as the lead agency in the preparation of the NEPA documents for this project. Western, in accordance with the Council on Environmental Quality (CEQ) Regulations for Implementing NEPA (40 CFR Parts 1500–1508) and DOE NEPA Implementing Procedures (10 CFR Part 1021), served as a cooperating agency. Western adopted the EIS in March 2010 (DOE/EIS–0398) to meet its NEPA responsibilities for its transmission actions in support of the Intertie.

FOR FURTHER INFORMATION CONTACT: Mr. David Young, Environmental Protection Specialist, Western Area Power Administration, Sierra Nevada Region, 114 Parkshore Drive, Folsom, CA 95630–4710; telephone (916) 353–4542; e-mail *dyoung@wapa.gov*. Copies of the Draft EIS and Final EIS are available online at *http://www.usbr.gov/mp/nepa/nepa_projdetails.cfm?Project_ID=1014*. For general information about the DOE NEPA process, visit the DOE NEPA Program Web site at *http://nepa.energy.gov/* or contact Ms. Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance, GC–54, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585; telephone (800) 472–2756.

SUPPLEMENTARY INFORMATION: The purpose of the Intertie is to improve the DMC conveyance conditions that restrict the C.W. "Bill" Jones Pumping Plant to less than its original-design authorized pumping capacity of 4,600 cubic feet per second (cfs) and to improve operational flexibility for operation, maintenance, and emergency activities. A lack of operational flexibility presently compromises the ability of the Central Valley Project, owned and operated by Reclamation, and the State Water Project to respond to emergencies, conduct necessary system maintenance, and provide capacity to respond to environmental opportunities in the Sacramento-San Joaquin River Delta (Delta). The amount, timing, and location of water deliveries from the DMC, apparent canal subsidence, siltation, the facility design, and other factors have resulted in a mismatch between designed/authorized Jones Pumping Plant export capacity and DMC conveyance capacity.

The primary project component of the Intertie would be a pumping plant with four electrically-powered pumping units having a total pumping capacity of 467 cfs although the maximum average monthly pumping is expected to be around 400 cfs. Water would be withdrawn from the DMC through a conventional-style intake structure and pumped uphill a vertical distance of about 50 feet through belowground pipelines and be discharged into the California Aqueduct. The pipeline would be located between the DMC and the California Aqueduct at Mile 7.2 of the DMC and Mile 9 of the California Aqueduct; all Intertie facilities would be in Alameda County, California. A switchyard would be located northwest of the pumping plant. The Intertie would be owned by Reclamation and operated by the San Luis & Delta-Mendota Water Authority (Water Authority).

Reclamation completed the EIS process and issued a ROD on December 28, 2009, authorizing the construction of the Intertie (Reclamation's Proposed Action and Preferred Alternative, also referred to as Alternative 2).

Western's Purpose and Need

Western's purpose and need for the proposed action is a result of Reclamation's request for an interconnection with Western's system. Reclamation requires a reliable electrical connection and power supply to run the Intertie pumps. Western's Open Access Transmission Service Tariff describes all conditions necessary for access to its transmission system. Western provides an interconnection to its transmission system if there is sufficient available capacity, while considering transmission system reliability and power delivery to existing customers, and the applicant's objectives.

Western's Proposed Action

Western plans to authorize a new interconnection and design, construct, own, operate, and maintain a new 69-kV transmission line and fiber optic cable for delivery of project use power as part of Reclamation's DMC Intertie project. Western would construct the new 4.5-mile-long 69-kV transmission line and fiber optic cable between its existing Tracy Substation and Reclamation's new DMC Intertie pumping plant switchyard. The transmission line would run parallel to the DMC for approximately 4.5 miles and would be constructed entirely on the west side of the canal and within the existing previously disturbed canal right-of-way.

The transmission line would be constructed using approximately 51 wood poles and 25 glue laminate poles which would be placed in augered holes in the spoil piles that border the canal from its construction. The holes would be no more than 3 feet, 5 inches in diameter and approximately 14 feet in depth, supporting poles approximately 61 feet tall. A crane using the existing access and maintenance road along the canal would be used to set the transmission structures. Although span lengths will vary according to ground and alignment conditions, it is estimated that the average span length across straight segments of the transmission line would be approximately 300 feet. The existing access and maintenance road would be realigned where necessary to accommodate transmission line structures, but the upgraded access road

would remain on the spoil area and within the canal right-of-way.

The majority of the soil extracted from augered holes would be backfilled and compacted to support the poles. The remainder would be placed back onto the spoil piles. Wood poles would be free standing without guy wires. Conductor, fiber optic cable, and optical ground wire would be strung on these poles. Transmission line installation would result in a permanent ground disturbance of approximately 3 to 13 square feet for each pole; the total permanent ground disturbance for the entire transmission line would be 0.005 to 0.02 acre. These estimates are based on a permanent ground disturbance diameter of 2 to 4 feet for each pole.

The fiber optic cable would provide a communications link between the substation and the switchyard. Western would install a new load break disconnect at the Tracy Substation to provide reliability and flexibility for the new power service. Western would also install a new fused disconnect on the new transmission line to provide protection for the line and flexibility for other electrical service.

Alternatives Considered

Reclamation evaluated four alternatives in their Intertie EIS, including No Action, with the transmission line being included as a component in two of the evaluated action alternatives. Due to the locations of the Tracy Substation, the DMC, and Reclamation's switchyard, locating the transmission line along the DMC was an obvious opportunity to consolidate project facilities and minimize possible environmental impacts. This route kept the new transmission line within the existing canal right-of-way and on a previously disturbed area, the side-cast spoil from the original construction of the DMC. The route also allowed use of the existing canal access and maintenance road to be used for construction and future maintenance of the transmission line. A cursory review indicated that any potential alternative transmission line routes would impact other landowners, add to the overall length of the line, likely impact previously undisturbed areas, and clearly increase overall potential impacts to environmental resources. Given the opportunity to use the existing canal right-of-way and minimize environmental impacts, no other transmission alignment options were developed for the Intertie project.

Environmentally Preferred Alternative

Reclamation identified their Alternative 4 (Virtual Intertie) as the Environmentally Preferred Alternative. This alternative relied on temporary facilities and would not require Western to construct the transmission line. However, this alternative did not meet all of Reclamation's objectives and needs; therefore, Reclamation made the decision to implement their Preferred Alternative (Alternative 2) that includes the transmission line component.

Public Involvement

A Notice of Intent announcing the preparation of an EIS was published in the **Federal Register** on July 12, 2006. Reclamation issued a news release on July 20, 2006, seeking public input on preparation of an EIS for the Intertie project. Two scoping meetings were held to solicit written comments about the scope of the environmental review. A Sacramento meeting was held August 1, 2006, and a Stockton meeting was held August 3, 2006. Comments were received and incorporated as appropriate into the EIS. Additionally, a scoping report was prepared.

Reclamation filed a Notice of Availability for the Draft EIS in the **Federal Register** on July 17, 2009. The Draft EIS was circulated for public review for 45 days, during which time Reclamation held two public hearings (August 4 and 5, 2009). No oral comments were received during these hearings, but 10 written comments were received during the public review period. All written comments were incorporated into the Final EIS which was released on November 20, 2009, and circulated for public review for 30 days.

Environmental Impacts

The scoping process and prior litigation revealed several areas of controversy surrounding the Intertie. The Intertie is controversial as it relates to diversions from the Delta and construction of facilities near the Transmission Agency of Northern California's California-Oregon Transmission Project. In the past several years, virtually any project proposal to change diversions in the Delta has been met with great resistance from a variety of agencies, organizations, and landowners depending on the specific proposal. Reclamation, in coordination with Western and the Water Authority, addressed each of the identified areas of controversy in the Intertie EIS through changes in the project, impact assessment, and inclusion of measures required for Endangered Species Act (ESA) compliance. No controversy or substantive environmental impacts were identified associated with Western's action of constructing the transmission line and related activities, primarily because of the selection of the route along the DMC, as described above under the heading "Alternatives Considered."

Consultation

As part of the development of the Intertie, Reclamation coordinated with several agencies, including U.S. Fish and Wildlife Service (USFWS), California Department of Water Resources (DWR), the State Historic Preservation Officer (SHPO), and Western and the Water Authority as cooperating agencies. Reclamation's ROD, which was signed on December 28, 2009, is available online at *http://www.usbr.gov/mp/nepa/nepa_projdetails.cfm?Project_ID=1014.* Reclamation coordinated with USFWS for development of the Coordination Act Report and consultation under Section 7 of the ESA and with DWR to obtain right-of-way access on the California Aqueduct. The SHPO concurred with Reclamation's finding that the Intertie would have no adverse effect on historic properties pursuant to 36 CFR 800.5(a). Reclamation's consultations and the Intertie EIS satisfy Western's NEPA compliance documentation requirements for the interconnection and construction, operation, and maintenance of the new transmission line and fiber optic cable for delivery of power for the Intertie.

Mitigation

Reclamation and Western adopted all practicable means to avoid or minimize adverse effects on the environment that would result from the implementation of the Intertie. Where feasible and appropriate, Reclamation and Western will implement mitigation measures as specified in Reclamation's ROD. The ROD includes a summary of all the environmental commitments and mitigation for the Intertie, specifies the party responsible for implementation, and provides a time frame for completion. Reclamation and Western will ensure that the environmental commitments and mitigation measures are effectively implemented and completed according to schedule during design, construction, and operation as required.

Floodplain Statement of Findings

In accordance with 10 CFR 1022, the Intertie EIS considered the potential impacts of the Intertie on floodplains and wetlands. Section 4.2 "Vegetation and Wetlands" of the EIS includes a map of all wetland resources and drainage features in the study area. Flood hazard areas identified on the

Federal Emergency Management Agency (FEMA) Flood Insurance Rate Maps are identified as a Special Flood Hazard Area (SFHA). SFHA is defined as the area that will be inundated by the flood event having a one percent chance of being equaled or exceeded in any given year. The one percent annual chance flood is also referred to as the base flood or 100-year flood. According to FEMA Flood Insurance Rate Map 06077c07457, the majority of the Intertie study area is located within Zone X with a small portion located within Zone AE. There are no practical means of avoiding floodplain areas. Implementation of environmental commitments and mandatory compliance with applicable floodplain management standards as set forth by FEMA will ensure the Intertie does not substantially alter the normal drainage patterns, affect runoff rates, or contribute to the impedance of flood flows.

The Intertie study area contains Seasonal, Emergent marsh, Alkali wetlands, and Perennial, Intermittent, and Ephemeral drainages. Clean Water Act Section 404 regulates the discharge of dredged and fill materials into waters of the United States. Waters of the United States refers to oceans, bays, rivers, streams, lakes, ponds and wetlands. EIS Section 4.2 "Vegetation and Wetlands" includes an evaluation of the Intertie impacts on wetlands and determined that none of the Intertie alternatives would result in the discharge of dredged or fill material into any wetland or water. Western will coordinate with Reclamation to ensure compliance with all applicable floodplain and wetland protection standards and requirements applicable to the construction, operation, and maintenance of the transmission line.

Decision

Western's decision is to interconnect the Intertie to Western's system and design, construct, own, operate, and maintain a new 69-kV transmission line, fiber optic cable, disconnects, and related equipment in support of Reclamation's decision to construct the Intertie as summarized above and described in detail in the EIS. This decision is based on the information contained in the DMC Intertie EIS which Western adopted in March 2010 as DOE/EIS–0398. This ROD was prepared in accordance with CEQ Regulations for Implementing NEPA (40 CFR Parts 1500–1508) and DOE NEPA Implementing Procedures (10 CFR Part 1021). Full implementation of this decision is contingent upon the implementation of all identified environmental commitments and mitigation measures applicable to Western's action and obtaining all applicable permits and approvals.

Dated: September 2, 2010.

Timothy J. Meeks,

Administrator.

[FR Doc. 2010–23066 Filed 9–14–10; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2003–0004; FRL–8845–1]

Access to Confidential Business Information by Industrial Economics Incorporated

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has authorized contractor, Industrial Economics Incorporated (IEI) of Cambridge, MA, to access information which has been submitted to EPA under all sections of the Toxic Substances Control Act (TSCA). Some of the information may be claimed or determined to be Confidential Business Information (CBI).

DATES: Access to the confidential data will occur no sooner than September 22, 2010.

FOR FURTHER INFORMATION CONTACT: *For general information contact*: Colby Lintner, Regulatory Coordinator, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov*.

For technical information contact: Scott Sherlock, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–8257; fax number: (202) 564–8251; e-mail address: *Scott.Sherlock@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Notice Apply to Me?

This action is directed to the public in general. This action may, however, be of interest to all who manufacture, process or distribute industrial chemicals. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket*. EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPPT–2003–0004. 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, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov*, or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the **Federal Register** listings at *http://www.epa.gov/fedrgstr*.

II. What Action is the Agency Taking?

Under Contract Number GS–10F–0061N, Order Number EP10H000898, contractor IEI of 2067 Massachusetts Avenue, Cambridge, MA, will assist the Office of Pollution Prevention and Toxics (OPPT) in preparing financial analysis of the firms, individuals, and organizations that are the subject of EPA enforcement actions taken under TSCA.

In accordance with 40 CFR 2.306(j), EPA has determined that under Contract Number GS–10F–0061N, Order Number EP10H000898, IEI will require access to CBI submitted to EPA under all sections of TSCA to perform successfully the duties specified under the contract. IEI

personnel will be given access to information submitted to EPA under all sections of TSCA.

EPA is issuing this notice to inform all submitters of information under all sections of TSCA that EPA may provide IEI access to these CBI materials on a need-to-know basis only. All access to TSCA CBI under this contract will take place at EPA Headquarters and IEI's site located in Cambridge, MA, in accordance with EPA's TSCA CBI Protection Manual.

Access to TSCA data, including CBI, will continue until February 28, 2015. If the contract is extended, this access will also continue for the duration of the extended contract without further notice.

IEI personnel will be required to sign nondisclosure agreements and will be briefed on appropriate security procedures before they are permitted access to TSCA CBI.

List of Subjects

Environmental protection, Confidential business information.

Dated: September 9, 2010.

Matthew Leopard,

Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2010–22999 Filed 9–14–10; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2008–0719, FRL–9201–9]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NPDES Animal Sectors (Renewal); EPA ICR No. 1989.07; OMB Control No. 2040–0250

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. This ICR describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before October 15, 2010.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OW–2008–0719 to (1) EPA online using *http://www.regulations.gov* (our preferred method), by e-mail to *owdocket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Water Docket, Mail Code 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Amelia Letnes, State and Regional Branch, Water Permits Division, OWM Mail Code: 4203M, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; *telephone number:* (202) 564–5627; *e-mail address: letnes.amelia@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On February 25, 2010 (75 *FR* 8695), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments during the comment period. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OW–2008–0719, which is available for online viewing at *http://www.regulations.gov,* or in-person viewing at the Water Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Water Docket is 202–566–2426.

Use EPA's electronic docket and comment system at *http://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select "search," then key in the docket ID number identified in this document. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *www.regulations.gov*.

Title: NPDES Animal Sectors (Renewal)

ICR Number: EPA ICR No. 1989.07, OMB Control No. 2040–0250.

ICR Status: This ICR is currently scheduled to expire on July 31, 2012. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The purpose of this ICR is to consolidate, streamline, and update EPA's concentrated animal feeding operations (CAFOs) and concentrated aquatic animal production (CAAP) facility ICRs into the currently approved ICR for CAFOs (OMB Control No. 2040–0250). The two ICRs that are being consolidated in this ICR are: (1) NPDES and ELG Regulatory Revisions for Concentrated Animal Feeding Operations (Final Rule) (OMB Control No. 2040–0250); and (2) Concentrated Aquatic Animal Production (CAAP) Effluent Guidelines (OMB Control No. 2040–0258). Additionally, two activities reported in the NPDES Program ICR (OMB Control No. 2040–0004) that are directly related with CAAP facilities or CAFOs will be incorporated in this ICR. (The two activities are the Permit Application for CAAP facilities using form 2B and Other Noncompliance Reports for CAFOs.)

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 1.1 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to

respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: concentrated animal feeding operations (CAFOs) and a subset of facilities engaged in aquatic animal production defined in 40 CFR part 451.

Estimated Number of Respondents: 22,844.

Frequency of Response: Varies (On occasion, Daily, Weekly, Monthly, Annually).

Estimated Total Annual Hour Burden: 3,273,678.

Estimated Total Annual Cost: $73,624,822, includes $8,780,398 annualized capital or O&M costs.

Changes in the Estimates: The current burden approved by OMB for the two ICRs being consolidated plus the activities from the NPDES Program ICR being migrated to this ICR is 3,044,140 hours. This consolidated ICR estimates a total burden that is 229,538 hours more than the currently approved burden for the same ICRs (a 7.5 percent increase). The main cause of increase is that the animal agricultural industry has continued to grow and consolidate, which has resulted in a greater number of animal feeding operations (AFOs) that meet the size threshold for being defined as a Large CAFO. The projections also reflect more robust estimates from States and EPA regions on numbers of CAFOs in each. EPA estimates that the industry will grow at an average annual rate of 5.6% over the life of this ICR; with permitted CAFOs growing at an average annual rate of 6.0%.

Dated: September 9, 2010.

John Moses, Director,

Collection Strategies Division.

[FR Doc. 2010–22975 Filed 9–14–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

EPA–HQ–OPP–2010–0533; FRL–8844–3

Amitraz; Receipt of Application for Emergency Exemption, Solicitation of Public Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received a specific exemption request from the South Dakota Department of Agriculture to use the pesticide amitraz (CAS No. 330089–61–1) to treat up to 250,000 colonies of beehives to control varroa mites. The applicant proposes a use of a pesticide which was voluntarily canceled under section 6(f) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and which poses a risk similar to the risk which was voluntarily canceled under section 6(f) of FIFRA. EPA is soliciting public comment before making the decision whether or not to grant the exemption.

DATES: Comments must be received on or before September 30, 2010.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2010–0533, 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–2010–0533. 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: Stacey Groce, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–2505; fax number: (703) 605–0781; e-mail address: *groce.stacey@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 www.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 pesticide(s) discussed in this document, compared to the general population.

II. What Action is the Agency Taking?

Under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136p), at the discretion of the Administrator, a Federal or State agency may be exempted from any provision of FIFRA if the Administrator determines that emergency conditions exist which require the exemption. The South Dakota Department of Agriculture has requested the Administrator to issue a specific exemption for the use of amitraz in beehives to control varroa mites. Information in accordance with 40 CFR part 166 was submitted as part of this request.

As part of this request, the applicant asserts that the beekeeping industry in South Dakota is threatened by varroa mite, a devastating pest found in bees. According to the applicant, varroa mites are developing resistance to pesticides currently available to control this pest. South Dakota is a top ranking honey producing state and the beekeeping industry is important to South Dakota's economy. Varroa mite outbreaks are also associated with colony virus problems.

The Applicant proposes to make no more than two treatments (plastic strips impregnated with amitraz) per year in beehives in all counties throughout South Dakota. Approximately 250,000 honeybee colonies could be treated in South Dakota, requiring 500,000 strips for a single varroa mite treatment. The total amount of pesticide that could be used is 250,000 grams active ingredient. The proposed treatment schedule would allow for the plastic strips to be hung in the beehives during the spring or fall if varroa mite infestations have reached treatment threshold.

This notice does not constitute a decision by EPA on the application itself. The regulations governing section 18 of FIFRA require publication of a notice of receipt of an application for a specific exemption proposing:

A use of a pesticide which was voluntarily canceled under section 6(f) of FIFRA, and which poses a risk similar to the risk which was voluntarily canceled under section 6(f) of FIFRA. The notice provides an opportunity for public comment on the application.

The Agency will review and consider all comments received during the comment period in determining whether to issue the specific exemption requested by the South Dakota Department of Agriculture.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: September 7, 2010.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2010–22998 Filed 9–14–10; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9201–7]

Announcement of the Board of Trustees for the National Environmental Education Foundation

AGENCY: Environmental Protection Agency; Office of External Affairs and Environmental Education.

ACTION: Notice.

SUMMARY: The National Environmental Education Foundation (NEEF) was created by Section 10 of Public Law #101–619, the National Environmental Education Act of 1990. It is a private 501(c)(3) non-profit organization established to promote and support education and training as necessary tools to further environmental protection and sustainable, environmentally sound development. It provides the common ground upon which leaders from business and industry, all levels of government, public interest groups, and others can work cooperatively to expand the reach of environmental education and training programs beyond the traditional classroom. The Foundation supports a grant program that promotes innovative environmental education and training programs; it also develops partnerships with government and other organizations to administer projects that promote the development of an environmentally literal public. The Administrator of the U.S. Environmental Protection Agency, as required by the terms of the Act, announces the following appointment to the National Environmental Education Foundation Board of Trustees. The appointee is Decker Anstrom, President (retired), Landmark Communications and former Chairman of The Weather Channel Companies.

FOR FURTHER INFORMATION CONTACT: For information regarding this Notice of Appointment, please contact Ms. Ruth McCully, Director, Office of Environmental Education, Office of External Affairs and Environmental Education (1704A) U.S. EPA, 1200 Pennsylvania Ave., NW., Washington, DC 20460. General information concerning NEEF can be found on their Web site at: *http://www.neefusa.org.*

SUPPLEMENTARY INFORMATION:

Additional Considerations: Great care has been taken to assure that this new appointee not only has the highest degree of expertise and commitment, but also brings to the Board diverse points of view relating to environmental education. This appointment is a four-year term which may be renewed once for an additional four years pending successful re-election by the NEEF nominating committee.

This appointee will join the current Board members which include:

- JL Armstrong (NEEF Vice Chair), National Manger, Toyota Motor Sales, USA, Inc.
- Raymond Ban, Executive Vice President, The Weather Channel.
- Holly Cannon, Principal, Beveridge and Diamond, P.C.
- Phillipe Cousteau, Co-Founder and CEO, EarthEcho International.
- Arthur Gibson (NEEF Chair), Vice President, Environment, Health and Safety, Baxter Healthcare Corporation.
- Kenneth Olden, Chairman, Avon Foundation Scientific Advisory Board.
- Trish Silber, President, Aliniad Consulting Partners, Inc.
- Bradley Smith, Dean, Huxley College of the Environment, Western Washington University.
- Kenneth Strassner (NEEF Treasurer), Vice President, Global Environment, Safety, Regulatory and Scientific Affairs, Kimberly-Clark Corporation.
- Diane Wood (NEEF Secretary), President, National Environmental Education Foundation.

Background: Section 10 (a) of the National Environmental Education Act of 1990 mandates a National Environmental Education Foundation. The Foundation is established in order to extend the contribution of environmental education and training to meeting critical environmental protection needs, both in this country and internationally; to facilitate the cooperation, coordination, and contribution of public and private resources to create an environmentally advanced educational system; and to foster an open and effective partnership among Federal, State, and local government, business, industry, academic institutions, community based environmental groups, and international organizations.

The Foundation is a charitable and nonprofit corporation whose income is exempt from tax, and donations to which are tax deductible to the same extent as those organizations listed pursuant to section 501(c) of the Internal Revenue Code of 1986. The Foundation is not an agency or establishment of the United States. The purposes of the Foundation are—

(A) Subject to the limitation contained in the final sentence of subsection (d) herein, to encourage, accept, leverage, and administer private gifts for the benefit of, or in connection with, the environmental education and training activities and services of the United States Environmental Protection Agency;

(B) To conduct such other environmental education activities as will further the development of an environmentally conscious and responsible public, a well-trained and environmentally literate workforce, and an environmentally advanced educational system;

(C) To participate with foreign entities and individuals in the conduct and coordination of activities that will further opportunities for environmental education and training to address environmental issues and problems involving the United States and Canada or Mexico.

The Foundation develops, supports, and/or operates programs and projects to educate and train educational and environmental professionals, and to assist them in the development and delivery of environmental education and training programs and studies.

The Foundation has a governing Board of Directors (hereafter referred to in this section as 'the Board'), which consists of 13 directors, each of whom shall be knowledgeable or experienced in the environment, education and/or training. The Board oversees the activities of the Foundation and assures that the activities of the Foundation are consistent with the environmental and education goals and policies of the Environmental Protection Agency and with the intents and purposes of the Act. The membership of the Board, to the extent practicable, represents diverse points of view relating to environmental education and training. Members of the Board are appointed by the Administrator of the Environmental Protection Agency.

Within 90 days of the date of the enactment of the National Environmental Education Act, and as appropriate thereafter, the Administrator will publish in the **Federal Register** an announcement of appointments of Directors of the Board. Such appointments become final and effective 90 days after publication in the **Federal Register**. The directors are appointed for terms of 4 years. The Administrator shall appoint an individual to serve as a director in the event of a vacancy on the Board within 60 days of said vacancy in the manner in which the original appointment was made. No individual may serve more than 2 consecutive terms as a director.

Dated: September 2, 2010.

Lisa P. Jackson,

Administrator.

Decker Anstrom

In 1987 Decker Anstrom joined the National Cable Television Association (NCTA) as Executive Vice President; he became President and CEO in 1994. During his tenure he led the cable industry's efforts that helped result in the Telecommunications Act of 1996. In 1999, Mr. Anstrom joined The Weather Channel Companies as President and CEO. In 2002 he became President of Landmark Communications, a privately held diversified media company that owned newspapers, local television stations, database centers and print and classified advertising businesses as well as The Weather Channel Companies. In that position he also served as Chairman of The Weather Channel Companies, at which time he helped introduce new programming regarding climate change. In addition, Mr. Anstrom served on numerous community non-profit and cable industry boards, including NCTA, which he chaired for two years. He retired in late 2008 as President of Landmark Communications and Chairman of The Weather Channel Companies. He currently serves on the Board of Directors of Comcast Corporation, two non-profit environmental groups, Island Press and Climate Central, and an educational non-profit organization, the Institute for Educational Leadership.

Prior to working at Landmark, Mr. Anstrom had a long career in public service in the communications industry. During the Carter Administration, he served as a senior staff member in the White House Office of Management and Budget, working on the creation of the U.S. Department of Education, and later in the White House Office of Presidential Personnel. He subsequently joined and became President of Public Strategies where he directed a broad range of public policy and economic

analyses for investment banking, corporate and non-profit clients.

Mr. Anstrom also holds a B.A. from Macalester College, St. Paul, MN, and attended one year of graduate school at the Woodrow Wilson School of Public and International Affairs, Princeton University, Princeton, NJ.

[FR Doc. 2010–22980 Filed 9–14–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009-0727; FRL–8839–6]

Lauryl Sulfate Salts Registration Review Final Decision; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's final registration review decision for the pesticide, lauryl sulfate salts (also known as sodium lauryl salts), case 4061. Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, that the pesticide can perform its intended function without causing unreasonable adverse effects on human health or the environment. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

FOR FURTHER INFORMATION CONTACT: For pesticide specific information, contact: Monisha Harris, Chemical Review Manager, Antimicrobials Division (7510P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308-0410; fax number: (703) 308-8090; e-mail address: *harris.monisha@epa.gov.*

For general information on the registration review program, contact: Lance Wormell, Antimicrobials Division (7510P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 603-0523; fax number: (703) 308–8090; e-mail address: *wormell.lance@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, farm worker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the chemical review manager 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–2009–0727. 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. Background

A. What Action is the Agency Taking?

Pursuant to 40 CFR 155.58(c), this notice announces the availability of EPA's final registration review decision for the lauryl sulfate salts. Sodium lauryl sulfate (PC Code 079011) is the only active ingredient in case 4061. There is one registered product that contains sodium lauryl sulfate as an active ingredient. The product, Kleenex® Brand Antiviral Tissues, contains 2.02% sodium lauryl sulfate and is registered by Kimberly-Clark Global Sales, LLC (EPA Reg. No. 9402-10). The tissues also contain citric acid as an active ingredient at 7.51%. Products containing sodium lauryl sulfate as an active ingredient were first registered in 1948 and sodium lauryl sulfate is widely used as an intentionally-added inert ingredient in pesticide products.

Pursuant to 40 CFR 155.57, a registration review decision is the Agency's determination whether a pesticide meets, or does not meet, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) standard for registration. EPA has considered lauryl sulfate salts in light of the FIFRA standard for registration. The Final Decision document in the docket describes the Agency's rationale for issuing a registration review final decision for lauryl sulfate salts.

In addition to the final registration review decision document, the registration review docket for lauryl sulfate salts also includes other relevant documents related to the registration review of this case. The combined final work plan and proposed registration review decision was posted to the docket and the public was invited to submit any comments or new information. During the 60–day comment period, no public comments were received.

Pursuant to 40 CFR 155.58(c), the registration review case docket for lauryl sulfate salts will remain open until all actions required in the final decision have been completed.

Background on the registration review program is provided at: *http://www.epa.gov/oppsrrd1/registration_review*. Links to earlier documents related to the registration review of lauryl sulfate salts are provided at: *http://www.epa.gov/oppsrrd1/registration_review/lauryl-sulfate/index.html*.

B. What is the Agency's Authority for Taking this Action?

Section 3(g) of FIFRA and 40 CFR part 155, subpart C, provide authority for this action.

List of Subjects

Environmental protection, Registration review, Pesticides and pests, Antimicrobials, Lauryl Sulfate Salts.

Dated: September 2, 2010.

Joan Harrigan-Farrelly

Director, Antimicrobials Division, Office of Pesticide Programs.

[FR Doc. 2010–22860Filed 9–14–10; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0588; FRL–8843–6]

FIFRA Scientific Advisory Panel; Notice of Rescheduled Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Agency is issuing this notice to reschedule the 3–day meeting

of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) Scientific Advisory Panel (SAP) to consider and review the Chlorpyrifos Physiologically Based Pharmacokinetic/Pharmacodynamic (PBPK/PD) Modeling linked to the Cumulative and Aggregate Risk Evaluation System (CARES). The meeting, originally scheduled for October 5–8, 2010, was announced in the **Federal Register** of August 18, 2010.

DATES: The meeting will be held on November 2-5, 2010, from 9 a.m. to approximately 5:30 p.m.

Comments. The Agency encourages that written comments be submitted by October 26, 2010, and requests for oral comments be submitted by October 29, 2010. However, written comments and requests to make oral comments may be submitted until the date of the meeting, but anyone submitting written comments after October 26, 2010, should contact the Designated Federal Official (DFO) listed under **FOR FURTHER INFORMATION CONTACT.** For additional instructions, see Unit I.C. of the **SUPPLEMENTARY INFORMATION.**

Nominations. Nominations of candidates to serve as ad hoc members of FIFRA SAP for this meeting should be provided on or before September 29, 2010.

Webcast. This meeting may be webcast. Please refer to the FIFRA SAP's website, *http://www.epa.gov/scipoly/SAP* for information on how to access the webcast. Please note that the webcast is a supplementary public process provided only for convenience. If difficulties arise resulting in webcasting outages, the meeting will continue as planned.

Special accommodations. For information on access or services for individuals with disabilities, and to request accommodation of a disability, please contact the DFO listed under **FOR FURTHER INFORMATION CONTACT** at least 10 days prior to the meeting to give EPA as much time as possible to process your request.

ADDRESSES: The meeting will be held at the Environmental Protection Agency, Conference Center, Lobby Level, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA 22202.

Comments. Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2010–0588, 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–2010–0588. If your comments contain any information that you consider to be CBI or otherwise protected, please contact the DFO listed under **FOR FURTHER INFORMATION CONTACT** to obtain special instructions before submitting your comments. 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.

Nominations, requests to present oral comments, and requests for special accommodations. Submit nominations to serve as ad hoc members of FIFRA SAP, requests for special seating accommodations, or requests to present oral comments to the DFO listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Sharlene Matten, DFO, Office of Science Coordination and Policy (7201M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–0130; fax number: (202) 564–8382; e-mail address: *matten.sharlene@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. This action may, however, be of interest to persons who are or may be required to conduct testing of chemical substances under the Federal Food, Drug, and Cosmetic Act (FFDCA), FIFRA, and the Food Quality Protection Act of 1996 (FQPA). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the DFO listed under **FOR FURTHER INFORMATION CONTACT**.

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

When submitting comments, remember to:

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

2. 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.

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

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

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

6. Provide specific examples to illustrate your concerns and suggest alternatives.

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

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

C. How May I Participate in this Meeting?

You may participate in this meeting by following the instructions in this unit. To ensure proper receipt by EPA, it is imperative that you identify docket ID number EPA–HQ–OPP–2010–0588 in the subject line on the first page of your request.

1. *Written comments.* The Agency encourages that written comments be submitted, using the instructions in **ADDRESSES**, no later than October 26, 2010, to provide FIFRA SAP the time necessary to consider and review the written comments. Written comments are accepted until the date of the meeting, but anyone submitting written comments after October 26, 2010, should contact the DFO listed under **FOR FURTHER INFORMATION CONTACT.** Anyone submitting written comments at the meeting should bring 30 copies for distribution to FIFRA SAP.

2. *Oral comments.* The Agency encourages that each individual or group wishing to make brief oral comments to FIFRA SAP submit their request to the DFO listed under **FOR FURTHER INFORMATION CONTACT** no later than October 29, 2010, in order to be included on the meeting agenda. Requests to present oral comments will be accepted until the date of the meeting and, to the extent that time permits, the Chair of FIFRA SAP may permit the presentation of oral comments at the meeting by interested persons who have not previously requested time. The request should identify the name of the individual making the presentation, the organization (if any) the individual will represent, and any requirements for audiovisual equipment (e.g., overhead projector, 35 mm projector, chalkboard). Oral comments before FIFRA SAP are limited to approximately 5 minutes unless prior arrangements have been made. In addition, each speaker should bring 30 copies of his or her comments and presentation slides for distribution to the FIFRA SAP at the meeting.

3. *Seating at the meeting.* Seating at the meeting will be open and on a first-come basis.

4. *Request for nominations to serve as ad hoc members of FIFRA SAP for this meeting.* As part of a broader process for developing a pool of candidates for each meeting, FIFRA SAP staff routinely solicits the stakeholder community for nominations of prospective candidates for service as ad hoc members of FIFRA SAP. Any interested person or organization may nominate qualified individuals to be considered as prospective candidates for a specific meeting. Individuals nominated for this meeting should have expertise in one or more of the following areas: Risk Assessment, organophosphate pesticides, cholinesterase inhibition, data-derived uncertainty factors (also referred to as chemical specific adjustment factors), pharmacodynamic modeling, physiologically based pharmacokinetic modeling, biomonitoring data, statistical modeling, probabilistic techniques, and dietary exposure to pesticides. Nominees should be scientists who have sufficient professional qualifications, including training and experience, to be capable of providing expert comments on the scientific issues for this meeting. Nominees should be identified by name, occupation, position, address, and telephone number. Nominations should be provided to the DFO listed under **FOR FURTHER INFORMATION CONTACT** on or before September 29, 2010. The Agency will consider all nominations of prospective candidates for this meeting that are received on or before this date. However, final selection of ad hoc members for this meeting is a discretionary function of the Agency.

The selection of scientists to serve on FIFRA SAP is based on the function of the panel and the expertise needed to address the Agency's charge to the panel. No interested scientists shall be ineligible to serve by reason of their membership on any other advisory committee to a Federal department or agency or their employment by a Federal department or agency except the EPA. Other factors considered during the selection process include availability of the potential panel member to fully participate in the panel's reviews, absence of any conflicts of interest or appearance of lack of impartiality, independence with respect to the matters under review, and lack of bias. Although financial conflicts of interest, the appearance of lack of impartiality, lack of independence, and bias may result in disqualification, the absence of such concerns does not assure that a candidate will be selected to serve on FIFRA SAP. Numerous qualified candidates are identified for each panel. Therefore, selection decisions involve carefully weighing a number of factors including the candidates' areas of expertise and professional qualifications and achieving an overall balance of different scientific perspectives on the panel. In order to have the collective breadth of experience needed to address the Agency's charge for this meeting, the Agency anticipates selecting approximately 10–15 ad hoc scientists.

FIFRA SAP members are subject to the provisions of 5 CFR part 2634, Executive Branch Financial Disclosure, as supplemented by the EPA in 5 CFR part 6401. In anticipation of this requirement, prospective candidates for service on the FIFRA SAP will be asked to submit confidential financial information which shall fully disclose, among other financial interests, the candidate's employment, stocks and bonds, and where applicable, sources of research support. EPA will evaluate the candidates financial disclosure form to assess whether there are financial conflicts of interest, appearance of a lack of impartiality or any prior involvement with the development of the documents under consideration (including previous scientific peer review) before the candidate is considered further for service on FIFRA SAP. Those who are selected from the pool of prospective candidates will be asked to attend the public meetings and to participate in the discussion of key issues and assumptions at these meetings. In addition, they will be asked to review and to help finalize the meeting minutes. The list of FIFRA SAP members participating at this meeting will be posted on the FIFRA SAP website at *http://epa.gov/scipoly/sap* or may be obtained from the OPP Regulatory Public Docket at *http://www.regulations.gov*.

II. Background

A. Purpose of FIFRA SAP

FIFRA SAP serves as the primary scientific peer review mechanism of EPA's Office of Chemical Safety and Pollution Prevention (OCSPP) and is structured to provide scientific advice, information and recommendations to the EPA Administrator on pesticides and pesticide-related issues as to the impact of regulatory actions on health and the environment. FIFRA SAP is a Federal advisory committee established in 1975 under FIFRA that operates in accordance with requirements of the Federal Advisory Committee Act. FIFRA SAP is composed of a permanent panel

consisting of seven members who are appointed by the EPA Administrator from nominees provided by the National Institutes of Health and the National Science Foundation. FIFRA, as amended by FQPA, established a Science Review Board consisting of at least 60 scientists who are available to the SAP on an ad hoc basis to assist in reviews conducted by the SAP. As a peer review mechanism, FIFRA SAP provides comments, evaluations and recommendations to improve the effectiveness and quality of analyses made by Agency scientists. Members of FIFRA SAP are scientists who have sufficient professional qualifications, including training and experience, to provide expert advice and recommendation to the Agency.

B. Public Meeting

Chlorpyrifos (0,0-diethyl-0-3,5,6-trichloro-2-pyridyl phosphorothioate) is a broad-spectrum, chlorinated organophosphate (OP) insecticide. In 2000, nearly all residential uses were voluntarily canceled by Dow AgroSciences, but agricultural uses remain. The 2000 human health risk assessment was largely based on adult laboratory animal data (rat or dog) for cholinesterase inhibition and the application of default uncertainty factors to address inter- and intra-species differences including susceptible populations. Currently, the Agency is developing a new human health risk assessment expected to be released in 2010. In 2008, the FIFRA SAP reviewed a draft science issue paper on the human health effects of chlorpyrifos. Since that time, Dow AgroSciences has undergone a research effort to improve the existing PBPK/PD model developed by Dr. Charles Timchalk and co-workers at Pacific Northwest National Laboratory. Dow AgroSciences has also developed a proposed approach for linking this PBPK/PD model to the CARES, see *http://www.ilsi.org/ResearchFoundation/Pages/CARES.aspx*, a publically available probabilistic exposure model. The purpose of the October 2010 SAP meeting will be to review the PBPK/PD model and to evaluate the proposed approach for linking this model to CARES. The linking of the chlorpyrifos PBPK/PD model to CARES may provide opportunities to integrate distributions of exposure to chlorpyrifos and its metabolites with cholinesterase inhibition levels across the U.S. population. In addition, this approach may allow estimation of data-derived uncertainty factors that consider use of toxicokinetic and toxicodynamic data to inform quantitative extrapolations for interspecies differences and human variability in dose response assessment. The topics to be covered in the October 2010 SAP are consistent with EPA's Office of Pesticide Programs continuing efforts to improve the scientific basis for risk assessment by broadening the application of probabilistic exposure techniques and PBPK models. The Agency has a conceptually similar effort on-going to link PBPK models for pyrethroids to the Stochastic Human Exposure and Dose Simulation model for multimedia and multipathway chemicals (SHEDS-Multimedia), a probabilistic exposure model developed by EPA's Office of Research and Development, that was reviewed by the SAP in July 2010. The current effort by Dow AgroSciences is a research effort which may, if sufficiently robust, inform future risk assessments. The October meeting is a key milestone in this effort. The Agency will solicit feedback from the Panel on technical issues related to the PBPK/PD model, the proposed approach for linking the PBPK/PD model with CARES, and the use of such linked models in risk assessment.

C. FIFRA SAP Documents and Meeting Minutes

EPA's background paper, related supporting materials, charge/questions to FIFRA SAP, FIFRA SAP composition (i.e., members and ad hoc members for this meeting), and the meeting agenda will be available by mid-October 2010. In addition, the Agency may provide additional background documents as the materials become available. You may obtain electronic copies of these documents, and certain other related documents that might be available electronically, at *http://www.regulations.gov* and the FIFRA SAP homepage at *http://www.epa.gov/scipoly/sap*.

FIFRA SAP will prepare meeting minutes summarizing its recommendations to the Agency approximately 90 days after the meeting. The meeting minutes will be posted on the FIFRA SAP website or may be obtained from the OPP Regulatory Public Docket at *http://www.regulations.gov*.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: September 2, 2010.

Steven M. Knott,

Acting Director, Office of Science Coordination and Policy.

[FR Doc. 2010–22974 Filed 9–14–10; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9201–8]

Science Advisory Board Staff Office; Notification of Public Teleconferences of the Mountaintop Mining Panel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Science Advisory Board (SAB) Staff Office announces two public teleconferences of the SAB Mountaintop Mining Panel to discuss the Panel's draft reports.

DATES: A public teleconference will be held on Wednesday, October 20, 2010 from 1 p.m. to 5 p.m. (Eastern Time). Should the Panel need additional time, a second public teleconference will be held on Tuesday, October 26, 2010 from 1 p.m. to 4 p.m. (Eastern Time).

ADDRESSES: The public teleconference will be conducted by telephone only.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing to obtain general information concerning the public teleconference may contact Mr. Edward Hanlon, Designated Federal Officer (DFO), via telephone at (202) 564–2134 or e-mail at *hanlon.edward@epa.gov.* General information concerning the EPA Science Advisory Board can be found on the SAB Web site at *http://www.epa.gov/sab.*

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act (FACA), 5 U.S.C., App. 2, notice is hereby given that the SAB Mountaintop Mining Panel will hold a public teleconference to discuss its draft reports. The SAB was established pursuant to 42 U.S.C. 4365 to provide independent scientific and technical advice to the Administrator on the technical basis for Agency positions and regulations. The SAB is a Federal Advisory Committee under FACA. The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

The Panel met on July 20–22, 2010 to review EPA's *The Effects of Mountaintop Mines and Valley Fills on Aquatic Ecosystems of the Central Appalachian Coalfields* and *Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams* draft reports [**Federal Register** Notice dated May 25, 2010 (75 FR 29339–29340)]. Materials from the July 2010 meeting are posted on the SAB Web site at *http://yosemite.epa.gov/sab/sabproduct.nsf/a84bfee16cc358ad85256ccd006b0b4b/*

4bb87d5b9c6dea458525770400481586!OpenDocument&Date=2010-07-21. The purpose of the October 20, 2010 teleconference call and the October 26, 2010 teleconference call if it occurs is to discuss the Panel's draft peer review reports of the two EPA documents.

Availability of Meeting Materials: Agendas and materials in support of these meetings will be placed on the EPA Web site at *http://www.epa.gov/sab* in advance of each meeting. For technical questions and information concerning EPA's draft documents, please contact Dr. Michael Slimak, EPA Office of Research and Development (ORD), at (703) 347–8524 or by e-mail at *slimak.michael@epa.gov.*

Procedures for Providing Public Input: Interested members of the public may submit relevant written or oral information for the Mountaintop Mining Panel to consider on the topics of this advisory activity. *Oral Statements:* In general, individuals or groups requesting an oral presentation at a teleconference meeting will be limited to three minutes per speaker, with no more than a total of one hour for all speakers. Interested parties should contact Mr. Hanlon at the contact information provided above by October 13, 2010, to be placed on the public speaker list for the October 20, 2010 teleconference call. *Written Statements:* Written statements should be received in the SAB Staff Office by October 13, 2010 for the October 20, 2010 teleconference call, so that the information can be made available to the Mountaintop Mining Panel for their consideration prior to the teleconference call. Written statements should be supplied to Mr. Hanlon in the following formats: One hard copy with original signature and one electronic copy via e-mail (acceptable file format: Adobe Acrobat PDF, MS Word, WordPerfect, MS PowerPoint, or Rich Text files). Submitters are asked to provide electronic versions of each document submitted with *and* without signatures, because the SAB Staff Office does not publish documents with signatures on its Web sites.

Accessibility: For information on access or services for individuals with disabilities, please contact Mr. Hanlon at (202) 564–2134 or e-mail at *hanlon.edward@epa.gov*, preferably at least ten (10) days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: September 8, 2010.

Anthony F. Maciorowski,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2010–22979 Filed 9–14–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0008; FRL–8843–5]

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 15, 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 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.

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). 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*: 2517–RGI, 2517–RGO. *Docket number*: EPA–HQ–OPP–010–0708. *Company name and address*: Sergeant's Pet Care Products, Inc., 2625 South 158th Plaza, Omaha, NE 68130. *Active ingredient*: Bifenthrin. *Proposed uses*: Dogs. *Contact*: BeWanda Alexander, (703) 305–7460, *alexander.bewanda@epa.gov*.

2. *File symbol*: 87320–E, 87320–R. *Docket number*: EPA–HQ–OPP–2010–0144. *Company name and address*: Stehekin, LLC, C/O, Spring Trading Company, 10805 W. Timberwagon Circle, Spring, TX 77380. *Active ingredient*: 1-Naphthaleneadcetic acid. *Proposed uses*: Potatoes. *Contact*: Janet Whitehurst, (703) 305–6129, *whitehurst.janet@epa.gov*.

List of Subjects

Environmental protection, Pesticides and pest.

Dated: September 7, 2010

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2010–22972 Filed 9–14–10; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9202–2]

Notice of Prevention of Significant Deterioration Final Determination for Power Holdings of Illinois, LLC

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of final action.

SUMMARY: This notice announces that on August 13, 2010, the Environmental Appeals Board (EAB) of the EPA denied a petition for review of a Federal Prevention of Significant Deterioration (PSD) permit issued to Power Holdings of Illinois, LLC, by the Illinois Environmental Protection Agency (IEPA).

DATES: The effective date for the EAB's decision is August 13, 2010. Pursuant to section 307(b)(1) of the Clean Air Act, 42 U.S.C. 7607(b)(1), judicial review of this permit decision, to the extent it is available, may be sought by filing a petition for review in the United States Court of Appeals for the Seventh Circuit within 60 days of *September 15, 2010.*

ADDRESSES: The documents relevant to the above action are available for public inspection during normal business hours at the following address: U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard (AR–18J), Chicago, Illinois 60604. EPA Region 5's normal business hours are 8:15 a.m. to 4:45 p.m. To arrange viewing of these documents, call Constantine Blathras at (312) 886–0671.

FOR FURTHER INFORMATION CONTACT: Constantine Blathras, Air and Radiation Division, Air Programs Branch, U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard (AR–18J), Chicago, Illinois 60604. Anyone who wishes to review the EAB decision can obtain it at *http://www.epa.gov/eab/.*

Notification of EAB Final Decision: The IEPA, acting under authority of a PSD delegation agreement, issued a PSD permit to Power Holdings of Illinois, LLC, on October 26, 2009, granting approval to construct a new synthetic natural gas plant in Jefferson County, Illinois. The plant would use gasification technology to gasify Illinois basin coal to create pipeline quality gas that would be sold to natural gas suppliers. The Sierra Club filed a petition for review with the EAB on November 29, 2009. The EAB denied the petition on August 13, 2010.

Dated: September 7, 2010.

Walter W. Kovalick Jr.,

Acting Deputy Regional Administrator, Region 5.

[FR Doc. 2010–22977 Filed 9–14–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–1017; FRL–8845–5]

Product Cancellation Order for Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's order for the cancellations, voluntarily requested by the registrants and accepted by the Agency, of the products listed in Table 1 of Unit II., pursuant to section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended. This cancellation order follows an August 4, 2010 **Federal Register** Notice of Receipt of Requests from the registrants listed in Table 2 of Unit II. to voluntarily cancel these product registrations. In the August 4, 2010 notice, EPA indicated that it would issue an order implementing the cancellations, unless the Agency received substantive comments within the 30-day comment period that would merit its further review of these requests, or unless the registrants withdrew their requests. The Agency did not receive any comments on the notice. Further, the registrants did not withdraw their requests. Accordingly, EPA hereby issues in this notice a cancellation order granting the requested cancellations. Any distribution, sale, or use of the products subject to this cancellation order is permitted only in accordance with the terms of this order, including any existing stocks provisions.

DATES: The cancellations are effective September 15, 2010.

FOR FURTHER INFORMATION CONTACT: Maia Tatinclaux, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (703) 347–0123; *fax number:* (703) 308–8090; *e-mail address: tatinclaux.maia@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How can I get copies of this document and other related information?

EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–1017. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov* or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

II. What action is the agency taking?

This notice announces the cancellation, as requested by registrants, of 76 products registered under FIFRA section 3. These registrations are listed in sequence by registration number in Table 1 of this unit.

TABLE 1—PRODUCT CANCELLATIONS

Registration No.	Product name	Active ingredients
000004–00146	Crabgrass Preventer and Weed Killer	Siduron.
000004–00179	Crabgrass Preventer and Weed Killer	Siduron.
000004–00355	Bonide Home Orchard Spray	Malathion, Captan, Sulfur.
000004–00375	Bonide Porch, Patio, Garden and Ornamental Spray	Piperonyl butoxide, Pyrethrins.
000004–00386	Bonide Pyrethrin Growers Spray	Pyrethrins.
000239–02523	Flea-B-Gon Flea Killer Formula II	Tetramethrin, Phenothrin.
000239–02524	Ortho Home and Garden Insect Killer Formula II	Tetramethrin, Phenothrin.
000239–02525	Ortho Flying and Crawling Insect Killer Formula II	Tetramethrin, Phenothrin.
000239–02535	Ortho Dog and Cat Flea Spray	Tetramethrin, Phenothrin.
000241–00295	Arsenal Herbicide 0.5 Granule	Imazapyr.
000241–00308	Arsenal 5-G Herbicide	Imazapyr.
000270–00356	Mycodex Premise Control Household Spray	Tetramethrin, Phenothrin, Pyriproxyfen.
000464–00665	Dow Diesel Fuel Conditioner	4-(2-Nitrobutyl) morpholine, Morpholine, 4,4′-(2-ethyl-2-nitro-1,3-propanediyl)bis-.
000464–00678	Fuelsaver F-15-Fuel Additive	4-(2-Nitrobutyl) morpholine, Morpholine, 4,4′-(2-ethyl-2-nitro-1,3-propanediyl)bis-.
000499–00291	Whitmire Sumithrin ME	Phenothrin.
000499–00321	Whitmire PT 120–3	Phenothrin.
000499–00381	Whitmire PT 175	MGK 264, Piperonyl butoxide, Pyrethrins.
000499–00389	Whitmire PT 120 HO Sumithrin Contact Insecticide	Phenothrin.
000506–00140	Tat Hornet and Wasp Killer	Phenothrin, Tetramethrin.
000524–00478	Bollgard BT Cotton	Bacillus thuringiensis var. kurstaki delta endotoxin protein as produced by the Cry1A(c) gene and its controlling sequences.
001020–00014	Oakite Biocide 20	Poly (oxy-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl(dimethylimino)-1,2-ethanediyl dichloride.
001021–01393	Multicide® Concentrate 2128	Phenothrin.
001021–01557	Multicide Intermediate 2471	Phenothrin.
001021–01719	Pyrocide Insecticide II	Piperonyl butoxide, Pyrethrins, Silicon dioxide.
001021–01843	Permethrin 10% Pour On	Permethrin.

TABLE 1—PRODUCT CANCELLATIONS—Continued

Registration No.	Product name	Active ingredients
001021–01844	Permethrin 0.25% Granules	Permethrin.
001021–01848	Permethrin 3.2 MUP	Permethrin.
001021–01849	Permethrin 0.5%G Homeowner	Permethrin.
001021–01850	Permethrin 0.5%GC	Permethrin.
001270–00073	Zep Thermo-Fog Insecticide	MGK 264, Piperonyl butoxide, Pyrethrins.
002217–00854	EH1392 Herbicide	Propanoic acid, 2-(4-((5-(trifluoromethyl)-2-pyridinyl)oxy)phenoxy)-, butil ester,®.
002517–00076	Sergeant's X-term Household Flea and Tick Killer with Nylar.	Tetramethrin, Phenothrin, Pyriproxyfen.
002724–00529	Speer Household Insect Killer	Phenothrin, Tetramethrin.
002724–00530	Speer Household Insect Spray	Phenothrin, Tetramethrin.
002724–00533	Speer Magic Guard Insect Killer	Phenothrin, Tetramethrin.
002724–00536	Speer Automatic Indoor Fogger	Phenothrin, Tetramethrin.
002724–00537	Better World House and Garden Insect Killer	Phenothrin, Tetramethrin.
002724–00538	Speer Pyrethroid Concentrate T-12/4 (Oil Dilutable)	Phenothrin, Tetramethrin.
002724–00540	Purr-R-Fect Pet (Pressurized) Flea Spray for Cats	Phenothrin, Tetramethrin.
002724–00541	Purr-R-Fect Pet Flea Spray for Cats	Phenothrin, Tetramethrin.
002724–00542	Better World Brand Pressurized Plant Spray	Phenothrin, Tetramethrin.
002724–00543	Happy Dog (Pressurized) Flea and Tick Spray for Dogs	Phenothrin, Tetramethrin.
002724–00545	Speer Six-Month Mothproofer	Phenothrin, Tetramethrin.
002724–00547	Happy Dog Flea and Tick Spray for Dogs	Phenothrin, Tetramethrin.
002724–00549	Speer Fogger and Contact Insecticide	Phenothrin, Tetramethrin.
002724–00597	Farnam Flying Insect Killer	Phenothrin, Tetramethrin.
002724–00599	Repel-X II	Butoxypolypropylene glycol, Tetramethrin, Phenothrin.
002724–00604	Farnam Flying Insect Killer	Phenothrin, Tetramethrin.
002724–00615	Mug-A-Bug VI Total Release Aerosol Fogger	Phenothrin, Tetramethrin.
002724–00663	Speer Flea Spray for Carpets and Furniture with Nylar	Phenothrin, Tetramethrin, Pyriproxyfen.
004313–00087	Wasp and Hornet Killer "Jet Stream"	Tetramethrin, Phenothrin.
004822–00172	Raid Household Flying Insect Killer Formula 3	Bioallethrin, Phenothrin.
004822–00465	P/P Flea and Tick Spray No. 2	Phenothrin, Tetramethrin.
005178–00004	Fish Brand E Mosquito Coils	Bioallethrin.
006836–00123	Glybrom RW-95	2,4-Imidazolidinedione, 1-bromo-3-chloro-5,5-dimethyl- and 1-3-Dibromo-5,5-dimethylhydantoin.
006836–00250	Dantobrom P Granular	2,4-Imidazolidinedione, 1-bromo-3-chloro-5,5-dimethyl-; 1-3-Dibromo-5,5-dimethylhydantoin and 1-3, Dichloro-5-ethyl-5-methylhydantonin.
008848–00042	Black Jack Flea and Tick Killer for Carpets and Rugs	Phenothrin, Tetramethrin.
010308–00014	Vape Mat	d-Allethrin.
010308–00015	Pynamin Forte 60 Mosquito Mat	d-Allethrin.
010308–00016	Pynamin Forte 120 Mosquito and Fly Mat	d-Allethrin.
010308–00017	Pynamin Forte Mosquito Coil	d-Allethrin.
019173–00347	Macco Industrial Strength Pyrethrin	Piperonyl butoxide, Pyrethrins, Xylene range aromatic solvent.
019713–00313	Pearsons Institutional Bug Killer	Piperonyl butoxide, Pyrethrins.
019713–00315	Pearson's Grain Spray	Piperonyl butoxide, Pyrethrins.
019713–00347	Macco Industrial Strength Pyrethrin	Piperonyl butoxide, Pyrethrins, Xylene range aromatic solvent.
019713–00348	Macco Pyrethrin Fogging Spray	Piperonyl butoxide, Pyrethrins, Xylene range aromatic solvent.
019713–00349	Macco Dairy Spray	Piperonyl butoxide, Pyrethrins.
047371–00138	Formulation RTU-451	Alkyl dimethyl benzyl ammonium chloride (50% c14, 40% C12, 10% C16).
047371–00177	Formulation RTU-PA 1210	Alkyl dimethyl benzyl ammonium chloride (50% c14, 40% C12, 10% C16) and 1-Decanaminuim, N-decyl-N,N-dimethyl-chloride.
053883–00031	Permethrin Technical	Permethrin.
070127–00004	Beetleball Technical	Benzene,1-methoxy-4-(2-propenyl)-.
070506–00199	TOTH 80 WP	Fentin hydroxide.
070506–00203	Tebuconazole 3.6FL Liquid Flowable Fungicide	Tebuconazole.
070506–00204	Tebuconazole 45 WDG	Tebuconazole.
075341–00005	Cop-R-Plastic Wood Preserving Compound	Copper naphthenate, Sodium fluoride.
075844–00003	Freedom Premise Spray	Deltamethrin.

Table 2 of this unit includes the names and addresses of record for all registrants of the products in Table 1 of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed in Table 1 of this unit.

TABLE 2—REGISTRANTS OF CANCELLED PRODUCTS

EPA Company No.	Company name and address
4	Bonide Products, Inc., Agent Registrations By Design, Inc., P.O. Box 1019, Salem, VA 24153–3805.
239	The Scotts Company, P.O. Box 190, Marysville, OH 43040.
241	BASF Corporation, 26 Davis Drive, P.O. Box 13528, Research Triangle Park, NC 27709–3528.
270	Farnam Companies, Inc., D/B/A Central Life Sciences, 301 West Osborn Road, Phoenix, AZ 85013.
464	The Dow Chemical Company, 1500 East Lake Cook Road, Buffalo Grove, IL 60089.
499	Whitmire Micro-Gen Research Laboratories, Inc., BASF CORP., 3568 Tree Court Industrial Blvd., St. Louis, MO 63122–6682.
506	Walco Linck Company, 30856 Rocky Rd., Greeley, CO 80631–9375.
524	Monsanto Company, 1300 I Street, NW., Suite 450 East, Washington, DC 20005.
1020	Chemetall U.S, Inc., 675 Central Avenue, New Providence, NJ 07974–0007.
1021	McLaughlin Gormley King Company, 8810 Tenth Ave North, Minneapolis, MN 55427–4319.
1270	ZEP Inc., 1310 Seaboard Industrial Blvd. NW., Atlanta, GA 30318.
2217	PBI/Gordon Corp., 1217 West 12th Street, P.O. Box 014090, Kansas City, MO 64101–0090.
2517	Sergeant's Pet Care Products, Inc., 2625 South 158th Plaza, Omaha, NE 68130–1703.
2724	Wellmark International, 1501 E. Woodfield Rd., Suite 200 West, Schaumburg, IL 60173.
4313	Carroll Company, 2900 W Kingsley Rd., Garland, TX 75041.
4822	S.C. Johnson and Son, Inc., 1525 Howe St., Racine, WI 53403.
5178	Blood Protection Co. Ltd., P.O. Box 65436, Tucson, AZ 85728.
6836	Lonza Inc., 90 Boroline Road, Allendale, NJ 07401.
8848	Safeguard Chemical Corp., 8203 West 20th Street, Suite A, Greeley, CO 80634–4696.
10308	Sumitomo Chemical Company Ltd., 1600 Riviera Avenue, Suite 200, Walnut Creek, CA 94596–8025.
19713	Drexel Chemical Company, 1700 Channel Ave., PO Box 13327, Memphis, TN 38113–0327.
47371	H&S Chemicals Division, 90 Boroline Road, Allendale, NJ 07401.
53883	Control Solutions, Inc., 427 Hide Away Circle, Cub Run, KY 42729.
70127	Novozymes Biologicals, Inc., 1150 Conn. Ave., NW., Suite 1100, Washington, DC 20036.
70506	United Phosphorus, Inc., 630 Freedom Business Center, Suite 402, King of Prussia, PA 19406.
75341	Osmose Utility Services Inc., 980 Ellicott Street, Buffalo, NY 14209.
75844	Andrew M. Martin Co. NV. Inc., Agent Technology Sciences Group Inc., 4061 N. 156th Dr., Goodyear, AZ 85338.

III. Summary of Public Comments Received and Agency Response to Comments

During the public comment period provided, EPA received no comments in response to the August 4, 2010 **Federal Register** notice, announcing the Agency's receipt of the requests for voluntary cancellations of products listed in Table 1 of Unit II.

IV. Cancellation Order

Pursuant to FIFRA section 6(f), EPA hereby approves the requested cancellations of the registrations identified in Table 1 of Unit II. Accordingly, the Agency hereby orders that the product registrations identified in Table 1 of Unit II are canceled. The effective date of the cancellations that are subject of this notice is September 15, 2010. Any distribution, sale, or use of existing stocks of the products identified in Table 1 of Unit II. in a manner inconsistent with any of the provisions for disposition of existing stocks set forth in Unit VI. will be a violation of FIFRA.

V. What is the agency's authority for taking this action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period, the EPA Administrator may approve such a request. The notice of receipt for this action was published for comment in the **Federal Register** issue of August 4, 2010 (75 FR 46926) (FRL–8837–6), the comment period closed on September 3, 2010.

VI. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. The existing stocks provisions for the products subject to this order are as follows.

A. Disposition of Existing Stocks for All Table 1 Products Except EPA Reg. No. 524–478

The registrants may continue to sell and distribute existing stocks of products listed in Table 1 of Unit II. (except EPA Reg. No. 524–478) until September 15, 2011, which is 1 year after the publication of the Cancellation Order in the **Federal Register**. Thereafter, the registrants are prohibited from selling or distributing products listed in Table 1, except for export in accordance with FIFRA section 17, or proper disposal. Persons other than the registrants may sell, distribute, or use existing stocks of products listed in Table 1 of Unit II. (except EPA Reg. No. 524–478) until existing stocks are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled products.

B. Disposition of Existing Stocks for EPA Reg. No. 524–478

In accordance with a "phase-out" agreement negotiated with Monsanto Company in conjunction with an amendment request for EPA Reg. No. 524–478, all sale, distribution, and planting of Bollgard® Cotton (EPA Reg. No. 524–478) is prohibited after July 1, 2010. The terms of the negotiated U.S. phase-out strategy include:

1. Production of Bollgard® Cotton (EPA Reg. No. 524–478) by Monsanto Company after September 30, 2009, is prohibited.

2. All sales of Bollgard® Cotton after September 30, 2009, are prohibited.

3. Planting of Bollgard® Cotton seed after midnight of July 1, 2010, is prohibited.

4. All Bollgard® Cotton seed not planted on or before July 1, 2010, must

be returned either to the retailer or to Monsanto Company. As a consequence of the U.S. phase-out strategy for Bollgard® Cotton, sale, distribution, and/or planting of Bollgard® Cotton is prohibited. All existing stocks must be returned to Monsanto Company or to an authorized retailer.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: September 7, 2010.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.

[FR Doc. 2010–22993 Filed 9–14–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than September 29, 2010.

A. Federal Reserve Bank of Cleveland (Nadine Wallman, Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101–2566:

1. Clay P. Graham, Bryan H. Graham, both in Zanesville, Ohio, and James F. Graham, Hebron, Ohio; to acquire voting shares of North Valley Bancshares, Inc., and thereby indirectly acquire voting shares of North Valley Bank, both of Zanesville, Ohio.

B. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. Edward F. and Sharon R. Lueger, both of Seneca, Kansas; Eugene and Janet Lueger, both of St. Marys, Kansas; Galen and Carol A. Lueger, both of Goff, Kansas; Gerald J. and Karla Lueger, both of St. Marys, Kansas; James J. and Joan M. Lueger, both of Seneca, Kansas, individually and as trustees of the James J. and Joan M. Lueger Revocable Living Trust; Robert and Susan Lueger, both of Shorewood, Wisconsin, individually and as trustees of the Robert J. and Susan A. Lueger Trust; Thomas Lueger, Leslie Lueger, Thomas A. Lueger, and Debra Lueger, all of Plattsmouth, Nebraska; Mary L. and Steven Nelson, both of Parkville, Missouri; Bradley J. and Susan R. Lueger, both of Seneca, Kansas; Brian M. Lueger, Olathe, Kansas; Marissa A. Lueger, Seneca, Kansas; Russell A. Lueger, Beloit, Kansas; Lori A. and Justin F. Lueger, both of Eudora, Kansas; all as members of the Lueger Family Group, to retain control of Community Bancshares, Inc., and thereby indirectly retain control of Community National Bank, both in Seneca, Kansas.

Board of Governors of the Federal Reserve System, September 9, 2010.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 2010–22992 Filed 9–14–10; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Federal Open Market Committee; Domestic Policy Directive of August 10, 2010

In accordance with § 271.25 of its rules regarding availability of information (12 CFR part 271), there is set forth below the domestic policy directive issued by the Federal Open Market Committee at its meeting held on August 10, 2010.[1]

The Federal Open Market Committee seeks monetary and financial conditions that will foster price stability and promote sustainable growth in output. To further its long–run objectives, the Committee seeks conditions in reserve markets consistent with federal funds trading in a range from 0 to ¼ percent. The Committee directs the Desk to maintain the total face value of domestic securities held in the System Open Market Account at approximately $2 trillion by reinvesting principal payments from agency debt and agency mortgage–backed securities in longer–term Treasury securities. The Committee directs the Desk to engage in dollar roll and coupon transactions as necessary to facilitate settlement of the Federal Reserve's agency MBS transactions. The System Open Market Account Manager and the Secretary will keep the Committee informed of ongoing developments regarding the System's balance sheet that could affect the attainment over time of the Committee's objectives of maximum employment and price stability.

By order of the Federal Open Market Committee, September 7, 2010.

William B. English,

Secretary, Federal Open Market Committee.

[FR Doc. 2010–22930 Filed 9–14–10; 8:45 am]

BILLING CODE 6210–01–S

[1] Copies of the Minutes of the Federal Open Market Committee at its meeting held on August 10, 2010, which includes the domestic policy directive issued at the meeting, are available upon request to the Board of Governors of the Federal Reserve System, Washington, D.C. 20551. The minutes are published in the Federal Reserve Bulletin and in the Board's annual report.

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 October 8, 2010.

A. Federal Reserve Bank of Boston (Richard Walker, Community Affairs Officer) P.O. Box 55882, Boston, Massachusetts 02106–2204:

1. Sugar River Bancorp, MHC, Newport, New Hampshire; to become a

mutual bank holding company by acquiring 100 percent of the voting shares of Sugar River Bank, Newport, New Hampshire.

B. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. Verus Acquisition Group, Inc., Fort Collins, Colorado; to become a bank holding company by acquiring 51 percent of the voting shares of Fort Collins Commerce Bank, Larimer Bank of Commerce, both of Fort Collins, Colorado, and Loveland Bank of Commerce, Loveland, Colorado.

Board of Governors of the Federal Reserve System, September 9, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010–22908 Filed 9–14–10; 8:45 am]

BILLING CODE 6210–01–S

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 October 11, 2010.

A. Federal Reserve Bank of Dallas (E. Ann Worthy, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. First Financial Bankshares, Inc., Abilene, Texas; to acquire 100 percent of the voting shares of Sam Houston Financial Corp., and thereby indirectly acquire voting shares of First State Bank, both of Huntsville, Texas.

Board of Governors of the Federal Reserve System, September 10, 2010.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 2010–22991 Filed 9–14–10; 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; Correction

This notice corrects a notice (FR Doc. 2010-22438) published on page 54884 of the issue for Thursday, September 9, 2010.

Under the Federal Reserve Bank of Dallas, the entry for Mason National Bancshares, Mason, Texas, is revised to read as follows:

A. Federal Reserve Bank of Dallas (E. Ann Worthy, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. Mason National Bancshares, Mason, Texas, to engage *de novo* in lending activities, pursuant to section 225.28(b)(1) of Regulation Y.

Comments on this application must be received by September 24, 2010.

Board of Governors of the Federal Reserve System, September 10, 2010.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 2010–22990 Filed 9–14–10; 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.: 201202–003.

Title: Oakland MTO Agreement.

Parties: Eagle Marine Services, Ltd.; Ports of America Outer Harbor Terminal, LLC; Seaside Transportation Service LLC; SSA Terminals, LLC; SSA Terminals (Oakland), LLC; Total Terminals International, LLC; and Trapac, Inc.

Filing Party: Wayne R. Rohde, Esq.; Cozen O'Connor; 1627 I Street, NW.; Suite 1100; Washington, DC 20006.

Synopsis: The amendment deletes Transbay Container Terminal, LLC as a party to the agreement.

By Order of the Federal Maritime Commission.

Dated: September 10, 2010.

Karen V. Gregory,

Secretary.

[FR Doc. 2010–22996 Filed 9–14–10; 8:45 am]

BILLING CODE 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 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.

Cargomar Express, Inc. (NVO & OFF), 6713 NW 84 Avenue, Miami, FL 33166. *Officer:* Lainder Araujo, President/Treasurer/Secretary, (Qualifying Individual), Application Type: New NVO & OFF License.

Disham Logistics LLC (OFF), 168–01 Rockaway Boulevard, Suite 204, Jamaica, NY 11434. *Officers:* Sadiah Mohammed, Member, (Qualifying Individual), Hicham Kallamni, Member, Application Type: New OFF License.

Expedia Shippers & Logistics, Inc. dba Morgan Shipping Lines (NVO), 331 West 57th Street, Suite 270, New York, NY 10019. *Officer:* Carlito Deleon, President/Secretary/Treasurer, (Qualifying Individual),

Application Type: Adding Trade Name.

F.H.L. Logistics, Inc. (NVO & OFF), 1354 NW 78th Avenue, Doral, FL 33126. *Officers:* Laura Leal-Ramos, Vice President/Secretary, (Qualifying Individual), Hernan Martinez, President/Treasurer, Application Type: New NVO & OFF License.

JC Logistics (USA), Inc. (NVO & OFF), 1818 Gilbreth Road, Suite 248, Burlingame, CA 94010. *Officers:* Jinbo (Patrick) Huang, Vice President, Alix K. Co, Secretary, (Qualifying Individuals), Application Type: QI Change.

Karakorum Services, Inc. (NVO & OFF), 6045 NW 87 Avenue, Miami, FL 33178. *Officer:* Mayela J. Luzardo, President/Director/Secretary, (Qualifying Individual), Application Type: New NVO & OFF License.

Nilson International LLC (NVO & OFF), 2017 Pittsburgh Avenue, Building C, Charleston, SC 29405. *Officers:* Gernot M. Brinkmann, Vice President/ Secretary Treasurer, (Qualifying Individual), David Nilson, President, Application Type: New NVO & OFF License.

Pavao Sosic dba C.O. Logistic (OFF), 3711 Country Club Drive, #6, Long Beach, CA 90807. *Officer:* Pavao Sosic, Sole Proprietor, Application Type: New OFF License.

Ruky International Shipping Line LLC (OFF), 149 Isabelle Street, Metuchen, NJ 08840. *Officer:* Amarasena A. Rupasinghe, President, (Qualifying Individual), Application Type: New OFF License.

Tommie LaMar Productions LLC dba Herring & Associates (OFF), 6601 Etherington Court, Manassas, VA 20112. *Officers:* Shawn D. Scott, Manager, Freight Forwarding, (Qualifying Individual), Tomette L. Herring, President, Application Type: New OFF License.

Dated: September 10, 2010.

Karen V. Gregory,

Secretary.

[FR Doc. 2010–22997 Filed 9–14–10; 8:45 am]

BILLING CODE 6730–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0480]

Integrated Food Safety System Online Collaboration Development—Cooperative Agreement With the National Center for Food Protection and Defense (U18)

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing its intention to receive and consider a single source application for the award of a cooperative agreement in fiscal year 2010 (FY10) to the National Center for Food Protection and Defense (NCFPD). One of the primary goals of the NCFPD is to allow FDA to meet the White House Food Safety Working Group recommendation that the Federal government prioritize crucial inspection and enforcement activity across the world; support safety efforts by States, localities, and businesses at home; and utilize data to guide these efforts and evaluate their outcomes.

DATES: Important dates are as follows:

1. The application due date is September 27, 2010.
2. The anticipated start date is September 2010.
3. The opening date is September 27, 2010.
4. The expiration date is September 30, 2010.

FOR FURTHER INFORMATION AND ADDITONAL REQUIREMENTS CONTACT:

Center Contact: Heather Brown, Food and Drug Administration, Office of Regulatory Affairs, 5600 Fishers Lane, rm. 13–45, Rockville, MD 20857, 301–796–4304, FAX: 301–443–7270, email: *heather.brown@fda.hhs.gov*.

Grants Management Contact: Kimberly Pendleton, Division of Acquisition Support and Grants (HFA–500), Food and Drug Administration, 5630 Fishers Lane, rm. 2104, Rockville, MD 20857, 301–827–9363, FAX: 301–827–7101, email: *Kimberly.Pendleton@fda.hhs.gov*.

For more information on this funding opportunity announcement (FOA) and to obtain detailed requirements, please refer to the full FOA located at *http://www.fda.gov/Food/NewsEvents/ucm176500.htm*.

SUPPLEMENTARY INFORMATION:

I. Funding Opportunity Description

Catalog of Federal Domestic Assistance Number: 93.103

A. Background

This funding opportunity is a single source application for the award of a cooperative agreement to the NCFPD to support the continued development and operations of collaborative online tools involving a range of stakeholders for the purposes of information sharing in the development of an integrated food safety system, and the development and implementation of a sustainable model for continued collaborative communications and information sharing. Competition is limited to NCFPD because it has unique expertise and capacity found nowhere else. It is the host/creator of FoodSHIELD, an inter-governmental collaborative project supporting information sharing at the Federal, State, and local levels. NCFPD also has past experience directly supporting the White House Food Safety Working Group Objectives to integrate the food safety system at all levels.

B. Research Objectives

Food can become contaminated at many different points—on the farm, in processing or distribution facilities, during transit, at retail and food service establishments, and in the home. In recent years, FDA, in cooperation with other food regulatory and public health agencies, has done a great deal to prevent both intentional and unintentional contamination of food at each of these points. FDA has worked with other Federal, State, local, tribal, territorial, and foreign counterpart food safety regulatory and public health agencies, as well as with law enforcement and intelligence-gathering agencies, industry, consumer groups, and academia to strengthen the Nation's food safety and food defense system across the entire distribution chain.

This cooperation has resulted in greater awareness of potential vulnerabilities, the creation of more effective prevention programs, new surveillance systems, and the ability to quickly respond to outbreaks of foodborne illness. However, changes in consumer dietary patterns, changes in industry practices, changes in the U.S. population, and an increasingly globalized food supply chain and new pathogens and other contaminants pose challenges that are requiring us to adapt our current food protection strategies.

Recognizing these challenges, President Obama has made a personal commitment to improving food safety. On July 7, 2009, the multiagency Food Safety Working Group (Working Group), which he established, issued its key findings on how to upgrade the food safety system for the 21st century. The

Working Group recommends a new public-health-focused approach to food safety based on three core principles: Prioritizing prevention, strengthening surveillance and enforcement, and improving response and recovery. Preventing harm to consumers is the top priority. Too often in the past, the food safety system has focused on reacting to problems rather than preventing harm in the first place. The Working Group recommends that food regulators shift toward prioritizing prevention and move aggressively to implement sensible measures to prevent problems before they occur.

The intent is to fund a proposal for the continued development and operation of collaborative online tools involving a range of stakeholders for the purposes of information sharing in the development of an integrated food safety system and the development and implementation of a sustainable model for continued collaborative communication and information sharing.

C. Eligibility Information

Competition is limited to NCFPD because it has unique expertise and capacity found nowhere else. It is the host/creator of FoodSHIELD, an inter-governmental collaborative project that supports information sharing at the Federal, State, and local levels. NCFPD is uniquely qualified to provide well-established and high-level access to Food/Ag Sector Organizations and coordination of electronic collaborative tools, as well as collaborative support from the Department of Health and Human Services, the Department of Homeland Security, and the U.S. Department of Agriculture. NCFPD also has past experience directly supporting the White House Food Safety Working Group Objectives to integrate the food safety system at all levels.

II. Award Information/Funds Available

A. Award Amount

The estimated amount of support in FY10 will be up to $250,000 total costs, with the possibility of up to 5 additional years of support at $500,000 per year, subject to the availability of funds, starting no later than September 2010 for the first year. More than one application will be considered depending on the availability of funds.

B. Length of Support

The award will provide 1 year of support, with the possibility of up to 5 additional years of support.

III. Paper Application, Registration, and Submission Information

To submit an electronic application in response to this FOA, applicants should first review the full announcement located at *http://inside.fda.gov:9003/PolicyProcedures/GuidanceRegulations/FederalRegister/ucm008714.htm*. Persons interested in applying for a grant may obtain an application at *http://grants.nih.gov/grants/forms.htm*. (FDA has verified the Web site addresses throughout this document, but FDA is not responsible for any subsequent changes to the Web sites after this document publishes in the **Federal Register**.) For all application submissions, the following steps are required:

- Step 1: Obtain a Dun and Bradstreet (DUNS) Number
- Step 2: Register With Central Contractor Registration
- Step 3: Register With Electronic Research Administration (eRA) Commons

Steps 1 and 2, in detail, can be found at *http://www07.grants.gov/applicants/organization_registration.jsp*. Step 3, in detail, can be found at *https://commons.era.nih.gov/commons/registration/registrationInstructions.jsp*. After you have followed these steps, submit paper applications to:

Kimberly Pendleton, Division of Acquisition Support and Grants (HFA–500), Food and Drug Administration, 5630 Fishers Lane, rm. 2104, Rockville, MD 20857, 301–827–9363, FAX: 301–827–7101, email: *Kimberly.Pendleton@fda.hhs.gov*.

Dated: September 10, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–22971 Filed 9–14–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Notice of Meetings

Pursuant to Public Law 92–463, notice is hereby given of the meetings of three Substance Abuse and Mental Health Services Administration (SAMHSA) advisory councils (Center for Mental Health Services National Advisory Council, Center for Substance Abuse Prevention National Advisory Council, and Center for Substance Abuse Treatment National Advisory Council) in September 2010.

The meeting will be a combined session of the three councils and will be open to the public. The Councils were established to advise the Secretary, Department of Health and Human Services (HHS), the Administrator, SAMHSA, and Centers Directors, concerning matters relating to the activities carried out by and through the Agency and Centers and the policies respecting such activities.

The agenda will include a report from the SAMHSA Administrator and discussions related to SAMHSA's strategic initiatives that will focus on the Agency's work in improving lives and capitalizing on emerging opportunities that advance and protect the Nation's health.

Attendance by the public will be limited to space available. Public comments are welcome. The meeting can also be accessed via web stream. To obtain the call-in numbers and access codes, to submit written or brief oral comments, or to request special accommodations for persons with disabilities, please register on-line at *https://nac.samhsa.gov/Registration/meetingsRegistration.aspx*. You may also communicate with the SAMHSA's Committee Management Officer, Ms. Toian Vaughn (*see* contact information below). Substantive program information and a roster of Council members may be obtained from the contact whose name and telephone number are listed below.

Committee Names: Center for Mental Health Services National Advisory Council, Center for Substance Abuse Prevention National Advisory Council, Center for Substance Abuse Treatment National Advisory Council.

Meeting Date(s): September 28, 2010.

Place: SAMHSA, 1 Choke Cherry Road, Sugarloaf and Seneca Conference Rooms, Rockville, Maryland 20857.

Open: September 28, 2010, 8:30 a.m.–4 p.m.

Contact: Toian Vaughn, M.S.W., Committee Management Officer, SAMHSA National Advisory Council, 1 Choke Cherry Road, Rockville, Maryland 20857, Telephone (240) 276–2307, *Fax:* (240) 276–2220 and *E-mail: toian.vaughn@samhsa.hhs.gov*.

The Center for Mental Health Services National Advisory Council will hold an individual meeting on September 27. This meeting will be open to the public and will include a report from the Director, a discussion on SAMHSA's strategic initiatives, and discussions concerning issues on SAMHSA's appropriation and budget and current administrative developments.

Attendance by the public will be limited to space available. Public comments are welcome. Please register on-line at *https://nac.samhsa.gov/*

Registration/meetingsRegistration.aspx. You may also communicate with the CMHS Designated Federal Official (DFO), Ms. Carol Watkins (*see* contact information below) to request special accommodations for persons with disabilities. Substantive program information and a roster of Council members may be obtained from the DFO.

Committee Names: Center for Mental Health Services National Advisory Council.

Meeting Date(s): September 27, 2010.

Place: SAMHSA, 1 Choke Cherry Road, Sugarloaf Conference Room, Rockville, Maryland 20857.

Open: September 27, 2010, 11 a.m.–4 p.m.

Contact: Carol Watkins, Designated Federal Official, CMHS National Advisory Council, 1 Choke Cherry Road, Room 6–1063, Rockville, Maryland 20857, Telephone (240) 276–2254, *Fax:* (240) 276–1395 and *E-mail: carol.watkin2@samhsa.hhs.gov*.

The Center for Substance Abuse Prevention National Advisory Council will hold an individual meeting on September 27. The meeting will be open to the public and include a report from the Director, a discussion on SAMHSA's strategic initiatives, and discussions on current administrative, legislative and program developments.

Attendance by the public will be limited to space available. Public comments are welcome. Please register on-line at *https://nac.samhsa.gov/Registration/meetingsRegistration.aspx*. You may also communicate with the CSAP Designated Federal Official (DFO), Mr. Michael Muni (*see* contact information below) to request special accommodations for persons with disabilities. Substantive program information and a roster of Council members may be obtained from the DFO.

Committee Names: Center for Substance Abuse Prevention National Advisory Council.

Meeting Date(s): September 27, 2010.

Place: SAMHSA, 1 Choke Cherry Road, Great Falls Conference Room, Rockville, Maryland 20857.

Open: September 27, 2010, 1 p.m.–4 p.m.

Contact: Michael Muni, Designated Federal Officer, CSAP National Advisory Council, 1 Choke Cherry Road, Rockville, Maryland 20857, Telephone (240) 276–2559, *Fax:* (240) 276–2430, E-mail: *Michael.muni@samhsa.hhs.gov*.

The Center for Substance Abuse Treatment National Advisory Council will hold an individual meeting on September 27. This meeting will be open to the public and will include a Director's report, a discussion on SAMHSA's strategic initiatives, and discussions concerning issues on SAMHSA's appropriation and budget and current administrative developments.

Attendance by the public will be limited to space available. Public comments are welcome. Please register on-line at *https://nac.samhsa.gov/Registration/meetingsRegistration.aspx.* You may also communicate with the CSAT Designated Federal Official (DFO), Ms. Cynthia Graham (*see* contact information below) to request special accommodations for persons with disabilities. Substantive program information and a roster of Council members may be obtained from the DFO.

Committee Names: Center for Substance Abuse Treatment National Advisory Council

Meeting Date(s): September 27, 2010

Place: SAMHSA, 1 Choke Cherry Road, Seneca Conference Room, Rockville, Maryland 20857.

Open: September 27, 2010, 1 p.m.–4 p.m.

Contact: Cynthia Graham, Designated Federal Official, CSAT National Advisory Council, 1 Choke Cherry Road, Rockville, Maryland 20857, Telephone (240) 276–1692, *Fax:* (240) 276–1690, *E-mail: cynthia.graham@samhsa.hhs.gov*.

Dated: September 9, 2010.

Toian Vaughn,

Committee Management Officer, Substance Abuse and Mental Health Services Administration.

[FR Doc. 2010–22954 Filed 9–14–10; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Service Administration

Advisory Committee on Interdisciplinary, Community-Based Linkages; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given of the following meeting:

Name: Advisory Committee on Interdisciplinary, Community-Based Linkages (ACICBL).

Dates and Times: September 22, 2010, 11 a.m. to 3 p.m., EDT.

Place: Conference Call.

Status: The meeting will be open to the public. The conference call access will be limited only by availability of telephone ports.

Purpose: The Committee members will finalize their efforts to develop the Tenth Annual Report for the Secretary of the Department of Health and Human Services (the Secretary) and Congress, focusing on the topic *Preparing the Interprofessional Workforce to Manage Health Behaviors.* The Committee proposes to discuss a concept paper with its author Dr. Bonnie Spring, Director of Behavioral Medicine, Feinberg School of Medicine, Northwestern University. This paper will be included in the final report. The meeting will afford Committee members with the opportunity to finalize the outstanding components of the annual report.

Agenda: The ACICBL agenda includes a presentation by Dr. Bonnie Spring, author of the concept paper that will be included in the Tenth Annual Report and a discussion facilitated by expert writer, Dr. Katharine Hendrix. Agenda items are subject to change as dictated by the priorities of the Committee.

SUPPLEMENTARY INFORMATION: Requests to make oral comments or to provide written comments to the ACICBL should be sent to Dr. Joan Weiss, Designated Federal Official at the contact information below. Individuals who plan to participate on the conference call should notify Dr. Weiss at least three days prior to the meeting, using the address and phone number below. Members of the public will have the opportunity to provide comments. The meeting phone number is 888–989–3319 and the pass code is 56615. Interested parties should refer to meeting subject as the HRSA Advisory Committee on Interdisciplinary, Community-Based Linkages.

The logistical challenges encountered with confirming a quorum to finalize the outstanding components of the annual report hindered an earlier publishing of the meeting notice.

FOR FURTHER INFORMATION CONTACT: Anyone requesting information regarding the ACICBL should contact Dr. Joan Weiss, Designated Federal Official within the Bureau of Health Professions, Health Resources and Services Administration, in one of three ways: (1) Send a request to the following address: Dr. Joan Weiss, Designated Federal Official, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 9–36, 5600 Fishers Lane, Rockville, Maryland 20857; (2) call (301) 443–6950; or (3) send an e-mail to *jweiss@hrsa.gov*. In the absence of Dr. Weiss, CAPT Norma J. Hatot, Senior Nurse Consultant, can be contacted via telephone at (301) 443–2681 or by e-mail at *nhatot@hrsa.gov.*

Dated: September 8, 2010.

Sahira Rafiullah,

Director, Division of Policy and Information Coordination.

[FR Doc. 2010–22907 Filed 9–14–10; 8:45 am]

BILLING CODE 4165–15–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: National Human Genome Research Institute Special Emphasis Panel; CEGS DAP.

Date: November 22, 2010.

Time: 2 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5635 Fishers Lane, Suite 4076, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Keith McKenney, PHD, Scientific Review Officer, NHGRI, 5635 Fishers Lane, Suite 4076, Bethesda, MD 20814, 301–594–4280, *mckenneyk@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research, National Institutes of Health, HHS)

Dated: *September 9, 2010.*

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23027 Filed 9–14–10; 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 Membrane Biology and Protein Processing Study Section, October 7, 2010, 8 a.m. to October 8, 2010, 5 p.m., St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036 which was published in the **Federal Register** on August 31, 2010, 75 FR 53317–53319.

The meeting will be held at The Beacon Hotel, 1615 Rhode Island Avenue, NW., Washington, DC 20036. The meeting dates and time remain the same. The meeting is closed to the public.

Dated: September 9, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23026 Filed 9–14–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflicts: Asthma and Pulmonary Immunology Applications.

Date: September 29, 2010.

Time: 10 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call.)

Contact Person: Everett E Sinnett, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2178, MSC 7818, Bethesda, MD 20892. 301–435–1016. *sinnett@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: Endocrinology, Metabolism, Nutrition and Reproductive Sciences, Integrated Review Group. Pregnancy and Neonatology Study Section.

Date: October 4, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: InterContinental Harbor Court Baltimore, 550 Light Street, Baltimore, MD 21202.

Contact Person: Michael Knecht, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6176, MSC 7892, Bethesda, MD 20892. (301) 435–1046. *knechtm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Transplantation Immunology.

Date: October 6, 2010.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

Contact Person: Patrick K Lai, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2215, MSC 7812, Bethesda, MD 20892. 301–435–1052. *laip@csr.nih.gov.*

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group, Biobehavioral Regulation, Learning and Ethology Study Section.

Date: October 7–8, 2010.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Helix, 1430 Rhode Island Avenue, NW., Washington, DC 20005.

Contact Person: Melissa Gerald, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3172, MSC 7848, Bethesda, MD 20892. (301) 408–9107. *geraldmel@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Clinical and Biomedical Research.

Date: October 7, 2010.

Time: 2:30 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call.)

Contact Person: Kathy Salaita, SCD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3172, MSC 7770, Bethesda, MD 20892. 301–806–8250. *salaitak@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Biobehavioral Regulation, Learning and Ethology.

Date: October 8, 2010.

Time: 9 a.m. to 10 a.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Helix, 1430 Rhode Island Avenue, NW., Washington, DC 20005.

Contact Person: Biao Tian, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3166, MSC 7848, Bethesda, MD 20892. 301–402–4411. *tianbi@csr.nih.gov.*

Name of Committee: Vascular and Hematology Integrated Review Group, Hypertension and Microcirculation Study Section.

Date: October 11–12, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036

Contact Person: Ai-Ping Zou, MD, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4118, MSC 7814, Bethesda, MD 20892. 301–435–1777. *zouai@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Hypersensitivity, Autoimmune, and Immune-mediated Diseases.

Date: October 13, 2010.

Time: 11:30 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting.)

Contact Person: Jin Huang, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4095G, MSC 7812, Bethesda, MD 20892. (301) 435–1230. *jh377p@nih.gov*.

Name of Committee: Vascular and Hematology Integrated Review Group, Atherosclerosis and Inflammation of the Cardiovascular System Study Section.

Date: October 14–15, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036.

Contact Person: Larry Pinkus, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4132, MSC 7802, Bethesda, MD 20892. (301) 435–1214. *pinkusl@csr.nih.gov*.

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group, Biophysics of Neural Systems Study Section.

Date: October 14, 2010.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Beacon Hotel and Corporate Quarters, 1615 Rhode Island Avenue, NW., Washington, DC 20036.

Contact Person: Geoffrey G Schofield, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4040–A, MSC 7850, Bethesda, MD 20892. (301) 435–1235. *geoffreys@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Animal Systems of Innate Immunity.

Date: October 15, 2010.

Time: 3 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Alexandria Old Town, 1767 King Street, Alexandria, VA 22314.

Contact Person: Tina McIntyre, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4202, MSC 7812, Bethesda, MD 20892. (301) 594–6375. *mcintyrt@csr.nih.gov.*

Name of Committee: Vascular and Hematology Integrated Review Group, Hemostasis and Thrombosis Study Section.

Date: October 19, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Bukhtiar H. Shah, PhD, DVM, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4120, MSC 7802, Bethesda, MD 20892. (301) 435–1233. *shahb@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, PAR09–084: Developmental Biology Area.

Date: October 19, 2010.

Time: 2 p.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: Cathy Wedeen, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3213, MSC 7808, Bethesda, MD 20892. (301) 435–1191. *wedeenc@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: September 9, 2010

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23024 Filed 9–14–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel, Alzheimer's Disease Genetics.

Date: October 4, 2010.

Time: 8 p.m. to 9 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda, 8120 Wisconsin Avenue, Bethesda, MD 20892.

Contact Person: William Cruce, PhD, Scientific Review Officer, National Institute on Aging, Scientific Review Branch, Gateway Building 2c–212, 7201 Wisconsin Ave., Bethesda, MD 20814. (301) 402–7704. *crucew@nia.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute on Aging Special Emphasis Panel, Calcium Dysregulation.

Date: October 8, 2010.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: Ramesh Vemuri, PhD, Chief, Scientific Review Branch, National Institute on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Suite 2c–212, Bethesda, MD 20892. (301) 402–7700. *rv23r@nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel, Aging and Innovation.

Date: October 27, 2010.

Time: 11 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: Rebecca J. Ferrell, PhD, Scientific Review Officer, National Institute on Aging, Gateway Building Rm. 2c212, 7201 Wisconsin Avenue, Bethesda, MD 20892. (301) 402–7703. *ferrellrj@mail.nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel, Drug Discovery for AD.

Date: November 1, 2010.

Time: 10 a.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: Alexander Parsadanian, PhD, Scientific Review Officer, National Institute on Aging, Gateway Building 2c–212, 7201 Wisconsin Avenue, Bethesda, MD 20892. (301) 496–9666. *PARSADANIANA@NIA.NIH.GOV.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: September 9, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23023 Filed 9–14–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Initial Review Group; Biomedical Research and Research Training Review Subcommittee B.

Date: November 4–5, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Arthur L. Zachary, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN–18, Bethesda, MD 20892, 301–594–2886, *zacharya@nigms.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: September 9, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23022 Filed 9–14–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of 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 open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Initial Review Group, Kidney, Urologic and Hematologic Diseases D Subcommittee.

Date: October 20–21, 2010.

Open: October 20, 2010, 7:30 a.m. to 8 a.m.

Agenda: To review procedures and discuss policies.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Closed: October 20, 2010, 8 a.m. to 7 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Closed: October 21, 2010, 7:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Barbara A. Woynarowska, PhD, Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institutes of Health, Room 754, 6707 Democracy Boulevard, Bethesda, MD 20892–5452. (301) 402–7172. *woynarowskab@niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Initial Review Group, Diabetes, Endocrinology and Metabolic Diseases B Subcommittee.

Date: October 20–22, 2010.

Open: October 20, 2010, 5 p.m. to 5:30 p.m.

Agenda: To review procedures and discuss policies.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Closed: October 20, 2010, 5:30 p.m. to 9 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Closed: October 21, 2010, 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Closed: October 22, 2010, 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: John F. Connaughton, PhD, Chief, Chartered Committees Section, Review Branch, DEA, NIDDK, National Institutes of Health, Room 753, 6707 Democracy Boulevard, Bethesda, MD 20892–5452. (301) 594–7797. *connaughtonj@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: September 9, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23019 Filed 9–14–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections

552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Protective Immunity in Special Populations.

Date: October 5–6, 2010.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate contract proposals.

Place: Crowne Plaza Hotel—Silver Spring, 8777 Georgia Avenue, Silver Spring, MD 20910.

Contact Person: James T. Snyder, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities/NIAID, National Institutes of Health, 6700B Rockledge Drive, MSC 7616, Room # 3257, Bethesda, MD 20892–7616, 301–435–1614, *james.snyder@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: September 9, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23017 Filed 9–14–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Initial Review Group; Function, Integration and Rehabilitation Sciences Subcommittee.

Date: October 12, 2010.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Anne Krey, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, 301–435–6908, *ak41o@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: *September 8, 2010.*

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23016 Filed 9–14–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Initial Review Group; Developmental Biology Subcommittee.

Date: October 13–15, 2010.

Time: 7 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Washington, 1515 Rhode Island Avenue, NW., Washington, DC 20005.

Contact Person: Norman Chang, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health And Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892. (301) 496–1485. *changn@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: September 8, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23014 Filed 9–14–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Nursing Research Initial Review Group.

Date: October 21–22, 2010.

Time: 8 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.

Contact Person: Weiqun Li, MD, Scientific Review Officer, National Institute of Nursing Research, National Institutes of Health, 6701 Democracy Blvd., Ste. 710, Bethesda, MD 20892, (301) 594–5966, *wli@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

(Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: September 9, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23072 Filed 9–14–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Fellowships in Digestive Diseases and Nutrition.

Date: October 18, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Monaco, 501 Geary Street, San Francisco, CA 94102.

Contact Person: Thomas A. Tatham, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 760, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–3993. *tathamt@mail.nih.gov*.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel. Kidney Disease Ancillary Studies.

Date: October 18, 2010.

Time: 2 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892. (Telephone Conference Call).

Contact Person: Najma Begum, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 749, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–8894, *begumn@niddk.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: September 9, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23070 Filed 9–14–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Initial Review Group; Behavior and Social Science of Aging Review Committee.

Date: October 7–8, 2010.

Time: 4 p.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: DoubleTree Bethesda Hotel, 8120 Wisconsin Avenue, Bethesda, MD 20892.

Contact Person: Jeannette L. Johnson, PhD, Scientific Review Officer, National Institutes on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Suite 2C–212, Bethesda, MD 20892, 301–402–7705, *johnsonj9@nia.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: September 9, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23069 Filed 9–14–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Initial Review Group; Minority Programs Review Subcommittee A.

Date: November 5, 2010.

Time: 8:30 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: Mona R. Trempe, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12, Bethesda, MD 20892, 301–594–3998, *trempemo@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: September 9, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23067 Filed 9–14–10; 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 Pathobiology of Kidney Disease Study Section, October 7, 2010, 8 a.m. to October 7, 2010, 7

p.m., Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814 which was published in the **Federal Register** on August 31, 2010, 75 FR 53317–53319.

The meeting will be two days October 6, 2010, 7 p.m. to October 7, 2010, 5 p.m. The meeting location remains the same. The meeting is closed to the public.

Dated: September 8, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23063 Filed 9–14–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. ICEB–2010–0003]

RIN 1653–ZA01

Employment Authorization for Haitian F–1 Nonimmigrant Students Experiencing Severe Economic Hardship as a Direct Result of the January 12, 2010 Earthquake in Haiti

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

ACTION: Notice of suspension of applicability of certain requirements.

SUMMARY: This notice informs the public of the suspension of certain regulatory requirements for F–1 nonimmigrant students whose country of citizenship is Haiti and who are experiencing severe economic hardship as a direct result of the January 12, 2010 earthquake in Haiti. The Department of Homeland Security (DHS) is taking action to provide relief to these F–1 students so they may obtain employment authorization, work an increased number of hours while school is in session, and reduce their course load, while continuing to maintain their F–1 student status. F–1 students who are granted employment authorization by means of this notice will be deemed to be engaged in a "full course of study" for the duration of their employment authorization, provided that they satisfy the minimum course load requirement described in this notice.

DATES: This notice is effective September 15, 2010 and will remain in effect until July 22, 2011.

FOR FURTHER INFORMATION CONTACT: Louis Farrell, Director, Student and Exchange Visitor Program; MS 5600, U.S. Immigration and Customs Enforcement; 500 12th Street, SW., Washington, DC 20536–5600; (703) 603–3400. This is not a toll-free number. Program information can be found at *http://www.ice.gov/sevis/*.

SUPPLEMENTARY INFORMATION:

What action is DHS taking under this notice?

The Secretary of Homeland Security is exercising her authority under 8 CFR 214.2(f)(9) to temporarily suspend the applicability of certain requirements governing on-campus and off-campus employment. F–1 students granted employment authorization by means of this notice will be deemed to be engaged in a "full course of study" for the duration of their employment authorization if they satisfy the minimum course load described in this notice. *See* 8 CFR 214.2(f)(6)(i)(F).

Who is covered by this notice?

This notice applies exclusively to F–1 students whose country of citizenship is Haiti and who were lawfully present in the United States in F–1 nonimmigrant status on January 12, 2010 under section 101(a)(15)(F)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(15)(F)(i) and (1) are enrolled in an institution that is Student and Exchange Visitor Program (SEVP)-certified for enrollment of F–1 students; (2) are currently maintaining F–1 status; and (3) are experiencing severe economic hardship as a direct result of the January 12, 2010 earthquake in Haiti.

This notice applies both to undergraduate and graduate students, as well as elementary school, middle school, and high school students. The notice, however, applies differently to elementary school, middle school, and high school students, as discussed in Question, "Does this notice apply to elementary school, middle school, and high school students in F–1 status?"

F–1 students covered by this notice who transfer to other academic institutions that are SEVP-certified for enrollment of F–1 students remain eligible for the relief provided by means of this notice.

Why is DHS taking this action?

DHS is taking action to provide relief to F–1 students whose country of citizenship is Haiti and who are experiencing severe economic hardship as a direct result of the January 12, 2010 earthquake in Haiti. These students may obtain employment authorization, work an increased number of hours while school is in session, and reduce their course load, while continuing to maintain their F–1 student status.

Haiti has limited resources to cope with a natural disaster like this earthquake, which was the strongest one to strike the island nation in 200 years. The country's critical infrastructure was severely damaged, and many government offices, schools, businesses, and hospitals were completely destroyed. Millions of Haitians have been displaced from their homes and must depend on international aid organizations to receive basic necessities such as food and water.

Approximately 1,127 F–1 students whose country of citizenship is Haiti are enrolled in schools in the United States. Given the extent of the destruction and humanitarian challenges in Haiti, affected F–1 students whose primary means of financial support comes from family members in Haiti may now need to be exempted from the normal student employment requirements to be able to continue their studies in the United States. Without employment authorization, these students may lack the means to meet basic living expenses.

What is the minimum course load requirement set forth in this notice?

Undergraduate students who are granted on-campus or off-campus employment authorization under this notice must remain registered for a minimum of six semester/quarter hours of instruction per academic term. Graduate-level F–1 students who are granted on-campus or off-campus employment authorization under this notice must remain registered for a minimum of three semester/quarter hours of instruction per academic term. *See* 8 CFR 214.2(f)(5)(v). In addition, F–1 students (both undergraduate and graduate) granted on-campus or off-campus employment authorization under this notice may count up to the equivalent of one class or three credits per session, term, semester, trimester, or quarter of online or distance education toward satisfying this minimum course load requirement, unless the F–1 student's course of study is in a language study program. *See* 8 CFR 214.2(f)(6)(i)(G). Elementary school, middle school, and high school students must maintain "class attendance for not less than the minimum number of hours a week prescribed by the school for normal progress toward graduation," as required under 8 CFR 214.2(f)(6)(i)(E).

May Haitian F–1 students who already have on-campus or off-campus employment authorization benefit from the suspension of regulatory requirements under this notice?

Yes. Haitian F–1 students who already have on-campus or off-campus employment authorization may benefit under this notice, which suspends

regulatory requirements relating to the minimum course load requirement under 8 CFR 214.2(f)(6)(i)(A) and (B) and the employment eligibility requirements under 8 CFR 214.2(f)(9) as specified in this notice. Such Haitian F–1 students may benefit without having to apply for a new Form I–766, Employment Authorization Document (EAD). To benefit from this notice, the student must request that his or her Designated School Official (DSO) enter the following statement in the remarks field of the SEVIS student record, which will be reflected on the student's Form I–20:

Approved for more than 20 hours per week of [DSO must insert "on-campus" or "off-campus," depending upon the type of employment authorization the student already has] employment authorization and reduced course load under the Special Student Relief authorization from [DSO must insert the beginning date of employment] until [DSO must insert the student's program end date, July 22, 2011, or the current EAD expiration date (if the student is currently working off campus), whichever date comes first].

Must the F–1 student apply for reinstatement after expiration of this special employment authorization if the student reduces his or her full course of study?

No. F–1 students who are granted employment authorization under this notice will be deemed to be engaged in a "full course of study" for the duration of their employment authorization, provided that qualifying undergraduate level F–1 students remain registered for a minimum of six semester/quarter hours of instruction per academic term, and qualifying graduate level F–1 students remain registered for a minimum of three semester/quarter hours of instruction per academic term. *See* 8 CFR 214.2(f)(5)(v) and (f)(6)(i)(F). Such students will not be required to apply for reinstatement under 8 CFR 214.2(f)(16) if they are otherwise maintaining F–1 status.

Will F–2 dependents (spouse or minor children) of F–1 students covered by this notice be eligible to apply for employment authorization?

No. An F–2 spouse or minor child of an F–1 student is not authorized to work in the United States and, therefore, may not accept employment under the F–2 status. *See* 8 CFR 214.2(f)(15)(i).

Will the suspension of the applicability of the standard student employment requirements apply to aliens who are granted an F–1 visa after this notice is published in the Federal Register?

No. The suspension of the applicability of the standard regulatory requirements only applies to those F–1 students whose country of citizenship is Haiti and who were lawfully present in the United States in F–1 nonimmigrant status on January 12, 2010 under section 101(a)(15)(F)(i) of the INA, 8 U.S.C. 1101(a)(15)(F)(i) and (1) are enrolled in an institution that is Student and Exchange Visitor Program (SEVP) certified for enrollment of F–1 students; (2) are currently maintaining F–1 status; and (3) are experiencing severe economic hardship as a direct result of the January 12, 2010 earthquake in Haiti.

F–1 students who do not meet these requirements do not qualify for the suspension of the applicability of the standard regulatory requirements, even if they are experiencing severe economic hardship as a direct result of the January 12, 2010 earthquake in Haiti.

Does this notice apply to an F–1 student who departs the United States after this notice is published in the Federal Register and who needs to obtain a new F–1 visa before he or she may return to the United States to continue his or her educational programs?

Yes, provided that the DSO has properly notated the student's SEVIS record, which will then appear on the student's Form I–20. Subject to the specific terms of this notice, the normal rules for visa issuance (including those related to public charge and nonimmigrant intent) remain applicable to nonimmigrants that need to apply for a new F–1 visa in order to continue their educational programs in the United States.

Does this notice apply to elementary school, middle school, and high school students in F–1 status?

This notice does not reduce the required course load for elementary school, middle school, or high school students in F–1 status. Such students must maintain the minimum number of hours of class attendance per week prescribed by the school for normal progress toward graduation. *See* 8 CFR 214.2(f)(6)(i)(E).

Eligible F–1 students from Haiti enrolled in an elementary school, middle school, or high school do benefit from the suspension of the requirement in 8 CFR 214.2(f)(9)(i) that limits on-campus employment to 20 hours per week while school is in session. DHS notes, however, that the suspension of this requirement is solely for DHS purposes of determining valid F–1 status. Nothing in this notice affects the applicability of federal and state labor laws limiting the employment of minors. With regard to off-campus employment, elementary school, middle school, and high school students benefit from the suspension of the requirement that a student must have been in F–1 status for one full academic year in order to be eligible for off-campus employment and the requirement that limits a student's work authorization to no more than 20 hours per week of off-campus employment while school is in session. With regard to on-campus employment, nothing in this notice affects the applicability of federal and state labor laws limiting the employment of minors. The suspension of certain regulatory requirements related to employment through this notice is applicable to all eligible F–1 students—regardless of educational level—pursuant to the regulations at 8 CFR 214.2(f)(9)(i) and (f)(9)(ii).

On-Campus Employment Authorization

Will F–1 students who are granted on-campus employment authorization under this notice be authorized to work more than 20 hours per week while school is in session?

Yes. For F–1 students covered in this notice, the Secretary is suspending the applicability of the requirement in 8 CFR 214.2(f)(9)(i) that limits an F–1 student's on-campus employment to 20 hours per week while school is in session. A student whose country of citizenship is Haiti and who is experiencing severe economic hardship as a direct result of the January 12, 2010 earthquake in Haiti is authorized to work more than 20 hours per week while school is in session if his or her DSO has entered the following statement in the remarks field of the SEVIS student record, which will be reflected on the student's Form I–20 *Certificate of Eligibility for Nonimmigrant (F–1) Student:*

Approved for more than 20 hours per week of on-campus authorization and reduced course load, under the Special Student Relief authorization from [DSO must insert the beginning date of employment] until [DSO must insert the student's program end date or July 22, 2011, whichever date comes first].

To obtain on-campus employment authorization, the student must demonstrate to his or her DSO that the employment is necessary to avoid severe economic hardship that is directly resulting from the earthquake in

Haiti. A student authorized by his or her DSO to engage in on-campus employment by means of this notice does not need to make any filing with U.S. Citizenship and Immigration Services (USCIS).

The standard rules permitting full-time work on-campus when school is not in session or during school vacations apply. *See* 8 CFR 214.2(f)(9)(i).

Will F–1 students who are granted on-campus employment authorization under this notice be authorized to reduce their normal course load and still maintain their F–1 nonimmigrant status?

Yes. F–1 students who are granted on-campus employment authorization under this notice will be deemed to be engaged in a "full course of study" for the purpose of maintaining their F–1 status for the duration of their on-campus employment if they satisfy the minimum course load requirement described in this notice. *See* 8 CFR 214.2(f)(6)(i)(F).

However, the authorization for reduced course load is solely for DHS purposes of determining valid F–1 status. Nothing in this notice mandates that a school allow a student to take a reduced course load if the reduction would not meet the school's minimum course load requirement for continued enrollment.[1]

Off-Campus Employment Authorization

What regulatory requirements does this notice temporarily suspend relating to off-campus employment?

For F–1 students covered by this notice, as provided under 8 CFR 214.2(f)(9)(ii)(A), the Secretary is suspending the following regulatory requirements relating to off-campus employment:

(a) The requirement that a student must have been in F–1 status for one full academic year in order to be eligible for off-campus employment;

(b) The requirement that an F–1 student must demonstrate that acceptance of employment will not interfere with the student's carrying a full course of study; and

(c) The requirement that limits a student's work authorization to no more than 20 hours per week of off-campus employment while school is in session.

[1] Minimum course load requirement for enrollment in a school must be established in a publicly available document (*e.g.,* catalog, Web site, or operating procedure), and it must be a standard applicable to all students (U.S. citizens and foreign students) enrolled at the school.

Will F–1 students who are granted off-campus employment authorization under this notice be authorized to reduce their normal course load and still maintain their F–1 nonimmigrant status?

Yes. F–1 students who are granted employment authorization by means of this notice will be deemed to be engaged in a "full course of study" for purpose of maintaining their F–1 status for the duration of their employment authorization if they satisfy the minimum course load requirement described in this notice. *See* 8 CFR 214.2(f)(6)(i)(F). However, the authorization for reduced course load is solely for DHS purposes of determining valid F–1 status. Nothing in this notice mandates that a school allow a student to take reduced course load if such reduced course load would not meet the school's minimum course load requirement.[2]

How may Haitian F–1 students obtain employment authorization for off-campus employment with a reduced course load under this notice?

F–1 students must file a Form I–765 *Application for Employment Authorization* with USCIS if they wish to apply for off-campus employment authorization based on severe economic hardship resulting from the January 12, 2010 earthquake in Haiti. Filing instructions are located at: *http://www.uscis.gov/i-765.* If an F–1 student has obtained an EAD as a result of applying for Temporary Protected Status (TPS) for Haiti or is in the process of seeking a TPS EAD, please see Question, "May Haitian F–1 students who already have on-campus or off-campus employment authorization benefit from this notice?" An F–1 student may use his or her TPS EAD to work, but in order to maintain F–1 status must comply with other requirements of the school's DSO as described.

Fee considerations. Submission of a Form I–765 currently requires payment of a $340 fee. If the applicant is unable to pay the fee, he or she must submit a written affidavit or unsworn declaration requesting a waiver of the fee and including the statement: "I declare under penalty of perjury that the foregoing is true and correct." *See http://www.uscis.gov/feewaiver.* The submission must include an explanation of why he or she should be granted the fee waiver and the reasons for his or her inability to pay. *See* 8 CFR 103.7(c).

Supporting documentation. An F–1 student seeking off-campus employment authorization due to severe economic hardship must demonstrate to the DSO at the school where the F–1 student is enrolled that this employment is necessary to avoid severe economic hardship and that the hardship is resulting from the January 12, 2010 earthquake in Haiti. If the DSO agrees that the student should receive such employment authorization, he or she must recommend application approval to USCIS by entering the following statement in the remarks field of the student's SEVIS record, which will then appear on the student's Form I–20:

> Recommended for off-campus employment authorization in excess of 20 hours per week and reduced course load under the Special Student Relief authorization from the date of the USCIS authorization noted on Form I–766 until [DSO must insert the program end date or July 22, 2011, whichever date comes first].

The student must then file the properly endorsed Form I–20 and Form I–765, according to the instructions for the Form I–765. The student may begin working off campus only upon receipt of the EAD from USCIS.

DSO recommendation. In making a recommendation that a student be approved for Special Student Relief, the DSO certifies that:

(a) The student is in good academic standing as determined by the DSO;

(b) The student is a citizen of Haiti and is experiencing severe economic hardship as a direct result of the January 12, 2010 earthquake in Haiti, as documented on the Form I–20;

(c) The student is carrying a full course of study at the time of the request for employment authorization;

(d) The student will be registered for the duration of his or her authorized employment for a minimum of six semester or quarter hours of instruction per academic term if the student is at the undergraduate level, or for a minimum of three semester or quarter hours of instruction per academic term if the student is at the graduate level; and

(e) The off-campus employment is necessary to alleviate severe economic hardship to the individual caused by the January 12, 2010 earthquake in Haiti.

Processing. To facilitate prompt adjudication of the student's application for off-campus employment authorization under 8 CFR 214.2(f)(9)(ii)(C), the student should:

(a) Ensure that the application package includes: (1) A completed Form I–765; (2) the required fee or properly

[2] Minimum course load requirement for enrollment in a school must be established in a publicly available document (*e.g.,* catalog, Web site or operating procedure), and it must be a standard applicable to all students (U.S. citizens and foreign students) enrolled at the school.

documented fee waiver request as defined in 8 CFR 103.7(c); and (3) a signed and dated copy of the student's Form I–20 with the appropriate DSO recommendation, as previously described in this notice; and

(b) Send the application in an envelope which is clearly marked on the front of the envelope, bottom right-hand side, with the phrase "SPECIAL STUDENT RELIEF." Failure to include this notation may result in significant processing delays. If USCIS approves the student's Form I–765, the USCIS official will send the student a Form I–766 *Employment Authorization Document* (EAD) as evidence of his or her employment authorization. The EAD will contain an expiration date that does not exceed the earlier of the student's program end date or July 22, 2011.

TPS Considerations

Can an F–1 student apply for TPS and for benefits under this notice at the same time?

Yes. An F–1 student who has not yet applied for TPS or for student relief under this notice has two options. Under the first option, the student may file the TPS application according to the instructions in the **Federal Register** Notice designating Haiti for TPS. *See* 75 FR 3476. All TPS applicants must file a Form I–821 *Application for Temporary Protected Status,* and Form I–765, regardless of whether they are seeking employment authorization under TPS. The fee (or a properly documented fee waiver request) for Form I–765 is required only if the applicant is seeking employment authorization under TPS. *See* 8 CFR 244.6. If the student files a TPS application and requests employment authorization under TPS, once the student receives the TPS-related EAD, the student may go to his/her DSO and ask the DSO to make the required entry in SEVIS, issue an updated Form I–20, as described in this notice, and note that the student has been authorized to carry a reduced course load and is working pursuant to a TPS-related EAD. So long as the student maintains the minimum course load described in this notice, does not otherwise violate his/her nonimmigrant status as provided under 8 CFR 214.1(g), and maintains his or her TPS, then the student maintains F–1 status and TPS concurrently. Under the second option, the student may apply for an EAD under student relief. In this instance, Form I–765 must be filed with the location specified in the filing instructions. At the same time, the student may file a separate TPS application, but must submit the TPS filing according to the instructions provided in the **Federal Register** Notice designating Haiti for TPS. Because the student has already applied for employment authorization under student relief, the Form I–765 submitted as part of the TPS application is without fee. Again, the student will be able to maintain F–1 status and TPS.

When a student applies simultaneously for TPS status and benefits under this notice, what is the minimum course load requirement while an application for employment authorization is pending?

The student must maintain normal course load requirements for a full course of study unless or until he or she is granted employment authorization under this notice. TPS-related employment authorization, by itself, does not authorize a student to drop below 12 credit hours. Once approved for "severe economic hardship" employment authorization, the student may drop below 12 credit hours (with a minimum of six semester or quarter hours of instruction per academic term if the student is at the undergraduate level, or for a minimum of three semester or quarter hours of instruction per academic term if the student is at the graduate level). *See* 8 CFR 214.2(f)(6), 214.2(f)(5)(v), 214.2(f)(9)(i) and (ii).

If a student has been approved for employment authorization under TPS, how does he or she apply for authorization to take a reduced course load under this notice?

There is no further application process. The student only needs to demonstrate economic hardship caused by the January 12, 2010 earthquake in Haiti to his or her DSO and receive the DSO recommendation in SEVIS. *See* "supporting documentation," above. No other EAD will be issued.

Can a student who has been granted TPS, and has allowed his or her F–1 status to lapse, apply for reinstatement to F–1 student status?

Yes. Current regulations permit a student who falls out of student status to apply for reinstatement. *See* 8 CFR 214.2(f)(16). For example, this provision would apply to a student who worked on a TPS-related EAD or dropped his or her course load before publication of this notice, and therefore fell out of student status. The student must satisfy the criteria set forth in the student status reinstatement regulations.

How long will this notice remain in effect?

This notice grants temporary relief until July 22, 2011 to a specific group of F–1 students whose country of citizenship is Haiti. During this period, DHS will continue to monitor the situation in Haiti. Should the special provisions authorized by this notice need to be modified or extended, DHS will announce such changes in the **Federal Register**.

Paperwork Reduction Act

An F–1 student seeking off-campus employment authorization due to severe economic hardship must demonstrate to the DSO at the school where he or she is enrolled that this employment is necessary to avoid severe economic hardship. If the DSO agrees that the student should receive such employment authorization, he or she must recommend application approval to USCIS by entering information in the remarks field of the student's SEVIS record. The authority to collect this information is currently contained in the Student and Exchange Visitor and Information System (SEVIS) collection of information currently approved by OMB under OMB Control Number 1653–0038.

This notice also allows F–1 students whose country of citizenship is Haiti and who are experiencing severe economic hardship as a direct result of the January 12, 2010 earthquake in Haiti, to obtain employment authorization, work an increased number of hours while school is in session, and reduce their course load, while continuing to maintain their F–1 student status.

To apply for work authorization an F–1 student must complete and submit currently approved Form I–765 according to the instructions on the form. The authority to collect the information contained on the current Form I–765, has previously been approved by the Office of Management and Budget under the Paperwork Reduction Act (PRA) (OMB Control No. 1615–0040). Although there will be a slight increase in the number of Form I–765 filings because of this notice, the number of filings currently contained in the OMB annual inventory for Form I–765 is sufficient to cover the additional filings. Accordingly, there is no further action required under the PRA.

Janet Napolitano,

Secretary.

[FR Doc. 2010–22929 Filed 9–14–10; 8:45 am]

BILLING CODE 9111–28–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Notice of Issuance of Final Determination Concerning APC InfraStruXure® Solutions and of Certain Units

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection ("CBP") has issued a final determination concerning the country of origin of InfraStruXure Solutions and of certain units. Based upon the facts presented, CBP has concluded in the final determination that the United States is the country of origin of InfraStruXure Solutions and of certain units for purposes of U.S. Government procurement.

DATES: The final determination was issued on September 9, 2010. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination on or before October 15, 2010.

FOR FURTHER INFORMATION CONTACT: Heather K. Pinnock, Valuation and Special Programs Branch: (202) 325–0034.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on September 9, 2010, pursuant to subpart B of part 177, Customs Regulations (19 CFR Part 177, subpart B), CBP issued a final determination concerning the country of origin of InfraStruXure Solutions and of certain units which may be offered to the U.S. Government under an undesignated government procurement contract. This final determination, in HQ H107335, was issued at the request of APC by Schneider Electric ("APC"), under procedures set forth at 19 CFR part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18). In the final determination, CBP concluded that, based upon the facts presented, InfraStruXure Solutions and certain units, assembled to completion in the United States from parts made in non-TAA countries, TAA countries and in the United States, and programmed and installed in the United States are substantially transformed in the United States, such that the United States is the country of origin of the finished articles for purposes of U.S. Government procurement.

Section 177.29, Customs Regulations (19 CFR 177.29), provides that notice of final determinations shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register.**

Dated: September 9, 2010.

Sandra L. Bell,

Executive Director, Regulations and Rulings, Office of International Trade.

Attachment

HQ H107335

September 9, 2010

OT:RR:CTF:VS H107335 HkP

CATEGORY: Marking

Stuart P. Seidel, Esq.
Baker & McKenzie LLP
815 Connecticut Avenue, NW.
Washington, DC 20006–4078.

RE: Request for Final Determination on the Country of Origin of APC InfraStruXure® Solutions and of certain Units

Dear Mr. Seidel: This is in response to your letter dated May 19, 2010, requesting a final determination on behalf of APC by Schneider Electric ("APC"), pursuant to subpart B of part 177 of the U.S. Customs and Border Protection ("CBP") Regulations (19 C.F.R. Part 177). Under these regulations, which implement Title III of the Trade Agreements Act of 1979 ("TAA"), as amended (19 U.S.C. 2511 et seq.), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

This final determination concerns the country of origin of APC's "InfraStruXure®" Solutions ("ISX") that are assembled at customer's premises to provide uninterruptible power supplies (UPS). This final determination also concerns certain individual units of the ISX: (1) the Symmetra PX UPS, and
(2) the Symmetra MW UPS. At your request, the final determination on the Rack Enclosures/Assemblies for the ISX, when imported separately, will be addressed in other correspondence. We note that as a U.S. manufacturer, producer and/or importer of the named products, APC is a party-at-interest within the meaning of 19 C.F.R. § 177.22(d)(1) and is entitled to request this final determination. Photographs were submitted with your request.

FACTS:

According to the information submitted, an ISX provides a systematic approach to building data center infrastructure utilizing standardized and reassembled components. They can be contained in a wiring closet, computer room, or a small, medium or large data center. In this case, the ISX incorporates UPS units (either Symmetra PX UPS or Symmetra MW UPS), power distribution units (PDUs), cooling or chilling units such as computer room air conditioners and InRow Cooling Units, Rack PDUs, Rack Assemblies and Enclosures, and a thermal containment system. The units will be integrated and monitored by the NetBotz and InfraStruXure Central Security environmental appliances and centralized management systems. These items are independently shipped and are assembled at the end user's (customer's) premises in the United States.

Every ISX in the U.S. is designed by certified APC sales/systems engineers based in the U.S. The design process involves site visits, surveys and audits of the customer's facility and can take from several hours to several days. Once the customer's requirements are known and the components imported, the systems are assembled, configured, networked, programmed and integrated by APC field service engineers at the customer's facility. This process can take from several hours for small systems to several weeks for large systems and must be performed by trained technicians and licensed electricians.

InfraStruXure Solution (ISX)

For purposes of this request, "typical" small, medium and large ISX have been described as having the following units (described *infra*).

Small system:

1 40 kW N+1 Symmetra PX UPS
1 40 kW InfraStruXure PDU with pre-fabricated circuits
10 NetShelter SX enclosures
20 Rack power distribution units
4 InRow RD air-cooled cooling units and condensers
4 NetBotz security and environmental appliances
1 InfraStruXure central basic monitoring/management system
Start-up, assembly and configuration services

Programming, assembly and installation of a small system typically take three days to complete.

Medium system:

1 250 kW Symmetra PX UPS
1 288 kW InfraStruXure PDU with pre-fabricated circuits
50 NetShelter SX enclosures
50 Rack power distribution units
16 InRow RC water-cooled cooling units and chillers
17 NetBotz security and environmental appliances
1 InfraStruXure central basic monitoring/management system
Start-up, assembly and configuration services

Programming, assembly and installation of a medium system typically take five to seven days to complete.

Large system:

1 1000 kW (1 MW) Symmetra MW UPS
16 288 kW InfraStruXure PDU with pre-fabricated circuits
200 NetShelter SX enclosures

200 Rack power distribution units
64 InRow RC chilled water-cooled cooling units and chillers
68 NetBotz security and environmental appliances
1 InfraStruXure central basic monitoring/management system
Start-up, assembly and configuration services

Programming, assembly and installation of a large system typically take 12–15 days to complete.

Units

As noted above, the ISX is comprised of various units. One unit, a UPS, is described as power protection for servers and voice and data networks. Specifically, the *Symmetra PX UPS* is a modular system made up of dedicated and redundant modules: Power, intelligence, battery, and bypass. Its architecture can scale power and runtime as demand grows or as higher levels of availability are required. The Symmetra PX is referred to as a "family" as it is available in different sizes. It serves as the core powertrain that drives the APC InfraStruXure systems for small and medium data centers but can also power individual zones of larger data centers. It has self-diagnostic capabilities and standardized modules which mitigate the risk of human error.

The UPS modules for the Symmetra PX are assembled in the Philippines. The total assembly time depends on the specific modules or components to be included. Power modules are the main component and take approximately one hour to be assembled. Subcomponents require under an hour to be assembled and the UPS frame takes approximately two hours to be assembled. The assembly operation involves soldering, welding, and the installation of firmware (programming instructions stored in the read only memory (ROM) rather than being implemented through software) at the board and module levels. The firmware provides the functionality for diagnostic testing. Fully functioning firmware is installed in the United States after complete assembly and integration of the full system at the end user's premises. Also installed in the Philippines is a version of the operating system (OS) [1] developed in the U.S., Denmark and Ireland. However, the OS is configured to the customer's requirements at the customer's premises in the U.S. when the system is assembled to completion. This configuration is a separate step from the system configuration that is required at the time of start up.

The components of the Symmetra PX UPS unit are imported from the Philippines in basic modules and take about one to three days to be assembled. The technicians inspect the components, assemble the modules, level the UPS enclosure/frame, and connect the UPS units to the frame and to other components in the system through cables and other wiring (ground and control). In order to physically attach the UPS enclosure to other enclosures, the side panels of the UPS enclosure, which has no wiring knock-outs, must be swapped with the opposite side panels from the PDU and XR Battery enclosures. In addition, the battery enclosure communication cables must be connected and the XR frame addresses selected, and the control wiring between the PDU and UPS and between various boards and enclosures must be installed.

Symmetra MW UPS—a high-power fault-tolerant UPS in the 400–1600 kW range. It is designed for large data centers, complete buildings, healthcare and other critical facility protection requirements. As with the Symmetra PX, the MW UPS is available in different sizes. It can be scaled for rigorous and changing electrical demands and provides increased availability through internal N+1 configurability, predictive failure notification and multi-module paralleling features. It features slide-in/out power modules, manageable external batteries and self-diagnosis, can be combined with a wide range of line-up and match options, and is a customizable system in a standardized design for any large on-demand network-critical physical infrastructure.

The main components of the Symmetra MW are assembled in India by soldering, welding and screwing. Each module takes two to three days to be completed. In the U.S., certified technicians assemble the full system to completion at the customer's premises from the basic modules assembled in India. The installation of the complete system takes seven to 10 days for a two-man crew. As described above in relation to the assembly of the PX UPS, technicians inspect the components, assemble the modules, level the UPS enclosure/frame, and connect the UPS units to the frame and to other components in the system through cables and other wiring. Firmware, partly developed in the United States, is stored and updated on an internal memory chip in the UPS unit and is custom configured in the U.S. during installation based on the options required for that particular installation.

Power Distribution Unit (PDU)—the PDU has a logic controller which serves as the PDU's brain. It includes a network management card, the input/output contacts and the memory chips for the PDU firmware. The logic card is located in the Row PDU and not in the UPS.

Row PDU—a modular power distribution unit mitigates the need to predict the future requirements and configurations of an end user's data center. It enables rapid expansion or reconfiguration through expansion modules (including circuit breaker, power cord, and power connection) which can be plugged into a touch-safe backplane in minutes, eliminating the need for risky hot work and shielding users from dangerous amperage. It also features output metering, branch current/circuit monitoring and auto-detection by the InfraStruXure suite of management options. The Modular Remote Power Panel [2] and Row PDU are manufactured in the Philippines, while the distribution modules are manufactured in the United States.

Rack PDU—provides power distribution via a single input with multiple output receptacles and distributes power from low amperage single phase circuits to higher power 3-phase solutions. Rack PDUs are available in basic, metered and switched versions.

Most component parts are manufactured in India and China and a small number in the United States and European Union countries. Complete testing of each part is performed in the country of manufacture. Firmware for diagnostic testing is developed in the U.S. but used in the country of manufacture. After testing, it is removed and replaced with firmware for operations, which is developed in the U.S. and India. Final configuration for the metered and switched versions of the Rack PDU is performed at the customer's premises in the U.S.

NetShelter SX Rack Enclosure—rack enclosures/assemblies have a strong focus on cooling, power distribution, cable management, and environmental monitoring. Their main components are: A vertical cable organizer, split doors, side panels with locks (and keys), frame posts, adjustable leveling feet, casters, a reversible curved door, vertical mounting flanges, a 1070-mm roof, and a 1200-mm roof. The hardware necessary to assemble the pieces together is: Plastic cup washers, M6x16 Phillips slot screws, M5x12 screws, cage nuts, and 7-mm hole plugs.

The main components are mostly sourced in China and account for 25.3% of the enclosures and 90% of their cost. Some of the minor components, such as bolts, washers, hole plugs and cable ties, come from suppliers in the U.S., as do labels, packaging sheets, product literature, warranty cards, and installation manuals. Shipping and packaging materials for the enclosures, such as corner posts, a pallet, and fork-lift guards are also sourced in the U.S. Together, these U.S.-sourced materials account for 68.7% of the total material used in the assembly of rack enclosures and 8.4% of their cost. The remaining components are from Germany and Korea.

The rack assemblies are imported unassembled and are assembled in the U.S. by teams of six people. Final set-up is at the customer's premises and involves unpacking, setting in place and setting-up for the mounting of equipment—lowering of leveling feet, screwing and otherwise assembling together vertical and horizontal pieces, resetting the mounting rail depth, attaching grounding to the enclosure, securing the enclosures to the floor and, when attaching two or more enclosures together, baying them in a row. Based on the diagrams submitted, a fully assembled enclosure resembles a large rectangular three-dimensional frame, with panels on two opposing sides and on the top but not on any of the remaining three sides (including the side secured to the floor). Set-up takes between 15 minutes and two hours per enclosure, depending on customer requirements.

InRow Cooling Units—prevent hot air recirculation from IT loads while improving cooling predictability and allowing for a "pay

[1] "The computer's master control program * * * It sets the standard for all application programs that run in the computer. Applications 'talk to' the operating system for all user interface and file management operations." *Computer Desktop Encyclopedia* (2010), *available at www.answers.com/topic/operating-system-technology*.

[2] This component was not described in the submission.

as you grow" environment. The units are available with and without humidity control and are designed to meet the diverse requirements for medium to large data centers. They are assembled in China and firmware, designed in the U.S. but installed in China, is used in the units. The firmware is upgraded when the unit is installed in a completed system at the customer's premises in the U.S. Installation of the unit requires on-site piping and connection to building systems.

InRoom Cooling Units—offer cooling solutions for lower density racked and non-racked IT loads as well as a flexible, assemble-to-order solution that provides variable fan technology and intelligent control for greater efficiency. They are manufactured in the United States using processes involving sheet metal work, soldering, brazing, and welding. The units use firmware developed and installed in the United States.

Chillers—air-cooled chillers are used for large data center environments. They are manufactured in the U.S. in a process that involves brazing and/or welding. The chillers use firmware that completely controls the chiller and that interfaces with building management and other systems.

Thermal Containment System—available in rack or aisle level configurations and is designed to completely separate the supply and return air paths of IT equipment. Thermal containment is available for 300 mm, 600 mm and 750 mm wide NetShelter Racks, UPS and PDU units, and InRow Cooling products. The units are manufactured in Canada and require additional assembly at the customer's premises.

NetBotz and InfraStruXure Central—a management system that provides a centralized dashboard to the client's InfraStruXure system and offers features such as a centralized repository, trending, alerting, alarming and escalation. The units are manufactured in the Philippines and India and have printed circuit board (PCB) and sheet metal components. Firmware, which is installed in India or in the Philippines, is designed in the U.S. and can be further tailored to meet customer requirements on installation by APC trained engineers. Additional assembly is required at the customer's premises.

Assembly and Installation

The assembly and installation process for an ISX in the U.S. is as follows:

1. Position the ISX power system, UPS and external battery cabinets in accordance with the site plan;
2. Assemble racks and enclosures;
3. Install all applicable system modules and rack mounted devices;
4. Ensure that the enclosures are aligned, leveled, and the brackets tightened; verify rack mounted ISX distribution systems are installed to manufacturer specifications;
5. Install NetShelter accessories (cabling, troughs, ladders, baying units);
6. Route all power cabling through the troughs;
7. Install data distribution system including cable heads and data distribution panel;
8. Move cooling system into place and assemble ductwork;
9. Install PEX flexible fluid piping, terminate connections, check for leaks;
10. Mount any remote sensors;
11. Install cooling system modules and rack mounted devices; and
12. Unpack management components and mount devices in the rack, install data cabling to all devices to be managed.

All firmware is proprietary to APC and is developed by APC in the United States, Denmark, and Ireland. Each release costs significant amounts of money and requires several thousand man-hours to develop. It takes trained and certified technicians several hours to install and configure the firmware at customers' premises.

LAW AND ANALYSIS:

Pursuant to Subpart B of Part 177, 19 CFR § 177.21 et seq., which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511 et seq.), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

Under the rule of origin set forth under 19 U.S.C. § 2518(4)(B):

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also 19 C.F.R. § 177.22(a).

In rendering advisory rulings and final determinations for purposes of U.S. Government procurement, CBP applies the provisions of subpart B of Part 177 consistent with the Federal Procurement Regulations. *See* 19 C.F.R. § 177.21. In this regard, CBP recognizes that the Federal Procurement Regulations restrict the U.S. Government's purchase of products to U.S.-made or designated country end products for acquisitions subject to the TAA. *See* 48 C.F.R. § 25.403(c)(1).

You contend that the final assembly, integration, configuration or programming results in a substantial transformation in the U.S., in which the individual modules, components, parts and accessories are substantially transformed into a new end product ("ISX").

In *Data General v. United States,* 4 Ct. Int'l Trade 182 (1982), the court determined that for purposes of determining eligibility under item 807.00, Tariff Schedules of the United States (predecessor to subheading 9802.00.80, Harmonized Tariff Schedule of the United States), the programming of a foreign PROM (Programmable Read-Only Memory chip) in the United States substantially transformed the PROM into a U.S. article. In programming the imported PROMs, the U.S. engineers systematically caused various distinct electronic interconnections to be formed within each integrated circuit. The programming bestowed upon each circuit its electronic function. That is, its "memory" which could be retrieved. A distinct physical change was effected in the PROM by the opening or closing of the fuses, depending on the method of programming. This physical alteration, not visible to the naked eye, could be discerned by electronic testing of the PROM. The court noted that the programs were designed by a project engineer with many years of experience in "designing and building hardware." While replicating the program pattern from a "master" PROM may be a quick one-step process, the development of the pattern and the production of the "master" PROM required much time and expertise. The court noted that it was undisputed that programming alters the character of a PROM. The essence of the article, its interconnections or stored memory, was established by programming. The court concluded that altering the non-functioning circuitry comprising a PROM through technological expertise in order to produce a functioning read only memory device possessing a desired distinctive circuit pattern was no less a "substantial transformation" than the manual interconnection of transistors, resistors and diodes upon a circuit board creating a similar pattern.

In determining whether the combining of parts or materials constitutes a substantial transformation, the determinative issue is the extent of operations performed and whether the parts lose their identity and become an integral part of the new article. *Belcrest Linens v. United States,* 573 F. Supp. 1149 (Ct. Int'l Trade 1983), *aff'd,* 741 F.2d 1368 (Fed. Cir. 1984). *See also Carlson Furniture Industries v. United States,* 65 Cust. Ct. 474, 482 (1970) ("And the end result of the activities performed on the imported articles … is the transformation of parts into a functional whole—giving rise to a new and different article within the principle of the Gibson-Thomsen case.") Assembly operations that are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation.

In order to determine whether a substantial transformation occurs when components of various origins are assembled into completed products, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. The country of origin of the item's components, extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. Additionally, factors such as the resources expended on product design and development, the extent and nature of post-assembly inspection and testing procedures, and worker skill required during the actual manufacturing process will be considered when determining whether a substantial transformation has occurred. No one factor is determinative.

In HQ 559255, dated August 21, 1995, a device referred to as a "CardDock" was under

consideration for country of origin marking purposes. The CardDock was a device which was installed in IBM PC compatible computers. After installation, the units were able to accept PCMCIA cards for the purpose of interfacing such PCMCIA cards with the computer in which the CardDock unit was installed. The CardDock units were partially assembled abroad but completed in the United States. The overseas processing included manufacturing the product's injection molded plastic frame and installing integrated circuits onto a circuit board along with various diodes, resistors and capacitors. After such operations, these items were shipped to the United States for further processing that included mating a U.S.-origin circuit board to the foreign-origin frame and board. The assembled units were thereafter subjected to various testing procedures. In consideration of the foregoing, CBP held that the foreign-origin components, i.e., the ISA boards, frame assemblies and connector cables, were substantially transformed when assembled to completion in the United States. In finding that the name, character, and use of the foreign-origin components had changed during processing in the United States, CBP noted that the components had lost their separate identity during assembly and had become an integral part of a new and distinct item which was visibly different from any of the individual foreign-origin components.

In HQ 735027, dated September 7, 1993, a device that software companies used to protect their software from piracy was under consideration for country of origin marking purposes. The device, referred to as the "MemoPlug", was assembled in Israel from parts that were obtained from Taiwan (such as various connectors and an Electronically Erasable Programmable Read Only Memory, or "EEPROM") and Israel (such as an internal circuit board). After assembly, these components were shipped to a processing facility in the United States where the EEPROM was programmed with special software. Such processing in the United States accounted for approximately 50 percent of the final selling price of the MemoPlugs. In finding that the foreign-origin components were substantially transformed in the United States, CBP noted that the U.S. processing transformed a blank media, the EEPROM, into a device that performed functions necessary to the prevention of software piracy.

In Headquarters Ruling Letter (HQ) 563012, dated May 4, 2004, CBP considered whether components of various origins would be substantially transformed when assembled to form a fabric switch. Most of the assembly of computer hardware was to be performed in China. Then, in either Hong Kong or the U.S., the hardware would be completed and the U.S.-origin software, which would provide the finished product with its "distinctive functional characteristics," would be downloaded onto the hardware. In the scenario where the fabric switch would be assembled to completion in Hong Kong and the software downloaded to the switch in that country, CBP determined that the country of origin for marking purposes would be Hong Kong. Likewise, were assembly and configuration to take place in the United States, CBP concluded that the country of origin would be the U.S.

InfraStruXure Solutions

We note that while several subassemblies and components are manufactured in other countries, after importation these individual units are assembled into systems at the customer's premises in the United States by trained technicians. As discussed below, several of the units comprising the ISX undergo assembly and programming in the U.S. Further, some of the units, the InRoom Cooling Units and Chillers, are entirely manufactured in the U.S. As a part of the assembly and installation process, the diagnostic firmware present in many of the units (UPS, Rack PDU, InRow Cooling units, NetBotz and InfraStruXure Central) is either replaced or upgraded, that is, the systems are programmed to perform their operational function by trained technicians. Most of the design and a high percentage of the original firmware and OS programming are developed in the U.S. *See* FACTS *supra.* Depending on the size of the system, programming, assembly and installation generally take from three to 15 days to complete.

As a result of the assembling, programming and installation of the units by highly trained APC technicians that takes place after importation, we agree with your contention that the units are substantially transformed in the U.S. from non-functional or partly functional devices into an intelligent and fully functional network or data center UPS system. Consequently, the country of origin of the typical small, medium and large InfraStruXure Solutions will be the United States.

In addition, you seek a final determination on certain units that may be sold separately (most likely as add-ons after the ISX has been in use for a while, but sometimes as replacement units).

Symmetra PX UPS and Symmetra MW UPS

After importation, the components of the UPS units (power, intelligence, battery, and bypass/static switch modules) must be assembled together in the UPS frame by trained technicians. Both models of UPS units are imported with firmware installed for diagnostic testing. In addition the Symmetra PX UPS is imported with a version of the operating system which APC technicians configure to the customer's requirements. APC technicians also install fully functional firmware onto both models of UPS units after complete assembly and integration into the full ISX system at the customer's premises. Assembly, installation and programming take between one and 10 days depending on the model of UPS unit.

Given the complexity of the devices and of the mechanical and electrical connections which must be made in the U.S. by highly trained technicians, and the fact that the units will be programmed in the United States using firmware developed in part in the U.S., we find that both models of UPS units would be substantially transformed in the United States and that the U.S. would be their country of origin. *See Data General* and *Belcrest Linens, supra.*

HOLDING:

Based on the facts provided, the assembly and programming operations performed in the United States on the units of the ISX give rise to a new and different article (an ISX) and impart the essential character of the ISX. Likewise, the assembly and programming operations performed in the United States on the components of the UPS units of the ISX give rise to a new and different article (a UPS unit). As such, the ISX and the UPS units described in this ruling are to be considered products of the United States for purposes of government procurement.

Notice of this final determination will be given in the Federal Register, as required by 19 C.F.R. § 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 C.F.R. § 177.31, that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 C.F.R. § 177.30, any party-at-interest may, within 30 days of publication of the Federal Register Notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,

Sandra L. Bell,

Executive Director, Regulations and Rulings, Office of International Trade.

[FR Doc. 2010–22928 Filed 9–14–10; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2010–0032]

Federal Radiological Preparedness Coordinating Committee

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice of public meeting.

SUMMARY: The Federal Radiological Preparedness Coordinating Committee is holding a public meeting on September 28, 2010 in Arlington, VA.

DATES: The meeting will take place on September 28, 2010. The session is open to the public and will take place from 9 a.m. to 11 a.m. Send written statements and requests to make oral statements to the person listed in the **FOR FURTHER INFORMATION CONTACT** section by close of business September 25, 2010.

ADDRESSES: The meeting will be held at the Marriott Crystal Gateway located at 1700 Jefferson Davis Highway, Arlington, VA 22202, in the Alexandria Room.

FOR FURTHER INFORMATION CONTACT: Timothy Greten, FRPCC Executive Secretary, DHS/FEMA, 1800 South Bell Street—CC847, Mail Stop 3025,

Arlington, VA 20598–3025; telephone (202) 646–3907; fax (703) 305–0837; or e-mail *timothy.greten@dhs.gov.*

SUPPLEMENTARY INFORMATION: The role and functions of the Federal Radiological Preparedness Coordinating Committee (FRPCC) are described in 44 CFR 351.10(a) and 351.11(a). The FRPCC is holding a public meeting on September 28, 2010, from 9 a.m. to 11 a.m., at the Marriott Crystal Gateway located at 1700 Jefferson Davis Highway, Arlington, VA 22202, in the Alexandria Room. Please note that the meeting may close early. This meeting is open to the public. Public meeting participants must pre-register to be admitted to the meeting. To pre-register, please provide your name and telephone number by close of business on September 25, 2010, to the individual listed in the **FOR FURTHER INFORMATION CONTACT** section.

The tentative agenda for the FRPCC meeting includes: (1) Introductions, (2) reports from FRPCC Subcommittees, (3) status of finalization of Radiological Emergency Preparedness (REP) Program Manual and NUREG–0654 Supplement 4, and (4) REP Program Manual and Supplement 4 Implementation "Impact Papers." The FRPCC Chair shall conduct the meeting in a way that will facilitate the orderly conduct of business. Reasonable provisions will be made, if time permits, for oral statements from the public of not more than five minutes in length. Any member of the public who wishes to make an oral statement at the meeting should send a written request for time by close of business on September 25, 2010, to the individual listed in the **FOR FURTHER INFORMATION CONTACT** section. Any member of the public who wishes to file a written statement with the FRPCC should provide the statement by close of business on September 25, 2010, to the individual listed in the **FOR FURTHER INFORMATION CONTACT** section. For further information and to review any supporting documents please go to *http://www.regulations.gov,* Docket ID FEMA–2010–0032.

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, please write or call the individual listed in the **FOR FURTHER INFORMATION CONTACT** section as soon as possible.

Authority: 44 CFR 351.10(a) and 351.11(a).

Timothy W. Manning,

Deputy Administrator, Protection and National Preparedness, Federal Emergency Management Agency.

[FR Doc. 2010–22984 Filed 9–14–10; 8:45 am]

BILLING CODE 9110–21–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR 5378–N–04]

Notice of Proposed Extension of a Currently Approved Information Collection: Comment Request; Housing Discrimination Information Form HUD–903.1, HUD 903.1A, HUD–903–1B, HUD–903.1F, HUD–903.1KOR, HUD–903.1C, HUD–903.1CAM, HUD–903.1RUS, 903–1_Somali

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Notice.

SUMMARY: The proposed extension of the currently approved information collection requirement concerning Housing Discrimination Information Forms HUD 903.1, HUD 903.1A, HUD–903–1B, HUD–903.1F, HUD–903.1KOR, HUD–903.1C, HUD–903.1CAM, HUD–903.1RUS, and HUD–903–1_Somali will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. HUD will also solicit public comments on the subject proposal.

DATES: *Comments Due Date:* November 15, 2010.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number, and should be sent to Leroy McKinney, Jr., Paperwork Reduction Act Manager, Office of Chief Information Officer, U.S. Department of Housing and Urban Development, 451 7th Street, SW., Room 4178, Washington, DC 20410–2000; *telephone:* (202) 402–5564.

FOR FURTHER INFORMATION CONTACT: Turner Russell, U.S. Department of Housing and Urban Development, 451 7th Street, SW., Room 5226, Washington, DC, 20410–2000; *telephone:* (202) 402–6995 (this is not a toll-free number). Hearing or speech-impaired individuals may access this number via TTY/ASCII by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: HUD is proposing this extension of a currently approved information collection to the OMB for review, as required by the Paperwork Reduction Act of 1995 [44 U.S.C. chapter 35, as amended].

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed extension of the collection of information regarding alleged discriminatory housing practices under the Fair Housing Act (Act) [42 U.S.C. 3601 *et seq.*]. The Act prohibits discrimination in the sale, rental, occupancy, advertising, and insuring of residential dwellings; and in residential real estate-related transactions; and in the provision of brokerage services, based on race, color, religion, sex, handicap [disability], familial status, or national origin.

Any person who claims to have been injured by a discriminatory housing practice, or who believes that he or she will be injured by a discriminatory housing practice that is about to occur, may file a complaint with HUD not later than one year after the alleged discriminatory housing practice occurred or terminated. Form HUD–903.1 was developed in order to promote consistency in the documents that, by statute, must be provided to persons against whom complaints are filed, and for the convenience of the general public. Section 103.25 of HUD's Fair Housing Act regulation describes the information that must be included in each complaint filed with HUD. For purposes of meeting the Act's one-year time limitation for filing complaints with HUD, complaints need not be initially submitted on the Form that HUD provides. Housing Discrimination Information Form HUD–903.1 (English language), HUD–903.1A (Spanish language), HUD–903–1B (Chinese language), HUD–903.1F (Vietnamese language), HUD–903.1KOR (Korean language), HUD–903.1C (Arabic language), HUD–903.1CAM (Cambodian language), HUD–903.1RUS (Russian language), and HUD–903–1 (Somali language) may be submitted to HUD by mail, in person, by facsimile, or via the Internet to HUD's Office of Fair Housing and Equal Opportunity (FHEO). FHEO staff uses the information provided on the Form to verify HUD's authority to investigate the aggrieved person's allegations under the Act.

Notice of Submission of Proposed Extension of Information Collection to OMB

Title of Proposal: Housing Discrimination Information Form.

Office: Fair Housing and Equal Opportunity, HUD.

OMB Control Number: 2529–0011.

Description of the need for the information and proposed use: HUD uses the Housing Discrimination Information Form HUD–903.1 (Form) to collect pertinent information from persons wishing to file housing discrimination complaints with HUD under the Fair Housing Act (Act). The Act makes it unlawful to discriminate in the sale, rental, occupancy, advertising, or insuring of residential dwellings; or to discriminate in residential real estate-related transactions; or in the provision of brokerage services, based on race, color, religion, sex, handicap [disability], familial status, or national origin.

Any person who claims to have been injured by a discriminatory housing practice, or any person who believes that he or she will be injured by a discriminatory housing practice that is about to occur, may file a complaint with HUD not later than one year after the alleged discriminatory housing practice occurs or terminates. The Form promotes consistency in the collection of information necessary to contact persons who file housing discrimination complaints with HUD. It also aids in the collection of information necessary for initial assessments of HUD's authority to investigate alleged discriminatory housing practices under the Act.

This information may subsequently be provided to persons against whom complaints are filed ["respondents"], as required under section 810(a)(1)(B)(ii) of the Act.

Agency form numbers, if applicable: Form HUD–903.1 (English), Form HUD–903.1A (Spanish), Form HUD–903–1B (Chinese), Form HUD–903.1F (Vietnamese), Form HUD–903.1K (Korean), Form HUD–903.1AR (Arabic), Form HUD–903.1CAM (Cambodian), Form HUD–903.1R (Russian), and Form HUD–903–1 (Somali).

Members of affected public: Individuals or households; businesses or other for-profit, not-for-profit institutions; State, Local, or Tribal Governments.

Estimation of the total number of hours needed to prepare the information collection, including the number of respondents, frequency of response, and hours of responses: During FY 2009, HUD staff received approximately 16,740 information submissions from persons wishing to file housing discrimination complaints with HUD. Telephone contacts accounted for 4,200 of this total. The remaining 12,540 complaint submissions were transmitted to HUD by mail, in-person, and via the Internet. HUD estimates that an aggrieved person requires approximately 45 minutes in which to complete this Form. The Form is completed once by each aggrieved person. Therefore, the total number of annual burden hours for this Form is 9,405 hours.

12,540 × 1 (frequency) × .45 minutes (.75 hours) = 9,405 hours.

Annualized cost burden to complainants: HUD does not provide postage-paid mailers for this information collection. Accordingly, persons who choose to submit this Form to HUD by mail must pay the prevailing cost of First Class Postage. As of the date of this Notice, the annualized cost burden per person, based on a one-time submission of this Form to HUD via First Class Postage, is Forty-Four Cents ($0.44) per person. During FY 2009, FHEO staff received approximately 6,225 submissions of potential complaint information by mail. Based on this number, HUD estimates that the total annualized cost burden for aggrieved persons who submit this Form to HUD by mail is $2,739.00. Aggrieved persons also may submit this Form to HUD in person, by facsimile, or electronically via the Internet.

Status of the proposed information collection: Renewal of a currently approved collection of pertinent information from persons wishing to file Fair Housing Act complaints with HUD.

Authority: The Paperwork Reduction Act of 1995 [44 U.S.C. Chapter 35, as amended].

Dated: September 6, 2010.

Turner Russell,

Director, Enforcement Support Division, Office of Enforcement, FHEO.

[FR Doc. 2010–22919 Filed 9–14–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5383–N–16]

Notice of Submission of Proposed Information Collection to OMB; Certification of Domestic Violence, Dating Violence, or Stalking

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

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* November 15, 2010.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name/or OMB Control number and should be sent to: Leroy McKinney, Jr., Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Room 4178, Washington, DC 20410–5000; telephone 202–402–5564, (this is not a toll-free number) or e-mail Mr. McKinney at *Leroy.McKinneyJr@hud.gov.* Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339. (Other than the HUD USER information line and TTY numbers, telephone numbers are not toll-free.)

FOR FURTHER INFORMATION CONTACT: Dacia Rogers, Office of Policy, Programs and Legislative Initiatives, PIH, Department of Housing and Urban Development, 451 7th Street, SW., Room 4116, Washington, DC 20410; telephone 202–402–3374, (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended). This notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology; *e.g.,* permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Certification of Domestic Violence, Dating Violence, or Stalking.

OMB Control Number: 2577–0249.

Description of Information Collection: This is a request for information collection that may be used in response to an incident or incidents of actual or threatened domestic violence, dating violence or stalking that may affect an

individual's participation in the Section 8 or public housing programs. When an individual presents a PHA, owner, or management agency with a claim for protections under the Violence Against Women Act (VAWA), the PHA, owner, or management agency may (but is not required to) to request that the individual complete, sign and submit within 14 business days of the request, a HUD approved certification form, or alternate documentation as described on the certification form, to document the domestic violence, dating violence, or stalking. The PHA's, owner's, or management agency's request for documentation must be made in writing. On the certification form, the individual certifies that he/she is a victim of domestic violence, dating violence, or stalking, and that the incident or incidences in question are bona fide incidences of such actual or threatened abuse. On the certification form, the individual must provide the name of the perpetrator.

PHAs are instructed that the delivery of the certification form to the tenant in response to incident via mail may place the victim at risk, *e.g.,* the abuser may monitor the mail; consequently, PHAs, owners and managers may require that the tenant come into the office to pick up the certification form. PHAs and owners are also encouraged to work with tenants to make delivery arrangements that do not place the tenant at risk.

If the PHA, owner, or management agent provides the individual with a written request for documentation of the abuse, and the individual does not provide the certification form, or alternate documentation as described on the certification form, within 14 business days from the date of receipt of the PHA's, owner's, or management agent's written request (or after any extension of that date provided by the PHA, owner or management agent), none of the protections afforded to the victim of domestic violence, dating violence or stalking by sections 606 or 607 will apply. The PHA, owner, or management agent would therefore be free to evict, or terminate assistance, in the circumstances authorized by otherwise applicable law and lease provisions, without regard to the amendments made by section 606 and 607.

Agency Form Numbers, if applicable: HUD–50066.

Members of Affected Public: Public Housing Authorities (PHAs), Owners, and Management Agents participating in the public housing and Section 8 Housing Choice Voucher programs.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of responses, and hours of response: An estimation of the total number of hours needed to prepare the information collection is **60 minutes** per applicant. The estimated number of respondents is 200. The frequency of response is once. The total public burden is estimated to be 200 hours.

Status of the Information Collection: Revision of a currently approved collection.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: August 20, 2010.

Merrie Nichols-Dixon,

Acting Deputy Assistant, Secretary for Policy, Program and Legislative Initiatives.

[FR Doc. 2010–22920 Filed 9–14–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–R–2010–N160; 1265–0000–10137–S3]

Pearl Harbor National Wildlife Refuge, Honolulu County, HI; Comprehensive Conservation Plan and Environmental Assessment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of our draft comprehensive conservation plan and environmental assessment (Draft CCP/EA) for the Pearl Harbor National Wildlife Refuge (refuge) for public review and comment. The Draft CCP/EA describes our proposal for managing the refuge for the next 15 years.

DATES: To ensure consideration, we must receive your written comments by September 28, 2010.

ADDRESSES: Address comments, questions, and requests for further information to David Ellis, Project Leader, O'ahu National Wildlife Refuge Complex, 66–590 Kamehameha Highway, Room 2C, Hale'iwa, HI 96712. Alternatively, you may fax comments to the refuge at (808) 637–3578, or e-mail them to *FW1PlanningComments@fws.gov* (include "Pearl Harbor Refuge CCP" in the subject line of the message). Additional information concerning the refuge is available on the Internet at *http://www.fws.gov/pearlharbor/.* You may request the CCP/EA for review by any of the above contact methods, or you may view or download it at *http://www.fws.gov/pacific/planning.*

FOR FURTHER INFORMATION CONTACT: David Ellis, Project Leader, (808) 637–6330.

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we continue the CCP process for the Pearl Harbor National Wildlife Refuge. We started this process by publishing a notice of intent in the **Federal Register** on December 1, 2008 (73 FR 72826).

Pearl Harbor Refuge is located on the southern coast of the island of O'ahu and is comprised of three units: Honouliuli, Waiawa, and Kalaeloa. The Honouliuli Unit and Waiawa Unit are wetland units located on the shores of Pearl Harbor. The 37-acre Honouliuli Unit and the 25-acre Waiawa Unit were established in 1972 to protect and enhance habitat for endangered Hawaiian waterbirds. Habitats found on these units include open water, freshwater marsh, mudflat, grassland, and shrubland. The units provide important breeding, feeding, and resting areas for endangered waterbirds, a variety of migratory waterfowl, shorebirds, and other wetland birds. Common migrants include Northern pintail and Pacific golden plover. Neither unit is open to the general public; however, a grade school wetland education program is administered under a special use permit at the Honouliuli Unit.

The 38-acre Kalaeloa Unit is a coastal upland unit on O'ahu's southwestern point, and was once part of the Naval Air Station Barbers Point (NAS). When the NAS closed in 2001, the unit was established to protect and enhance habitat for the endangered 'Ewa hinahina plant. The unit contains the largest remnant stand of 'Ewa hinahina and a reintroduced population of 'akoko, another endangered plant. We supplement these plant populations with nursery plantings and exotic plant control. The unit is located within the arid 'Ewa Plains, and encompasses exposed coral shelf, rocky shoreline, and sparse vegetation. The unit includes a unique microhabitat called anchialine pools. These salt water pools are in the raised limestone coral reef, and are connected to the ocean via tiny subterranean cracks and crevices within the coralline substrate. The anchialine pools support unique insects, plants, and animals, including two imperiled

species of native shrimp. The refuge's volunteer program administers college-level educational programs and habitat restoration activities on the unit. The unit is closed to the general public.

Background

The CCP Process

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee) (Refuge Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Refuge Administration Act.

Public Outreach

We began the public scoping phase of the CCP planning process by publishing a Notice of Intent (NOI) in the **Federal Register** on December 1, 2008 (73 FR 72826), announcing our intention to complete a CCP/EA for the James Campbell and Pearl Harbor National Wildlife Refuges. Simultaneously, we released Planning Update 1. We invited the public to two open house meetings and requested public comments in the NOI and in Planning Update 1. We held the public open house meetings, in Pearl City, Hawai'i, on December 9, 2008, and in Kahuku, Hawai'i, on January 8, 2009. In Planning Update 2, distributed in June 2009, we provided a summary of the comments we received and described refuge resources. We considered all of the public comments we received to date during development of the Draft CCP/EA. We will announce the public comment period for the James Campbell National Wildlife Refuge Draft CCP/EA in fall 2010.

Draft CCP Alternatives We Are Considering

We drafted two alternatives for managing the Pearl Harbor Refuge. Under both alternatives entry into the fenced portions of the refuge units will continue by special use permit. The Betty Bliss Memorial Overlook will be constructed outside the Honouliuli Unit's fence, to provide year-round interpretation, wildlife viewing, and photography opportunities. The coastal foot trail outside the Kalaeloa Unit's fence will remain open to the public for shoreline fishing. Both alternatives would protect threatened and endangered species and cultural resources. Brief descriptions of the alternatives follow.

Alternative A

Under Alternative A, we would continue the current level of management. On the wetlands of the Honouliuli and Waiawa Units, we would continue to control predators and manage and protect habitat for endangered Hawaiian waterbirds, as part of the Statewide effort to implement the Hawaiian Waterbird Recovery Plan. Under Alternative A, control of invasive plant species would be modest, and intensive predator control would continue. On the Kalaeloa Unit, we would continue to restore and manage endangered plants and control invasive plants at the current level. Protection would continue for 14 existing anchialine pools on the Kalaeloa Unit, but no additional pools would be restored. We would continue to cooperate with the Bishop Museum's effort to catalog avian and other fossil remains from the pools.

Alternative B

Under Alternative B, our preferred alternative, we would focus management efforts at the Kalaeloa Unit on increasing the restoration of native and rare coralline plain habitat. We would increase the existing 25-acre restoration area to 37 acres. Controlling and reducing invasive plants, and establishing native plants, including the 'akoko and 'Ewa hinahina, would be emphasized. We would develop a foot trail system, protect 14 existing anchialine pools, identify up to 30 additional pool sites for potential restoration, and continue with experimental translocation of endangered damselflies (pinapinao) to suitable habitat in the anchialine pools. We would also expand volunteer, research, and environmental education opportunities, including working with the Bishop Museum and the Smithsonian Institute to pursue an in-depth paleontological study of the entire unit.

On the Honouliuli and Waiawa Units, our focus would be on an increased level of wetland management to improve the units' overall capacity to support endangered waterbirds. Under this Alternative B, water level and vegetation management, invasive species control, including predator control, would be improved or increased as part of the Statewide effort to implement the Hawaiian Waterbird Recovery Plan. On the Honouliuli Unit, we would remove mangrove on 5 acres to improve and maintain intertidal mudflat habitat, and determine the feasibility of installing a predator-proof fence. On the Waiawa Unit, we would work with partners and neighbors to determine the feasibility of developing an additional refuge overlook.

Public Availability of Documents

We encourage you to stay involved in the CCP planning process by reviewing and commenting on the proposals we have developed in the Draft CCP/EA. Copies of the Draft CCP/EA are available by request from David Ellis or via the Internet (*see* **ADDRESSES**).

Next Steps

After this comment period ends, we will analyze the comments and address them in the final CCP/EA.

Public Availability of Comments

Before including your address, telephone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: September 10, 2010.

David Patte,

Acting Regional Director, Region 1, Portland, Oregon.

[FR Doc. 2010–23102 Filed 9–14–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–ES–2010–N184; 10120–1113–0000–C2]

Endangered and Threatened Wildlife and Plants; Draft Revised Recovery Plan for the Northern Spotted Owl (Strix occidentalis caurina)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability for review and comment.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the availability of the Draft Revised Recovery Plan for the Northern Spotted Owl (*Strix occidentalis caurina*), a northwestern U.S. species listed as threatened under the Endangered Species Act (Act). The Act requires the development of recovery plans for listed species, unless such a plan would not promote the conservation of a particular species. Recovery plans help guide conservation efforts by describing actions considered necessary for the recovery of the species, establishing criteria for downlisting or delisting listed species, and estimating time and cost for implementing the measures needed for recovery. We invite public review and comment on the Draft Revised Recovery Plan.

DATES: We must receive comments on the draft revised recovery plan on or before November 15, 2010.

ADDRESSES: Electronic copies of the draft revised recovery plan are available online at: *http://www.fws.gov/endangered/species/recovery-plans.html* and *http://www.fws.gov/species/nso.* Printed copies of the draft revised recovery plan are available by request from the Field Supervisor, U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office, 2600 SE. 98th Avenue, Ste. 100, Portland, OR 97266 (phone: 503/231–6179). Written comments and materials regarding this recovery plan should be addressed to the above Portland address or sent by e-mail to: *NSORPComments@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Brendan White, Fish and Wildlife Biologist, at the above address and phone number.

SUPPLEMENTARY INFORMATION:

Background

Recovery of endangered or threatened animals and plants is a primary goal of our endangered species program and the Endangered Species Act (Act) (16 U.S.C. 1531 *et seq.*). Recovery means improvement of the status of listed species to the point at which listing is no longer necessary under the criteria set out in section 4(a)(1) of the Act.

The Act requires the development of recovery plans for listed species unless such a plan would not promote the conservation of a particular species. Recovery plans help guide conservation efforts by describing such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species, establishing criteria for delisting in accordance with the provisions of ESA Section 4, and estimating the time and cost for implementing those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

Section 4(f) of the Act requires that public notice and an opportunity for public review and comment be provided during recovery plan development. We will consider all comments we receive during the public comment period on the substance of the recovery plan. Comments regarding recovery plan implementation will be forwarded to appropriate Federal or other entities so that they can take them into account during the course of implementing recovery actions. Responses to individual commenters will not be provided, but we will provide a summary of how we addressed substantive comments in an appendix to the final recovery plan.

The northern spotted owl (hereafter, spotted owl) was Federally listed as a threatened species on June 26, 1990 (55 FR 26114). The current range of the spotted owl extends from southwest British Columbia through the Cascade Mountains, coastal ranges, and intervening forested lands in Washington, Oregon, and California, as far south as Marin County. Spotted owls generally rely on older forested habitats because such forests contain the structures and characteristics required for nesting, roosting, and foraging. Features that support nesting and roosting typically include a moderate-to-high forest canopy closure (60 to 90 percent); a multi-layered, multi-species forest canopy with large overstory trees; a high incidence of large trees with various deformities (large cavities, broken tops, mistletoe infections, and other evidence of decadence); large snags; large accumulations of fallen trees and other woody debris on the ground; and sufficient open space below the forest canopy for spotted owls to fly. Foraging habitat generally has attributes similar to nesting and roosting habitat, but may also include areas with less structural diversity and lower canopy cover.

The spotted owl was listed as threatened throughout its range due to the loss of suitable habitat to timber harvesting, exacerbated by catastrophic events such as fire and wind storms. Today we recognize past habitat loss, current habitat loss, and competition from barred owls (*Strix varia*) as the most pressing threats to spotted owl persistence. The recovery actions in this draft revised recovery plan are designed to address these and other threats within the range of the spotted owl.

The draft revised plan prioritizes recovery tasks aimed at: (1) Maintaining and managing for an adequate amount of spotted owl habitat across the species' range through active forest restoration and management, where appropriate; (2) restoring natural processes in the dry-forest landscapes such that the impacts of habitat loss through fire are minimized; and (3) conducting large-scale experiments on the effects of barred owl removal in areas where the two species co-occur. The goal of this recovery plan is to improve the status of the spotted owl so it no longer requires the protections of the Endangered Species Act.

In May of 2008 we published the Recovery Plan for the Northern Spotted Owl and announced its availability in the **Federal Register** (May 21, 2008; 73 FR 29471). The 2008 Recovery Plan formed the basis for our revised designation of spotted owl critical habitat, which we published in the **Federal Register** on August 13, 2008 (73 FR 47325). Both the 2008 critical habitat designation and the 2008 recovery plan were challenged in court. *Carpenters' Industrial Council* v. *Salazar,* Case No. 1:08-cv-01409-EGS (D.DC). In addition, on December 15, 2008, the Inspector General of the Department of the Interior issued a report entitled "Investigative Report of The Endangered Species Act and the Conflict between Science and Policy" which concluded that the integrity of the agency decision-making process for the spotted owl recovery plan was potentially jeopardized by improper political influence. As a result, the Federal government filed a motion in the lawsuit for remand of the 2008 recovery plan and critical habitat designation. On September 1, 2010, the Court issued an opinion remanding the 2008 recovery plan to us for issuance of a revised plan within nine months. The Court also indicated that it will remand the 2008 critical habitat designation pending resolution of a schedule for a new rulemaking. This notice is part of the process to consider revisions to the 2008 recovery plan.

The draft revised recovery plan is based on a review of all relevant biology, including new scientific information that has become available and critical peer-review comments we received on the 2008 Recovery Plan from three professional scientific associations: The Wildlife Society, the American Ornithologists' Union, and The Society for Conservation Biology. Like several previous plans for conserving and recovering the spotted owl, the 2008 Recovery Plan recommended a network of large habitat blocks, or Managed Owl Conservation Areas (MOCAs), intended to support

long-term recovery of the species. The peer-review comments, however, were critical of this network for several reasons, including that we did not use updated modeling techniques to design the network and assess its efficacy.

The draft revised recovery plan focuses on six main topics: (1) Adequacy of spotted owl habitat reserves on the west side of the Cascade Mountains, (2) lack of habitat reserves on the east side of the Cascade Mountains, (3) the role of non-Federal lands in spotted owl recovery, (4) adequacy of the existing strategy for conservation of dispersal habitat, (5) protection of high-quality habitat, and (6) protection of occupied spotted owl sites.

The draft revised recovery plan is different from the 2008 Recovery Plan in several respects. We are conducting a scientifically rigorous, multi-step, range-wide modeling effort to design a habitat conservation network and assess its ability to provide for long-term recovery of the spotted owl. Consequently, we are not proposing to rely on the MOCA network recommended in the 2008 Recovery Plan and will instead use the model results to help evaluate several habitat conservation network scenarios. Until the barred owl threat is reduced, the draft revised plan recommends maintaining all occupied sites and unoccupied high-quality spotted owl habitat on all lands within the range of the spotted owl. The draft revised plan also recognizes the possibility of needing additional conservation contributions from non-Federal lands. Finally, the draft revised plan affirms our support for forest restoration management actions that are neutral or beneficial to spotted owl recovery.

Request for Public Comments

We invite written comments on the draft revised recovery plan. While all comments we receive by the date specified above will be considered in developing a final revised recovery plan, we encourage commenters to focus on those portions of the recovery plan that have been revised, particularly those topics noted above. Comments and materials we receive will be available for public inspection, by appointment, during normal business hours at the Oregon Fish and Wildlife Office in Portland (*see* **ADDRESSES**).

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

The authority for this action is section 4(f) of the Endangered Species Act, 16 U.S.C. 1533 (f).

Dated: September 2, 2010.

David Patte,

Acting Regional Director, Region 1, U.S. Fish and Wildlife Service.

[FR Doc. 2010–22861 Filed 9–14–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–R–2010–N035; 40136–1265–0000–S3]

Savannah Coastal Refuges' Complex, GA and SC

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability: Draft comprehensive conservation plan and environmental assessment; request for comments.

SUMMARY: We, the Fish and Wildlife Service (Service), announce the availability of a draft comprehensive conservation plan and environmental assessment (Draft CCP/EA) for the Savannah Coastal Refuges' Complex (Complex) for public review and comment. In this Draft CCP/EA, we describe the alternative we propose to use to manage this Complex for the 15 years following approval of the final CCP. The Complex consists of the following refuges: Pinckney Island; Savannah; Tybee; Wassaw; Harris Neck; Blackbeard Island; and Wolf Island. A separate CCP was prepared for the Wolf Island National Wildlife Refuge.

DATES: To ensure consideration, we must receive your written comments by October 15, 2010.

ADDRESSES: You may obtain a copy of the Draft CCP/EA by contacting Ms. Laura Housh, via U.S. mail at Okefenokee NWR, 2700 Suwannee Canal Road, Folkston, GA 31537, or via e-mail at *laura_housh@fws.gov.* Alternatively, you may download the document from our Internet site at *http://southeast.fws.gov/planning* under "Draft Documents." Submit comments on the Draft CCP/EA to the above postal address or e-mail address.

FOR FURTHER INFORMATION CONTACT: Ms. Laura Housh, Refuge Planner, *telephone:* 912/496–7366, ext. 244; *fax:* 912/496–3322.

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we continue the CCP process for the Savannah Coastal Refuges' Complex. We started the process through a notice in the **Federal Register** on May 19, 2008 (73 FR 28838). For more about the Complex and this process, please see that notice.

Background

The CCP Process

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee), as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Administration Act.

CCP Alternatives, Including our Proposed Alternative

We developed three alternatives for managing the Complex and chose Alternative B as the proposed alternative. A full description of each alternative is in the Draft CCP/EA. We summarize each alternative below.

Alternative A—No Action Alternative

This alternative is the "no-action" or "status quo" alternative in which no major management changes would be initiated by the Service. Management emphasis would continue to focus on maintaining biological integrity of habitats found on each refuge. Under this alternative, we would protect and maintain all refuge lands, primarily focusing on the needs of threatened and endangered species, with additional emphasis on the needs of migratory birds and resident wildlife.

We would continue mandated activities for protection of federally

listed species through current habitat management and monitoring programs accomplished primarily through established partnership and research projects.

Current management of migratory birds would continue to provide suitable habitat for waterfowl, contributing to the objective of the North American Waterfowl Management Plan. Surveying, monitoring, and managing colonial waterbirds, shorebirds, neotropical migratory birds, wading birds, marsh birds, and other resident birds would continue. The management of the Complex that would provide for the basic needs of these species varies. Management measures at some refuges include planting vegetation used for food, nest, and cover, including moist-soil management.

Mostly opportunistic monitoring and managing of resident wildlife would occur under this alternative. The main objective for game species management would be to sustain healthy populations through hunting programs and current habitat management. Only current wildlife management programs would continue to be maintained.

We would continue habitat management of existing beaches, wetlands, open waters, forested habitats, scrub/shrub habitats, grasslands, and open lands. All ponds, levees, moist-soil water management units, and water control structures and pumps would continue to be maintained to provide critical habitat for threatened and endangered species, waterfowl, and wetland-dependent birds. Current water quality information would be addressed on an as-needed basis and would continue to be limited. All other habitat management programs would remain unchanged.

We would continue to control invasive and exotic plant species on an opportunistic basis as resources allow. This limited control would be performed by chemical and/or mechanical means, but would remain intermittent. Control would continue to be implemented by the take of exotic or invasive animals as part of hunting programs offered on some of the refuges, and opportunistically by Complex staff.

We would maintain the current levels of wildlife-dependent recreation activities. An extensive network of public use facilities would continue to be maintained.

Land would be acquired from willing sellers within each refuge's current acquisition boundary and in accordance with current Service policy. Law enforcement on each refuge would continue at the current level, with emphasis on resource protection and public safety. We would maintain the Complex as resources allow. The Complex would continue to include a combined staff of 30 full-time employees.

Alternative B—Increased Management (Proposed Alternative)

The proposed action (Alternative B) was selected by the Service as the alternative that best signifies the vision, goals, and purposes of the Complex. Additionally, this alternative was developed based on public input and the best professional judgment of the planning team. Under Alternative B, the emphasis would be on restoring and improving Complex resources needed for wildlife and habitat management and providing enhanced appropriate and compatible wildlife-dependent public use opportunities, while addressing key issues and individual refuge mandates.

This alternative would focus on augmenting wildlife and habitat management to identify, conserve, and restore populations of native fish and wildlife species, with an emphasis on migratory birds and threatened and endangered species. This would partially be accomplished by increased monitoring of waterfowl, other migratory and resident birds, and endemic species in order to assess and adapt management strategies and actions. Additionally, information gaps would be addressed by the initiation of baseline surveying, periodic monitoring, and ultimately the addition of adaptive habitat management.

Habitat management programs for impoundments, beaches, wetlands, open waters, forested habitats, scrub/shrub habitats, grasslands, and open lands would be re-evaluated and we would develop step-down management plans to meet the foraging, resting, and breeding requirements of priority species. Additionally, monitoring and adaptive habitat management would be implemented to potentially counteract the impacts associated with long-term climate change and sea level rise.

The control of invasive and exotic plant species would be more aggressively managed by implementing a management plan, completing a baseline inventory, supporting research, and through strategic mechanical and chemical means. Additionally, we would utilize this management plan and monitoring to enhance efforts to control/remove invasive, exotic, and nuisance animals on the refuges.

Alternative B enhances each refuges' visitor services opportunities (except for Tybee NWR, which would remain closed to the public) by: (1) Improving the quality of fishing opportunities; (2) streamlining quota hunt process and where possible evaluating the options of allowing the use of crossbows and creating additional hunting opportunities; and (3) maintaining and where possible expanding environmental education opportunities. Volunteer programs and friends groups would be expanded to enhance all aspects of refuge management and to increase resource availability. We would evaluate the possibility of utilizing a concessionaire at Pinckney NWR to implement a tram tour that would provide a means for access and participation by patrons with mobility issues.

Under this alternative, the priority of land acquisition at Harris Neck NWR would be to acquire lands from willing sellers that could provide resource and public use values. These lands could be acquired by fee title purchase, donation, mitigation purchase and transfer, or other viable means. This would include an investigation into expanding the current acquisition boundary. At Savannah NWR, the focus would increase on acquiring lands from willing sellers by any viable means that could provide resource and public use values.

Law enforcement activities to protect archaeological and historical sites and provide visitor safety would be intensified. The allocation of an additional law enforcement officer for the Complex would provide security for cultural resources, but would also ensure visitor safety and public compliance with refuge regulations.

Administration plans would stress the need for increased maintenance of existing infrastructure and construction of new facilities. Funding for new construction projects would be balanced between habitat management and public use needs. An additional staff position would be required to accomplish the goals of this alternative. Personnel priorities would include employing an environmental education coordinator, law enforcement officers/park rangers, a volunteer coordinator, biological technicians, maintenance workers, refuge managers, refuge assistant managers, and a geographic information systems specialist. The increased budget and staffing levels would better enable the Complex to meet the obligations of wildlife stewardship, habitat management, and public use.

Alternative C—Minimal Intervention

Under Alternative C, the management of Complex resources would be employed to allow natural succession to take place, while maintaining the

current slate of public use opportunities. All purposes of the refuges and mandated monitoring of Federal trust species and archaeological resources would be continued, but other wildlife management would be mostly performed on an incidental basis.

This alternative would utilize a custodial habitat management strategy. Impoundments, beaches, wetlands, open waters, forested habitats, scrub/shrub habitats, grasslands, and open lands would not be actively managed and would allow natural disturbance to maintain succession, unless the habitat primarily focuses on the needs of threatened and endangered species or the needs of priority species, such as migratory birds. Fire management would be reduced to include wildfire response only.

We would continue mandated activities for protection of federally listed species. Conservation of federally listed threatened and endangered species would be continued primarily through established partnership and research projects.

Current management of migratory birds would continue to provide suitable habitat for waterfowl. Climate control changes and sea level rise would continue to be monitored on an opportunistic basis, with very little or no adaptive habitat management. We would control invasive and exotic plant and animal species on an opportunistic basis as resources allow. This limited control would be performed by chemical and/or mechanical means, but would remain intermittent. We would maintain the current levels of wildlife-dependent recreation activities. Public use facilities would continue to be maintained, as would the current visitor services program.

Law enforcement officers would be added to the staff to increase emphasis on resource protection and public safety. This includes being designated to uphold current regulations and for protection of wildlife, visitors, and cultural and historical resources. We would maintain the Complex as resources allow. No additional land acquisition would be pursued under this alternative.

Next Step

After the comment period ends, we will analyze the comments and address them.

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

This notice is published under the authority of the National Wildlife Refuge System Improvement Act of 1997, Public Law 105–57.

Dated: March 19, 2010.

Mark J. Musaus,

Acting Regional Director.

[FR Doc. 2010–22965 Filed 9–14–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNM920000 L13100000 FI0000; OKNM 121969]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease OKNM 121969, Oklahoma

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Reinstatement of Terminated Oil and Gas Lease.

SUMMARY: Under the Class II provisions of Title IV of the Federal Oil and Gas Royalty Management Act of 1982, the Bureau of Land Management (BLM) received a petition for reinstatement of oil and gas lease OKNM 121969 from the lessee(s), Brower Oil & Gas, Inc., for lands in Garvin County, Oklahoma. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Margie Dupre, Bureau of Land Management, New Mexico State Office, P.O. Box 27115, Santa Fe, New Mexico 87502–0115 or at (505) 954–2142.

SUPPLEMENTARY INFORMATION: No valid lease has been issued that affects the lands. The lessee agrees to new lease terms for rentals and royalties of $10 per acre or a fraction thereof, per year, and 16 ⅔ percent, respectively. The lessee paid the required $500 administrative fee for the reinstatement of the lease and the $166 cost for publishing this Notice in the **Federal Register**. The lessee met all the requirements for reinstatement of the lease as set out in Section 31(d) and (e) of the Mineral Leasing Act of 1920 (30 U.S.C. 188). We are proposing to reinstate lease OKNM 121969, effective the date of termination, May 1, 2010, under the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Margie Dupre,

Land Law Examiner, Fluids Adjudication Team.

[FR Doc. 2010–22963 Filed 9–14–10; 8:45 am]

BILLING CODE 4310–FB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–923–1310–FI; WYW149955]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease WYW149955, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: Under the provisions of the Mineral Leasing Act of 1920, as amended, the Bureau of Land Management (BLM) received a petition for reinstatement from Chesapeake Exploration LLC and Khody Land & Minerals Company for competitive oil and gas lease WYW149955 for land in Converse County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Julie L. Weaver, Chief, Fluid Minerals Adjudication, at (307) 775–6176.

SUPPLEMENTARY INFORMATION: The lessees have agreed to the amended lease terms for rentals and royalties at rates of $10 per acre or fraction thereof, per year and 16⅔ percent, respectively. The lessees have paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessees have met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the BLM is proposing to reinstate lease WYW149955 effective April 1, 2010, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. The BLM has not issued a valid lease to any other interest affecting the lands.

Julie L. Weaver,

Chief, Fluid Minerals Adjudication.

[FR Doc. 2010–22961 Filed 9–14–10; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–923–1310–FI; WYW149954]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease WYW149954, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: Under the provisions of the Mineral Leasing Act of 1920, as amended, the Bureau of Land Management (BLM) received a petition for reinstatement from Chesapeake Exploration LLC and Khody Land & Minerals Company for competitive oil and gas lease WYW149954 for land in Converse County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Julie L. Weaver, Chief, Fluid Minerals Adjudication, at (307) 775–6176.

SUPPLEMENTARY INFORMATION: The lessees have agreed to the amended lease terms for rentals and royalties at rates of $10 per acre, or fraction thereof, per year and 16⅔ percent, respectively. The lessees have paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessees have met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the BLM is proposing to reinstate lease WYW149954 effective April 1, 2010, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. The BLM has not issued a valid lease to any other interest affecting the lands.

Julie L. Weaver,

Chief, Fluid Minerals Adjudication.

[FR Doc. 2010–22955 Filed 9–14–10; 8:45 am]

BILLING CODE 4310–22–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–698]

Notice of Commission Decision Not To Review an Initial Determination Terminating the Investigation; In the Matter of Certain DC-DC Controllers and Products Containing Same

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's initial determination ("ID") (Order No. 56) granting a joint motion to terminate the investigation as to one respondent and terminating the investigation in its entirety. The Commission has issued the subject consent order.

FOR FURTHER INFORMATION CONTACT: Sidney A. Rosenzweig, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 708–2532. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on December 29, 2009, based on a complaint filed by Richtek Technology Corp. (Taiwan) and Richtek USA, Inc. (San Jose, California) (collectively "Richtek"), alleging a violation of section 337 in the importation, sale for importation, and sale within the United States after importation of certain DC–DC controllers by reason of infringement of certain claims of U.S. Patent Nos. 7,315,190; 6,414,470; and 7,132,717; and by reason of trade secret misappropriation. 75 FR 446 (Jan. 5, 2010). The complaint, as amended, named eight respondents: uPI Semiconductor Corp. (Taiwan) ("uPI"); Advanced Micro Devices, Inc. (Sunnyvale, California) ("AMD"); Sapphire Technology Ltd. (Hong Kong) ("Sapphire"); Best Data Products d/b/a Diamond Multimedia (Chatsworth, California) ("Diamond"); Eastcom, Inc. d/b/a XFX Technology USA (Rowland Heights, California) ("XFX"); Micro-Star International Co., Ltd. (Taiwan) and MSI Computer Corp. (City of Industry, California) (collectively, "MSI"); and VisionTek Products LLC (Inverness, Illinois) ("VisionTek"). *See* Second Am. Compl. ¶¶ 12–34 (May 20, 2010).

The investigation has been terminated by settlement agreement or consent order against all parties other than VisionTek: On July 12, 2010, the Commission determined not to review the ALJ's termination of the investigation as against AMD, Diamond, and XFX. On August 13, 2010, the Commission determined not to review the ALJ's termination of the investigation against uPI and Sapphire. On August 20, 2010, the Commission determined not to review the ALJ's termination of the investigation against the MSI respondents. On July 27, 2010, VisionTek and Richtek jointly moved to terminate the investigation based on a consent order stipulation and proposed consent order. The ALJ denied the motion. Order No. 51 (July 29, 2010). On August 5, 2010, VisionTek and Richtek jointly moved to terminate the investigation based on a settlement agreement. On August 17, 2010, the ALJ granted the motion. Order No. 56. Because VisionTek is the last respondent, termination against VisionTek results in termination of the investigation.

No petitions for review of the ID were filed. The Commission has determined not to review the ID.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in sections 210.21(b) and 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.21(b), 210.42).

By order of the Commission.
Issued: September 9, 2010.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–22957 Filed 9–14–10; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–343P]

Controlled Substances: Proposed Aggregate Production Quotas for 2011

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Notice of proposed year 2011 aggregate production quotas.

SUMMARY: This notice proposes initial year 2011 aggregate production quotas for controlled substances in schedules I and II of the Controlled Substances Act (CSA).

DATES: Written comments must be postmarked and electronic comments must be submitted on or before October 15, 2010.

ADDRESSES: To ensure proper handling of comments, please reference "Docket No. DEA–343P" on all written and electronic correspondence. Written comments sent via regular or express mail should be sent to the Drug Enforcement Administration, *Attention:* DEA Federal Register Representative/ODL, 8701 Morrissette Drive, Springfield, Virginia 22152. Comments may be sent to DEA by sending an electronic message to *dea.diversion.policy@usdoj.gov*. DEA will accept attachments to electronic comments in Microsoft Word, WordPerfect, Adobe PDF, or Excel file formats only. DEA will not accept any file format other than those specifically listed here.

Please note that DEA is requesting that electronic comments be submitted before midnight Eastern Time on the day the comment period closes. Commenters in time zones other than Eastern Time may want to consider this so that their electronic comments are received timely. All comments sent via regular or express mail will be considered timely if postmarked on the day the comment period closes.

FOR FURTHER INFORMATION CONTACT: Christine A. Sannerud, PhD, Chief, Drug and Chemical Evaluation Section, 8701 Morrissette Drive, Springfield, Virginia 22152, Telephone: (202) 307–7183.

Availability Of Public Comments: Please note that all comments received are considered part of the public record and made available for public inspection in the Drug Enforcement Administration's public docket. Such information includes personal identifying information (such as your name, address, *etc.*) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, *etc.*) as part of your comment, but do not want it to be made available in the public docket, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You must also place all the personal identifying information you do not want made available in the public docket in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it made available in the public docket, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment.

If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be made available in the public docket.

Personal identifying information and confidential business information identified and located as set forth above will be redacted and the comment, in redacted form, will be placed in the Drug Enforcement Administration's public docket file. Please note that the Freedom of Information Act applies to all comments received. If you wish to inspect the agency's public docket file in person by appointment, *please see* the **FOR FURTHER INFORMATION** paragraph.

SUPPLEMENTARY INFORMATION: Section 306 of the CSA (21 U.S.C. 826) requires that the Attorney General establish aggregate production quotas for each basic class of controlled substance listed in schedules I and II. This responsibility has been delegated to the Administrator of the DEA by 28 CFR 0.100. The Administrator, in turn, has redelegated this function to the Deputy Administrator, pursuant to 28 CFR 0.104.

The proposed year 2011 aggregate production quotas represent those quantities of controlled substances that may be produced in the United States in 2011 to provide adequate supplies of each substance for: The estimated medical, scientific, research, and industrial needs of the United States; lawful export requirements; and the establishment and maintenance of reserve stocks. These quotas do not include imports of controlled substances for use in industrial processes.

In determining the year 2011 aggregate production quotas, the Deputy Administrator considered the following factors: total actual 2009 and estimated 2010 and 2011 net disposals of each substance by all manufacturers; estimates of 2010 year-end inventories of each substance and of any substance manufactured from it and trends in accumulation of such inventories; product development requirements of both bulk and finished dosage form manufacturers; projected demand as indicated by procurement quota applications filed pursuant to 21 CFR 1303.12; and other pertinent information.

Pursuant to 21 CFR 1303, the Deputy Administrator of the DEA will adjust the 2011 aggregate production quotas and individual manufacturing quotas allocated for the year based upon 2010 year-end inventory and actual 2010 disposition data supplied by quota recipients for each basic class of schedules I or II controlled substances.

Therefore, under the authority vested in the Attorney General by Section 306 of the CSA of 1970 (21 U.S.C. 826), and delegated to the Administrator of the DEA by 28 CFR 0.100, and redelegated to the Deputy Administrator pursuant to 28 CFR 0.104, the Deputy Administrator hereby proposes that the year 2011 aggregate production quotas for the following controlled substances, expressed in grams of anhydrous acid or base, be established as follows:

Basic Class—Schedule I	Proposed 2011 quotas (g)
1-Methyl-4-phenyl-4-propionoxypiperidine	2
2,5-Dimethoxyamphetamine	2
2,5-Dimethoxy-4-ethylamphetamine (DOET)	2
2,5-Dimethoxy-4-n-propylthiophenethylamine	2
3-Methylfentanyl	2
3-Methylthiofentanyl	2

Basic Class—Schedule I	Proposed 2011 quotas (g)
3,4-Methylenedioxyamphetamine (MDA)	20
3,4-Methylenedioxy-N-ethylamphetamine (MDEA)	10
3,4-Methylenedioxymethamphetamine (MDMA)	20
3,4,5-Trimethoxyamphetamine	2
4-Bromo-2,5-dimethoxyamphetamine (DOB)	2
4-Bromo-2,5-dimethoxyphenethylamine (2-CB)	2
4-Methoxyamphetamine	77
4-Methylaminorex	2
4-Methyl-2,5-dimethoxyamphetamine (DOM)	2
5-Methoxy-3,4-methylenedioxyamphetamine	2
5-Methoxy-N,N-diisopropyltryptamine	2
Acetyl-alpha-methylfentanyl	2
Acetyldihydrocodeine	2
Acetylmethadol	2
Allylprodine	2
Alphacetylmethadol	2
Alpha-ethyltryptamine	2
Alphameprodine	2
Alphamethadol	2
Alpha-methylfentanyl	2
Alpha-methylthiofentanyl	2
Alpha-methyltryptamine (AMT)	2
Aminorex	2
Benzylmorphine	2
Betacetylmethadol	2
Beta-hydroxy-3-methylfentanyl	2
Beta-hydroxyfentanyl	2
Betameprodine	2
Betamethadol	2
Betaprodine	2
Bufotenine	3
Cathinone	3
Codeine-N-oxide	602
Diethyltryptamine	2
Difenoxin	3,000
Dihydromorphine	3,608,000
Dimethyltryptamine	3
Gamma-hydroxybutyric acid	3,000,000
Heroin	20
Hydromorphinol	2
Hydroxypethidine	2
Ibogaine	1
Lysergic acid diethylamide (LSD)	15
Marihuana	21,000
Mescaline	5
Methaqualone	7
Methcathinone	4
Methyldihydromorphine	2
Morphine-N-oxide	605
N-Benzylpiperazine	2
N,N-Dimethylamphetamine	2
N-Ethylamphetamine	2
N-Hydroxy-3,4-methylenedioxyamphetamine	2
Noracymethadol	2
Norlevorphanol	52
Normethadone	2
Normorphine	16
Para-fluorofentanyl	2
Phenomorphan	2
Pholcodine	2
Psilocybin	2
Psilocyn	2
Tetrahydrocannabinols	264,000
Thiofentanyl	2
Tilidine	10
Trimeperidine	2

Basic Class—Schedule II	Proposed 2011 quotas (g)
1-Phenylcyclohexylamine	2
1-piperdinocyclohexanecarbonitrile	2
4-Anilino-N-phenethyl-4-piperidine (ANPP)	2,500,000
Alfentanil	8,000
Alphaprodine	2
Amobarbital	40,003
Amphetamine (for conversion)	7,500,000
Amphetamine (for sale)	18,600,000
Cocaine	247,000
Codeine (for conversion)	65,000,000
Codeine (for sale)	39,605,000
Dextropropoxyphene	92,000,000
Dihydrocodeine	800,000
Diphenoxylate	827,000
Ecgonine	83,000
Ethylmorphine	2
Fentanyl	1,428,000
Glutethimide	2
Hydrocodone (for sale)	55,000,000
Hydromorphone	3,455,000
Isomethadone	11
Levo-alphacetylmethadol (LAAM)	3
Levomethorphan	5
Levorphanol	10,000
Lisdexamfetamine	9,000,000
Meperidine	6,600,000
Meperidine Intermediate-A	3
Meperidine Intermediate-B	7
Meperidine Intermediate-C	3
Metazocine	1
Methadone (for sale)	20,000,000
Methadone Intermediate	26,000,000
Methamphetamine	3,130,000
[750,000 grams of levo-desoxyephedrine for use in a non-controlled, non-prescription product; 2,331,000 grams for methamphetamine mostly for conversion to a schedule III product; and 49,000 grams for methamphetamine (for sale)]	
Methylphenidate	50,000,000
Morphine (for conversion)	83,000,000
Morphine (for sale)	39,000,000
Nabilone	9,002
Noroxymorphone (for conversion)	9,000,000
Noroxymorphone (for sale)	41,000
Opium (powder)	230,000
Opium (tincture)	1,500,000
Oripavine	15,000,000
Oxycodone (for conversion)	5,600,000
Oxycodone (for sale)	105,500,000
Oxymorphone (for conversion)	12,800,000
Oxymorphone (for sale)	3,070,000
Pentobarbital	28,000,000
Phenazocine	1
Phencyclidine	14
Phenmetrazine	2
Phenylacetone	8,000,000
Racemethorphan	2
Remifentanil	2,500
Secobarbital	67,000
Sufentanil	7,000
Tapentadol	1,000,000
Thebaine	126,000,000

The Deputy Administrator further proposes that aggregate production quotas for all other schedules I and II controlled substances included in 21 CFR 1308.11 and 1308.12 be established at zero.

All interested persons are invited to submit their comments in writing or electronically regarding this proposal following the procedures in the **ADDRESSES** section of this document. A person may object to or comment on the proposal relating to any of the above-mentioned substances without filing

comments or objections regarding the others. If a person believes that one or more of these issues warrant a hearing, the individual should so state and summarize the reasons for this belief.

In the event that comments or objections to this proposal raise one or more issues which the Deputy Administrator finds warrant a hearing, the Deputy Administrator shall order a public hearing by notice in the Federal Register, summarizing the issues to be heard and setting the time for the hearing.

The Office of Management and Budget has determined that notices of aggregate production quotas are not subject to centralized review under Executive Order 12866.

This action does not preempt or modify any provision of state law; nor does it impose enforcement responsibilities on any state; nor does it diminish the power of any state to enforce its own laws. Accordingly, this action does not have federalism implications warranting the application of Executive Order 13132.

The Deputy Administrator hereby certifies that this action will have no significant impact upon small entities whose interests must be considered under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* The establishment of aggregate production quotas for schedules I and II controlled substances is mandated by law and by international treaty obligations. The quotas are necessary to provide for the estimated medical, scientific, research and industrial needs of the United States, for export requirements and the establishment and maintenance of reserve stocks. While aggregate production quotas are of primary importance to large manufacturers, their impact upon small entities is neither negative nor beneficial. Accordingly, the Deputy Administrator has determined that this action does not require a regulatory flexibility analysis.

This action meets the applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988 Civil Justice Reform.

This action will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $129,400,000 or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

This action is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This action will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Dated: September 3, 2010.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. 2010–22905 Filed 9–14–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (BJA) Docket No. 1531]

Meeting of the Department of Justice's (DOJ's) National Motor Vehicle Title Information System (NMVTIS) Federal Advisory Committee

AGENCY: Office of Justice Programs (OJP), Justice.

ACTION: Notice of meeting.

SUMMARY: This is an announcement of a meeting of DOJ's National Motor Vehicle Title Information System (NMVTIS) Federal Advisory Committee to discuss the role of the NMVTIS Federal Advisory Committee Members and various issues relating to the operation and implementation of NMVTIS.

DATES: The meeting will take place on Thursday, October 7th, 2010 from 8:30 a.m. to 4 p.m. ET and on Friday, October 8th, 2010 from 8:30 a.m. to 12 p.m. ET.

ADDRESSES: The meeting will take place at the Omni Shoreham Hotel, 2500 Calvert Street, NW., Washington, DC 20008; *Phone:* (202) 234–0700.

FOR FURTHER INFORMATION CONTACT: Alissa Huntoon, Designated Federal Employee (DFE), Bureau of Justice Assistance, Office of Justice Programs, 810 7th Street Northwest, Washington, DC 20531; *Phone:* (202) 305–1661 [**note:** this is not a toll-free number]; *E-mail: Alissa.Huntoon@usdoj.gov.*

SUPPLEMENTARY INFORMATION: This meeting is open to the public. Members of the public who wish to attend this meeting must register with Ms. Alissa Huntoon at the above address at least seven (7) days in advance of the meeting. Registrations will be accepted on a space available basis. Access to the meeting will not be allowed without registration. Please bring photo identification and allow extra time prior to the meeting. Interested persons whose registrations have been accepted may be permitted to participate in the discussions at the discretion of the meeting chairman and with approval of the DFE.

Anyone requiring special accommodations should notify Ms. Huntoon at least seven (7) days in advance of the meeting.

Purpose

The NMVTIS Federal Advisory Committee will provide input and recommendations to the Office of Justice Programs (OJP) regarding the operations and administration of NMVTIS. The primary duties of the NMVTIS Federal Advisory Committee will be to advise the Bureau of Justice Assistance (BJA) Director on NMVTIS-related issues, including but not limited to: Implementation of a system that is self-sustainable with user fees; options for alternative revenue-generating opportunities; determining ways to enhance the technological capabilities of the system to increase its flexibility; and options for reducing the economic burden on current and future reporting entities and users of the system.

Alissa Huntoon,

NMVTIS DFE, Bureau of Justice Assistance, Office of Justice Programs.

[FR Doc. 2010–22917 Filed 9–14–10; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Employment and Training Administration

Comment Request for Information Collection for the YouthBuild (YB) Reporting System (OMB Control No. 1205–0464), Extension Without Revisions

AGENCY: Employment and Training Administration.

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden conducts a preclearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized,

collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment and Training Administration is soliciting comments concerning the collection of data about the YB Reporting System which expires on October 31, 2010.

A copy of the proposed information collection request (ICR) can be obtained by contacting the office listed below in the addressee section of this notice.

DATES: Written comments must be submitted to the office listed in the addressee's section below on or before November 15, 2010.

ADDRESSES: Submit written comments to Anne Stom, Room N–4508, Employment and Training Administration, 200 Constitution Avenue, NW., Washington, DC 20210. *Telephone number:* 202–693–3377 (this is not a toll-free number). *Fax:* 202–693–3113. *E-mail: stom.anne@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

This is a request for the Department of Labor, Employment and Training Administration's (ETA) request to continue the reporting and recordkeeping requirements of the YouthBuild (YB) program. This reporting structure features standardized data collection for program participants and quarterly progress and Management Information System (MIS) report formats. All data collection and reporting is done by YouthBuild grantees.

The quarterly progress reports provide a detailed, narrative account of program activities, accomplishments, and progress toward performance outcomes during the quarter. The quarterly performance reports include aggregate and participant-level information on demographic characteristics, types of services received, placements, outcomes, and follow-up status. Specifically, these reports collect data on individuals who receive education, occupational skill training, leadership development services, and other services essential to preparing at-risk youth for high-wage, high-demand occupations through YouthBuild programs.

The accuracy, reliability, and comparability of program reports submitted by grantees using federal funds are fundamental elements of good public administration and are necessary tools for maintaining and demonstrating system integrity. The use of a standard set of data elements, definitions, and specifications at all levels of the workforce system helps improve the quality of performance information that is received by ETA.

II. Review Focus

The Department of Labor is particularly interested in comments which:

* Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

* Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

* Enhance the quality, utility, and clarity of the information to be collected; and

* Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses

III. Current Actions

Type of Review: Extension without changes.

Title: YouthBuild (YB) Reporting System.

OMB Number: OMB 1205–0464.

Affected Public: Grantees—Not for Profit institutions.

Form(s): ETA–9138, Standardized Quarterly Performance Report—YouthBuild Program; and ETA–9143, WorkSite Description.

Form/activity	Total respondents	Frequency	Total annual responses	Average time per response (hours)	Total annual burden hours
Participant Data Collection	6,000 youth participants	Collected by grantees, continual.	6,000	1.8	10,800
Housing Site Description ETA–9143	220 grantees	Annually	220	40	8,800
Quarterly narrative progress report	220 grantees	Quarterly	880	16	14,080
Quarterly performance report. ETA–9138.	220 grantees	Quarterly	880	16	14,080
Totals	220 grantees		7760		38,960

Total Annual Burden Cost for Respondents: $0.

Comments submitted in response to this comment request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: Signed at Washington, DC, this 3rd day of September, 2010.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

[FR Doc. 2010–22927 Filed 9–14–10; 8:45 am]

BILLING CODE 4510–FT–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers by (TA–W) number issued

during the period of August 23, 2010 through August 27, 2010.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Under Section 222(a)(2)(A), the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The sales or production, or both, of such firm have decreased absolutely; and

(3) One of the following must be satisfied:

(A) Imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased;

(B) Imports of articles like or directly competitive with articles into which one or more component parts produced by such firm are directly incorporated, have increased;

(C) Imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased;

(D) Imports of articles like or directly competitive with articles which are produced directly using services supplied by such firm, have increased; and

(4) The increase in imports contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; or

II. Section 222(a)(2)(B) all of the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) One of the following must be satisfied:

(A) There has been a shift by the workers' firm to a foreign country in the production of articles or supply of services like or directly competitive with those produced/supplied by the workers' firm;

(B) There has been an acquisition from a foreign country by the workers' firm of articles/services that are like or directly competitive with those produced/supplied by the workers' firm; and

(3) The shift/acquisition contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in public agencies and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) A significant number or proportion of the workers in the public agency have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The public agency has acquired from a foreign country services like or directly competitive with services which are supplied by such agency; and

(3) The acquisition of services contributed importantly to such workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected secondary workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(c) of the Act must be met.

(1) A significant number or proportion of the workers in the workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm is a Supplier or Downstream Producer to a firm that employed a group of workers who received a certification of eligibility under Section 222(a) of the Act, and such supply or production is related to the article or service that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied to the firm described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss of business by the workers' firm with the firm described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in firms identified by the International Trade Commission and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(f) of the Act must be met.

(1) The workers' firm is publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in—

(A) An affirmative determination of serious injury or threat thereof under section 202(b)(1);

(B) An affirmative determination of market disruption or threat thereof under section 421(b)(1); or

(C) An affirmative final determination of material injury or threat thereof under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A));

(2) The petition is filed during the 1-year period beginning on the date on which—

(A) A summary of the report submitted to the President by the International Trade Commission under section 202(f)(1) with respect to the affirmative determination described in paragraph (1)(A) is published in the Federal Register under section 202(f)(3); or

(B) Notice of an affirmative determination described in subparagraph (1) is published in the **Federal Register**; and

(3) The workers have become totally or partially separated from the workers' firm within—

(A) The 1-year period described in paragraph (2); or

(B) Notwithstanding section 223(b)(1), the 1-year period preceding the 1-year period described in paragraph (2).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
73,873	Teleperformance USA Corporation, TPUSA, Inc	Salt Lake City, UT	March 30, 2009.
73,873A	Teleperformance USA Corporation, TPUSA, Inc	Lindon, UT	March 30, 2009.
73,903	Owens-Illinois, Inc., Leased Workers from Manpower, Inc	Clarion, PA	April 9, 2009.

TA–W No.	Subject firm	Location	Impact date
73,982	Smiths Medical PM, Inc., Leased Workers from Aerotek and Spherion	Waukesha, WI	April 14, 2009.
74,133	Time Sensitive Circuits	Amesbury, MA	May 20, 2009.
74,171	Waytec Electronics Corporation, Leased Workers from Alpha Omega, Kelly Services, and ManPower.	Lynchburg, VA	May 27, 2009.
74,237	Temple-Inland	Evansville, IN	June 7, 2009.
74,279	Soo Tractor Sweeprake Company	Sioux City, IA	June 12, 2009.
74,357	Cinram Distribution, LLC, Cinram International; Simi Valley Distribution Center; Leased Workers, etc.	Simi Valley, CA	July 7, 2009.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production or services) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
72,869	Dell, Inc., Global Command Center and Proactive Maintenance Divisions; Leased Workers, etc.	Oklahoma City, OK	November 11, 2008.
73,153	Kimberly-Clark Global Sales, Inc., Kimberly-Clark Corporation; Leased Workers from Stafflogix Corporation.	Neenah, WI	December 18, 2008.
73,153A	Kimberly-Clark Worldwide, Inc., Kimberly-Clark Corporation; Leased Workers from Stafflogix Corporation.	Neenah, WI	December 18, 2008.
73,657	SunGard Public Sector, SunGard Data Systems	Lake Mary, FL	March 5, 2009.
73,809	Hewlett Packard/EDS, Primary Delivery Engineer Unit, Working On-Site At Proctor & Gamble.	Cincinnati, OH	March 19, 2009.
73,909	International Business Machines (IBM), Service Parts Organizations	Mechanicsburg, PA	March 29, 2009.
74,141	Affiliated Computer Services, Inc., Xerox Corporation, Workers of ACS Application Management Services, etc.	Dallas, TX	May 24, 2009.
74,156	Mattel, Inc., Global Logistics Org., Distribution Center, Leased Workers Select Staffing.	City of Industry, CA	May 17, 2009.
74,164	International Business Machines (IBM), Global Technology Services Delivery Division.	Greenville, SC	May 26, 2009.
74,185	LF USA, Inc., Li & Fung Limited, Leased Workers from Winston Staffing	New York, NY	May 21, 2009.
74,319	RR Donnelley, Digital Solutions Center Division	Pontiac, IL	June 29, 2009.
74,336	Polaris Industries, Leased Workers from Westaff	Osceola, WI	June 28, 2009.
74,368	Novartis Pharmaceuticals Corporation, Electronic Data Management Division; Leased Workers from RCM Technologies, etc.	East Hanover, NJ	July 9, 2009.
74,386	Goodyear Tire & Rubber Company, Tyler Plant; Leased Workers Unicco Contracted Services and Kelly Services.	Tyler, TX	June 30, 2009.
74,413	McGuire Furniture Company, Kohler Co., Leased Workers from Manpower and Ajilon.	San Francisco, CA	July 8, 2009.
74,465	Harman Consumer, Inc., Engineering Department; Division of Harman International Industries, Inc..	Northridge, CA	August 2, 2009.
74,472	EMC Corporation, Information Infrastructure Products, Ionix Software Engineers.	Research Triangle Park, NC.	July 30, 2009.
74,472A	EMC Corporation, Information Infrastructure Products, Ionix Software Engineers.	Hopkinton, MA	July 30, 2009.
74,473	EMC Corporation, Information Infrastructure Products, Ionix Software Engineers.	Alexandria, VA	July 30, 2009.
74,474	EMC Corporation, Information Infrastructure Products; Ionix Software Engineers; etc.	Berkeley Heights, NJ	July 30, 2009.
74,479	EMC Corporation, Information Infrastructure Products; Ionix Software Engineers.	Richardson, TX	July 30, 2009.
74,480	EMC Corporation, Information Infrastructure Products; Ionix Software Engineers.	White Plains, NY	July 30, 2009.
74,503	Road 9, Inc., Leased Workers From TPA–Administaff Companies II, LP	Greenwood Village, CO	August 10, 2009.
74,523	RR Donnelley, Digital Solutions Center Division; Leased Workers from Quality Personnel.	Glasgow, KY	August 11, 2009.
74,531	Anthem Insurance Companies, Inc., Wellpoint, Finance Accounting, Leased Workers from Rogert Half/Accounting etc.	Mason, OH	August 13, 2009.

The following certifications have been issued. The requirements of Section 222(c) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
73,610	Visteon Corporation, Springfield Plant; Leased Workers MSX International, Adecco, Manpower.	Springfield, OH	March 2, 2009.

Negative Determinations for Worker Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

The investigation revealed that the criterion under paragraph (a)(1), or (b)(1), or (c)(1) (employment decline or threat of separation) of section 222 has not been met.

TA–W No.	Subject firm	Location	Impact date
73,335	Arvin Technologies, Inc	Troy, MI.	
73,335A	ArvinMeritor, Inc	Troy, MI.	

The investigation revealed that the criteria under paragraphs (a)(2)(A)(i) (decline in sales or production, or both) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W No.	Subject firm	Location	Impact date
74,235	RSG Forest Products, Inc	Kalama, WA.	

The investigation revealed that the criteria under paragraphs (a)(2)(A) (increased imports) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W No.	Subject firm	Location	Impact date
73,045	Techline, USA, Leased Workers from Express Employment Professionals.	Waunakee, WI.	
73,137	Loadcraft Industries, Ltd	Brady, TX.	
73,479	Enesco, LLC, Gund Division, Distribution Center	Edison, NJ.	
73,508	Wausau Window And Wall Systems, A Subsidiary of Apogee Enterprises, Inc.	Wausau, WI.	
73,551	RMC Pacific Materials, Inc., Cemex, Inc	Davenport, CA.	
73,685	Northwestern Tool & Die, LLC	Vernon Hills, IL.	
73,815	Colfax Envelope Corporation	Buffalo Grove, IL.	
74,079	San Francisco Chronicle, Hearst Communications, Leased Workers from Correstaff, etc.	Union City, CA.	
74,089	The Eastridge Group of Staffing Companies, Contractors & Builders Division; Bosa Holding, Inc.	San Diego, CA.	
74,118	Ach Food Company, Inc	Jacksonville, IL.	
74,192	KDH Defense Systems, Incorporated	Waynesburg, PA.	
74,375	Wisconsin Bell, Inc., Doing Business As Wisconsin Bell; Consumer Centers Sales and Services.	Milwaukee, WI.	
74,458	Smart-Sox, Inc	Thomasville, NC.	
74,462	US Airways, Inc., Port Columbus, Fleet Services	Columbus, OH.	

Determinations Terminating Investigations of Petitions for Worker Adjustment Assistance

After notice of the petitions was published in the **Federal Register** and on the Department's website, as required by Section 221 of the Act (19 U.S.C. 2271), the Department initiated investigations of these petitions.

The following determinations terminating investigations were issued because the petitioner has requested that the petition be withdrawn.

TA–W No.	Subject firm	Location	Impact date
74,475	EMC Corporation, Information Infrastructure Products, Ionix Software Engineers.	Berkeley Heights, NJ.	
74,476	EMC Corporation, Information Infrastructure Products, Ionix Software Engineers.	Colorado Springs, CO.	
74,477	EMC Corporation, Information Infrastructure Products, Ionix Software Engineers.	Colorado Springs, CO.	

The following determinations terminating investigations were issued because the petitioning groups of workers are covered by active certifications. Consequently, further investigation in these cases would serve no purpose since the petitioning group of workers cannot be covered by more than one certification at a time.

TA–W No.	Subject firm	Location	Impact date
74,478	EMC Corporation, Information Infrastructure Products, Ionix Software Engineers.	Duluth, GA.	

TA–W No.	Subject firm	Location	Impact date
74,535	The TriZetto Group, Inc.	Greenwood Village, CO.	

I hereby certify that the aforementioned determinations were issued during the period of August 23, 2010 through August 27, 2010. Copies of these determinations may be requested under the Freedom of Information Act. Requests may be submitted by fax, courier services, or mail to FOIA Disclosure Officer, Office of Trade Adjustment Assistance (ETA), U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 or *tofoiarequest@dol.gov.* These determinations also are available on the Department's website at *http://www.doleta.gov/tradeact* under the searchable listing of determinations.

Dated: September 3, 2010.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 2010–22922 Filed 9–14–10; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than September 27, 2010.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than September 27, 2010.

Copies of these petitions may be requested under the Freedom of Information Act. Requests may be submitted by fax, courier services, or mail, to FOIA Disclosure Officer, Office of Trade Adjustment Assistance (ETA), U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 or to *foiarequest@dol.gov.*

Signed at Washington, DC this 2nd of September 2010.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

APPENDIX

[TAA petitions instituted between 8/23/10 and 8/27/10]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
74539	Harris Corporation—Broadcast Communications Division (Workers)	Chesapeake, VA	08/23/10	08/18/10
74540	BMC Software (State/One-Stop)	Houston, TX	08/23/10	07/22/10
74541	Annex Manufacturing, LLC (Workers)	Lyons, NY	08/23/10	08/17/10
74542	Reader's Digest (Workers)	Greendale, WI	08/23/10	08/18/10
74543	Certainteed Corporation (Company)	Mountaintop, PA	08/23/10	08/12/10
74544	3M IMTEC (Company)	Ardmore, OK	08/23/10	07/28/10
74545	HAVI Logistics, North America (Workers)	Bloomingdale, IL	08/23/10	08/11/10
74546	Medline Industries, Inc. (Company)	Oldsmar, FL	08/23/10	08/16/10
74547	HAVI Logistics NA–DAVIS (Workers)	Davis, CA	08/23/10	08/11/10
74548	Bainbridge Mills (Company)	Bainbridge, GA	08/23/10	08/18/10
74549	Algonac Cast Products (Workers)	Algonac, MI	08/23/10	08/18/10
74550	Artisans, Inc. (Company)	Glen Flora, WI	08/23/10	08/20/10
74551	Vaughan Furniture Company (Company)	Galax, VA	08/23/10	08/17/10
74552	CKE Restaurants, Inc. (Company)	Anaheim, CA	08/23/10	08/18/10
74553	Fiserv, Inc. (State/One-Stop)	Owing Mills, MD	08/23/10	08/18/10
74554	IBM (State/One-Stop)	San Francisco, CA	08/23/10	08/20/10
74555	White Pine Copper Refinery (Union)	White Pine, MI	08/23/10	08/06/10
74556	Telair International, Incorporated (Company)	Simi Valley, CA	08/25/10	07/20/10
74557	Brinker International (Workers)	Dallas, TX	08/25/10	08/06/10
74558	United Solar Ovonic (Workers)	Auburn Hills, MI	08/25/10	08/23/10
74559	Solo Cup Company (Company)	Springfield, MO	08/25/10	08/24/10
74560	Wyman-Gordon, PCC (Union)	Houston, TX	08/25/10	08/20/10
74561	Hilton World Wide Reservation (Workers)	Hemet, CA	08/25/10	08/11/10
74562	Express Scripts (Workers)	Plano, TX	08/25/10	08/24/10
74563	Riddell, Inc. (Company)	San Antonio, TX	08/27/10	08/20/10
74564	Darlington Auto (State/One-Stop)	Darlington, SC	08/27/10	08/18/10
74565	Smead Manufacturing Company (Company)	McGregor, TX	08/27/10	08/25/10
74566	Bob Evans Farms, Inc. (Workers)	Galva, IL	08/27/10	08/24/10

APPENDIX—Continued

[TAA petitions instituted between 8/23/10 and 8/27/10]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
74567	Janssen R&D and Janssen Pharmaceutical Supply Group (Company).	Springhouse, PA	08/27/10	08/24/10
74568	Cardone Industries (Workers)	Philadelphia, PA	08/27/10	08/17/10

[FR Doc. 2010–22923 Filed 9–14–10; 8:45 am]

BILLING CODE 4510–FN–P

MERIT SYSTEMS PROTECTION BOARD

Oral Argument

AGENCY: Merit Systems Protection Board.

ACTION: Notice.

SUMMARY: Notice is hereby given of the scheduling of oral argument in the matters of *Rhonda K. Conyers* v. *Department of Defense,* MSPB Docket No. CH–0752–09–0925–I–1, and *Devon H. Northover* v. *Department of Defense,* MSPB Docket No. AT–0752–10–0184–I–1.

DATE AND TIME: Tuesday, September 21, 2010, at 10 a.m.

PLACE: The United States Court of Appeals for the Federal Circuit, Room 201, 717 Madison Place, NW., Washington, DC.

STATUS: Open.

FOR FUTHER INFORMATION CONTACT: Matthew Shannon, Merit Systems Protection Board, Office of the Clerk of the Board, 1615 M Street, NW., Washington, DC 20419; (202) 653–7200; *mspb@mspb.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to 5 CFR 1201.117(a)(2), the Merit Systems Protection Board ("MSPB" or "Board") will hear oral argument in the matters of *Rhonda K. Conyers* v. *Department of Defense,* MSPB Docket No. CH–0752–09–0925–I–1, and *Devon Northover* v. *Department of Defense,* MSPB Docket No. AT–0752–10–0184–I–1. *Conyers* and *Northover* raise the question of whether, pursuant to 5 CFR part 732, the rule in *Department of the Navy* v. *Egan,* 484 U.S. 518, 530–31 (1988), limiting the scope of MSPB review of an adverse action based on the revocation of a security clearance, also applies to an adverse action involving an employee in a "non-critical sensitive" position due to the employee having been denied continued eligibility for employment in a sensitive position. The Board requested and received an advisory brief from the Office of Personnel Management (OPM) in this matter, *see* 5 U.S.C. 1204(e)(1)(A), and the Board invited amicus curiae to submit briefs. *See* 75 FR 6728, Feb. 10, 2010. The parties, OPM, and the amici curiae will be allotted time at the hearing to present oral argument in this matter. The briefs submitted by the parties, OPM, and the amici curiae are available for viewing on the MSPB's Web site at *http://www.mspb.gov.* A recording of the oral argument will also be made available on the MSPB's Web site. The public is welcome to attend this hearing for the sole purpose of observation. Any person attending this oral argument who requires special accessibility features, such as sign language interpretation, must inform MSPB of those needs in advance.

William D. Spencer,

Clerk of the Board.

[FR Doc. 2010–22921 Filed 9–14–10; 8:45 am]

BILLING CODE 7400–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts

Arts Advisory Panel; Meetings

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that four meetings of the Arts Advisory Panel to the National Council on the Arts will be held at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506 as follows (ending times are approximate):

Arts Education (application review): October 4–5, 2010 in Room 716. A portion of this meeting, from 3:15 p.m. to 4 p.m. on October 5th, will be open to the public for a policy discussion. The remainder of the meeting, from 9 a.m. to 6 p.m. on October 4th, and from 9 a.m. to 3:15 p.m and from 4 p.m. to 5 p.m. on October 5th, will be closed.

Arts Education (application review): October 6–8, 2010 in Room 716. A portion of this meeting, from 3:15 p.m. to 4 p.m. on October 8th, will be open to the public for a policy discussion. The remainder of the meeting, from 9 a.m. to 6 p.m. on October 6th and 7th, and from 9 a.m. to 3:15 p.m. and from 4 p.m. to 4:30 p.m. on October 8th, will be closed.

Design (application review): October 20–21, 2010 in Room 730. This meeting, from 9 a.m. to 5:30 p.m. on October 20th and from 9 a.m. to 4:30 p.m. on October 21st, will be closed.

Arts Education (application review): October 25–26, 2010 in Room 714. A portion of this meeting, from 1:15 p.m. to 2 p.m. on October 26th, will be open to the public for a policy discussion. The remainder of the meeting, from 9 a.m. to 5:15 p.m. on October 25th, and from 9 a.m. to 1:15 p.m. on October 26th, will be closed.

The closed portions of meetings are for the purpose of Panel review, discussion, evaluation, and recommendations on financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency. In accordance with the determination of the Chairman of November 10, 2009, these sessions will be closed to the public pursuant to subsection (c)(6) of section 552b of Title 5, United States Code.

Any person may observe meetings, or portions thereof, of advisory panels that are open to the public, and if time allows, may be permitted to participate in the panel's discussions at the discretion of the panel chairman. If you need any accommodations due to a disability, please contact the Office of AccessAbility, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682–5532, TDY–TDD 202/682–5496, at least seven (7) days prior to the meeting.

Further information with reference to these meetings can be obtained from Ms. Kathy Plowitz-Worden, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC 20506, or call 202/682–5691.

Dated: September 10, 2010.

Kathy Plowitz-Worden,

Panel Coordinator, Panel Operations, National Endowment for the Arts.

[FR Doc. 2010–22994 Filed 9–14–10; 8:45 am]

BILLING CODE 7537–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Permits Issued Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of permits issued under the Antarctic Conservation of 1978, Public Law 95–541.

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permits issued under the Antarctic Conservation Act of 1978. This is the required notice.

FOR FURTHER INFORMATION CONTACT: Nadene G. Kennedy, Permit Office, Office of Polar Programs, Rm. 755, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

SUPPLEMENTARY INFORMATION: On August 3, 2010, the National Science Foundation published a notice in the **Federal Register** of permit applications received. Permits were issued on September 9, 2010 to:

Sam Feola	Permit No. 2011–009.
Sam Feola	Permit No. 2011–010.
Sam Feola	Permit No. 2011–011.
Sam Feola	Permit No. 2011–012.
Sam Feola	Permit No. 2011–013.
Sam Feola	Permit No. 2011–014.
Sam Feola	Permit No. 2011–015.

Nadene G. Kennedy,

Permit Officer.

[FR Doc. 2010–22924 Filed 9–14–10; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Permits Issued Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of permits issued under the Antarctic Conservation of 1978, Public Law 95–541.

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permits issued under the Antarctic Conservation Act of 1978. This is the required notice.

FOR FURTHER INFORMATION CONTACT: Nadene G. Kennedy, Permit Office, Office of Polar Programs, Rm. 755, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

SUPPLEMENTARY INFORMATION: On July 28, 2010, the National Science Foundation published a notice in the Federal Register of a permit application received. A permit was issued on September 9, 2010 to: Sam Feola, Permit No. 2011–008.

Nadene G. Kennedy,

Permit Officer.

[FR Doc. 2010–22925 Filed 9–14–10; 8:45 am]

BILLING CODE 7555–01–P

U.S. OFFICE OF PERSONNEL MANAGEMENT

Announcement of Public Meeting Transcript and Comment Period

AGENCY: U.S. Office of Personnel Management.

ACTION: Notice of transcript and public comment.

SUMMARY: The Office of Personnel Management held a public hearing on June 25, 2010, on issues concerning pathways to Federal jobs for students and recent graduates. The transcript from the hearing is now available at *http://www.chcoc.gov/documents/DisplayDocument.aspx?PublicDocID=195.* Members of the public are welcome to provide any further comments on issues raised at the hearing.

DATES: Members of the public wishing to submit written statements must submit such statements by September 29, 2010.

ADDRESSES: Send written statements to Ms. Angela Bailey, Deputy Associate Director for Recruitment and Diversity, 1900 E Street, NW., Room 6500, Washington, DC 20415 or *hiringevent@opm.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Juanita Wheeler. She can be reached on 202–606–2660 or at *Juanita.Wheeler@opm.gov.*

SUPPLEMENTARY INFORMATION: On May 11, 2010, President Obama issued a Memorandum for the Heads of Executive Departments and Agencies in which he stated that "the Federal Government must recruit and hire highly qualified employees and public service should be a career of choice for the most talented Americans." This public meeting was one phase of that initiative.

The purpose of this meeting was (1) to hear and consider views on whether normal, competitive hiring is an effective avenue for bringing recent college graduates into the Federal workforce and, if so, why that is the case; (2) to ascertain from those who believe that it is not effective, whether this presents a problem for the Federal Government that is sufficiently significant to warrant action or changes to policy; and (3) if action or changes in policy are warranted, to determine what change should be effected and by whom. The transcripts from that public hearing are now available at *http://www.chcoc.gov/documents/DisplayDocument.aspx?PublicDocID=195.* Members of the public are invited to provide any further comments they wish addressing the three issues presented above, and, in particular, to respond to comments made at the hearing. You may submit your written comments to Ms. Angela Bailey, Deputy Associate Director for Recruitment and Diversity, on or before September 29, 2010, to the address listed above. Please limit your statements to no more than five pages. All written statements and oral presentations will become part of the record of proceedings and deliberations.

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2010–22909 Filed 9–14–10; 8:45 am]

BILLING CODE 6325–39–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62870; File No. SR–CBOE–2010–078]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Permit Certain FLEX Options To Trade Under the FLEX Trading Procedures for a Limited Time on a Closing Only Basis

September 8, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 30, 2010, the Chicago Board Options Exchange, Incorporated ("Exchange" or "CBOE") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend certain CBOE rules pertaining to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Flexible Exchange ("FLEX") Options to permit certain FLEX Options to continue to trade under the FLEX trading procedures for a limited time. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/Legal*), on the Commission's Web site at *http://www.sec.gov;* at the Exchange's Office of the Secretary and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to allow certain FLEX Options, which are identical in all terms to a Non-FLEX Option, to continue to trade using the FLEX trading procedures for the balance of the trading day on which the Non-FLEX Option is added as an intra-day add.

The Exchange recently adopted rule changes to allow FLEX Options to expire on or within two business days of a third-Friday-of-the-month expiration ("Expiration FLEX Options").[3] Such FLEX Options could have either an American-, European-, or European-Capped-style exercise. Among other things, the rule change also provided that Expiration FLEX Options will be permitted before (but not after) Non-FLEX Options with identical terms are listed. Once and if an option series is listed for trading as a Non-FLEX Option series, (i) all existing open positions established under the FLEX trading procedures shall be fully fungible with transactions in the respective Non-FLEX Option series, and (ii) any further trading in the series would be as Non-FLEX Options subject to the Non-FLEX trading procedures and rules.

The Options Clearing Corporation ("OCC") became concerned that, in certain circumstances, in the event a Non-FLEX Option is listed with identical terms to an existing FLEX Option, OCC could not net the positions in the contracts until the next business day. If the Non-FLEX Option were listed intra-day, and an investor with a position in the FLEX Option attempted to close the position using the Non-FLEX Option, the investor would be technically long in one contract and short in the other contract. This would expose the investor to assignment risk until the next day despite having offsetting positions.

The limited circumstances are:

- The Non-FLEX Option is listed intra-day.
- The FLEX contract is for American-style exercise.
- All other terms are identical and the contracts are otherwise fungible.

The risk does not occur in expiration Friday FLEX Option positions during the five days prior to expiration, as no new Non-FLEX Option series may be listed within five days of expiration. It also does not exist for FLEX Option positions that will be identical to Non-FLEX series to be added after expiration, as those new series are added "overnight" and OCC will convert the FLEX position to the Non-FLEX Option series at the time the Non-FLEX series is created. In addition, it does not exist for FLEX Options positions that have a European-Capped-style exercise, as there are no Non-FLEX European-Capped-style options currently traded on CBOE. Further, it does not exist for most FLEX Index Options listed on CBOE, as most Non-FLEX Index options currently traded on CBOE are European-style exercise, and thus the Non-FLEX Index Options cannot be exercised on the day the series is listed. The only exception is Non-FLEX, American-style options on the S&P 100 (OEX).

As an example, suppose underlying issue XYZ, trading around $25 per share, has options listed on the March cycle, and in February an investor wishes to buy just-out-of-the-money call options that expire in May. Since the Non-FLEX May Options will not be listed until after the March expiration, the investor enters a FLEX Option order in February to buy 250 Call 30 options expiring on the third Friday of May. If, as expected, the Non-FLEX May 30 call options are listed on the Monday after March expiration, the investor's open FLEX position will be converted by OCC over the weekend following March expiration to the Non-FLEX series.

However, if XYZ stock should decline between the time of the FLEX transaction and March expiration, the May 30 calls may not be added after March expiration. If that were to occur, the May 30 calls may be added sometime later. Suppose the Exchange receives a request to add the May 30 calls on the morning of the Wednesday after expiration, and the Exchange lists them immediately. The investor with the FLEX position may then decide it is an opportune time to close his position.

Under the current rules, the investor would be required to close the position by entering a sell order in the new Non-FLEX Option series. However, when the Non-FLEX transaction is reported to OCC, the investor is considered short in the Non-FLEX Option series, and is still long in the FLEX Option. OCC cannot aggregate the FLEX positions into the Non-FLEX series until after exercise and assignment processing. If a buyer in the new Non-FLEX series were to exercise the options, the original investor who had attempted to close the FLEX position with an offsetting Non-FLEX trade would be at risk of being assigned on the technically short Non-FLEX position.

Because of this risk, OCC will not clear an American-style expiration Friday FLEX option. The Exchange has spoken with OCC and OCC has agreed that allowing an option position in a FLEX contract to be closed using a FLEX Option in such circumstances will mitigate the risk.

The assignment risk does not exist if the Non-FLEX Option is to be added the next trading day. In situations where OCC is aware that a series will be added overnight, they can convert the FLEX position to a Non-FLEX position before the next trading day. However, OCC cannot guarantee that an identical Non-FLEX series will not be added intra-day, and thus will not clear such American-style FLEX Options.

CBOE is proposing a limited exception to the requirement that the trading in such options be under the Non-FLEX trading procedures. The Exchange proposes that, in the event a Non-FLEX Option is listed intra-day, a FLEX Option position with identical terms could be closed under the FLEX trading procedures, but only for the balance of the trading day on which the series is added. Under the proposed rule change, both sides of the FLEX transaction would have to be closing only positions.

This change will allow a FLEX Option to be traded in such a manner to mitigate assignment risk.

A FLEX Post Official (also referred to in the rules as simply a "FLEX

[3] *See* Securities Exchange Act Release No. 59417 (February 18, 2009), 74 FR 8591 (February 25, 2009) (SR–CBOE–2008–115).

Official")[4] has the regulatory responsibility for reviewing the conformity of FLEX trades to the terms and specifications contained in Rule 24A.4 or 24B.4, as applicable. In the event a Non-FLEX series, having the same terms as an existing expiration Friday FLEX Option, is listed intra-day, the FLEX Official will review any subsequent FLEX transactions in that series and verify that the transaction is being executed for the purpose of closing out an existing FLEX position. In addition:

• With respect to FLEX trades occurring on the Chapter XXIVA FLEX trading platform, should such trading platform be used by the Exchange,[5] the FLEX Official will not disseminate a FLEX Request for Quote for any order representing a FLEX series having the same terms as a Non-FLEX series, unless such FLEX Order is a closing order (and it is the day the Non-FLEX series has been added). Additionally, if the FLEX Official were to disseminate a FLEX Request for Quotes for a closing order representing a FLEX series having the same terms as a Non-FLEX series, the FLEX Official would only accept response quotes and orders that were closing out an existing FLEX position.

• With respect to FLEX trades occurring on the Chapter XXIVB FLEX trading platform, the FLEX Official will make an announcement that the FLEX series is now restricted to closing transactions; a FLEX Request for Quotes may not be disseminated for any order representing a FLEX series having the same terms as a Non-FLEX series, unless such FLEX Order is a closing order (and it is the day the Non-FLEX series has been added); and only responses that were closing out an existing FLEX position would be permitted. Any transactions that occur that do not conform to these requirements would be nullified by the FLEX Official pursuant to Rule 24B.14.

The CBOE Department of Regulation reviews FLEX trading activity, and, in the event a Non-FLEX series with the same terms as an expiration Friday FLEX option is listed intra-day, will review any subsequent FLEX transactions in the series to verify that they are closing a position.

[4] FLEX Officials are Exchange employees or independent contractors designated pursuant to Rule 24A.12 or 24B.14.

[5] Currently CBOE's Chapter XXIVA FLEX trading platform is not utilized by the Exchange. Instead, all FLEX Options are currently traded on CBOE's Chapter XXIVB FLEX trading platform.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act[6] and the rules and regulations thereunder and, in particular, the requirements of Section 6(b) of the Act.[7] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[8] in that it is designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest, by giving CBOE Trading Permit Holders and investors additional tools to trade customized options in an exchange environment while allowing a FLEX position to be traded in such a manner as to mitigate inadvertent assignment risk.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days 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 self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change or such shorter time as designated by the Commission, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10]

[6] 15 U.S.C. 78s(b)(1).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[11] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing.

The Commission notes that the proposed rule change is substantially similar to a proposed rule change previously submitted by NYSE Arca which was published for notice and comment in the **Federal Register**.[12] The Commission notes that it did not receive any comments on the NYSE Arca proposal, and does not believe the CBOE's proposal raises any new or novel issues. Further, as noted above, because of the inadvertent assignment risk, market participants could not trade previously approved American style FLEX Options expiring on Expiration Friday.[13] The proposal seeks to mitigate such assignment risks by limiting certain FLEX transactions to closing only, thereby allowing the trading of previously approved FLEX Options. For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest and therefore, designates the proposed rule change operative upon filing.[14]

At any time within 60 days of the filing of such 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.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule

[11] 17 CFR 240.19b–4(f)(6)(iii).

[12] *See* Securities Exchange Act Release No. 62321 (June 17, 2010), 75 FR 36130 (June 24, 2010) (SR–NYSEArca–2010–46).

[13] *See supra* note 5.

[14] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *(http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2010–078 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2010–078. 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 No. SR–CBOE–2010–078 and should be submitted on or before October 6, 2010

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–22947 Filed 9–14–10; 8:45 am]

BILLING CODE 8010–01–P

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62867; File No. SR–Phlx–2010–122]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Clarify What Information Must Be Entered Into the Exchange's Options Floor Broker Management System

September 8, 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 September 2, 2010, NASDAQ OMX PHLX LLC ("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 Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposal to amend Phlx Rule 1063 (Responsibilities of Floor Brokers) and Phlx Options Procedure Advice C–2 (Options Floor Broker Management System)[3] to clarify what information must be entered into the Exchange's Options Floor Broker Management System.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/Filings/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposal is to amend Phlx Rule 1063 and Options Floor Procedure Advice C–2 to clarify that information entered into the Exchange's Options Floor Broker Management System must include order receipt time.

The Exchange's Options Floor Broker Management System ("FBMS")[4] was designed to establish an electronic audit trail for equity, equity index and U.S. dollar-settled foreign currency options[5] orders represented by Floor Brokers[6] on the Exchange.[7] The Options Floor Broker Management System is found in Rule 1063(e) and corresponding Advice C–2 and states that either a Floor Broker or an employee of a Floor Broker has to record all options orders represented by such Floor Broker onto the electronic FBMS (as described in Rule 1080,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Options Floor Procedure Advices ("OFPAs" or "Advices") generally correspond to Exchange rules. OFPA C–2 is a corresponding Advice to Rule 1063, which deals, in part, with the Options Floor Broker Management System and is part of the Exchange's minor rule plan ("MRP" or "Minor Rule Plan"). The Exchange's Minor Rule Plan consists of Advices with preset fines, pursuant to Rule 19d–1(c) under the Act. 17 CFR 240.19d–1(c). *See* Securities Exchange Act Release No. 50997 (January 7, 2005), 70 FR 2444 (January 13, 2005) (SR–Phlx–2003–40) (approval order establishing Floor Broker Management System in OFPA C–2 and Rule 1063).

[4] Rule 1080, Commentary .06 states, in relevant part: The Options Floor Broker Management System is a component of AUTOM designed to enable Floor Brokers and/or their employees to enter, route and report transactions stemming from options orders received on the Exchange. The Options Floor Broker Management System also is designed to establish an electronic audit trail for options orders represented and executed by Floor Brokers on the Exchange, such that the audit trial provides an accurate, time-sequenced record of electronic and other orders, quotations and transactions on the Exchange, beginning with the receipt of an order by the Exchange, and further documenting the life of the order through the process of execution, partial execution, or cancellation of that order. Rule 1080(a) states, in relevant part: AUTOM is the Exchange's electronic order delivery and reporting system, which provides for the automatic entry and routing of Exchange-listed equity options, index options and U.S. dollar-settled foreign currency options orders to the Exchange trading floor.

[5] U.S. dollar-settled foreign currency options traded on the Exchange are also known as World Currency Options ("WCO") or Foreign Currency Options ("FCO").

[6] Floor Broker is defined in Rule 1060 as: An individual who is registered with the Exchange for the purpose, while on the Options Floor, of accepting and executing options orders received from members and member organizations.

[7] *See* Securities Exchange Act Release No. 50997 (January 7, 2005), 70 FR 2444 (January 13, 2005) (SR–Phlx–2003–40) (approval order establishing FBMS in Rule 1063 and OFPA C–2, and adding definition of FBMS in Commentary .06 to Rule 1080).

Commentary .06) contemporaneously upon receipt of an order and prior to the representation of such an order in the trading crowd.

Rule 1063(e) and OFPA C–2 specify what information must be entered into FBMS (the "FBMS information"). The FBMS information currently required to be entered includes, among other things, the options symbol and the order type (*i.e.,* customer, firm, broker-dealer, professional), but not the order receipt time. Rule 1063(f), as well the second paragraph of corresponding OFPA C–2, states that Floor Brokers or their employees shall enter FBMS information for FLEX [8] options into the Exchange's electronic audit trail in the same electronic format as the required by Rule 1063(e) and OFPA C–2 for equity, equity index and U.S. dollar-settled foreign currency options. In that per OFPA C–2 the Options Floor Broker Management System is part of the Exchange's Minor Rule Plan,[9] the Advice sets forth a fine schedule for failure to enter FBMS information.[10]

The Exchange notes that the time that an order is entered is being captured by the system in the audit trail created via the FBMS per Rule 1063(e) and OFPA C–2, but is not specifically required in the rule and Advice as currently written. The Exchange is therefore proposing to change Rule 1063 and OFPA C–2 to require entry of order receipt time information into the FBMS, thereby making this information requirement a part of the Minor Rule Plan reflected in OFPA C–2 and conforming the Advice and the rule.

Specifically, the Exchange proposes to state in Rule 1063(e)(i) and OFPA C–2 that Floor Brokers or their employees must record order receipt time in conjunction with order type in FBMS. Proposed Rule 1063(e)(i) and OFPA C–2 as amended will each state, in relevant part: The following specific information with respect to orders represented by a Floor Broker shall be recorded by such Floor Broker or such Floor Broker's employees: (i) The order type (*i.e.,* customer, firm, broker-dealer, professional) and order receipt time; (ii) the option symbol; (iii) buy, sell, cross or cancel; [11] (iv) call, put, complex (*i.e.,* spread, straddle), or contingency order as described in Rule 1066; (v) number of contracts; (vi) limit price or market order or, in the case of a complex order, net debit or credit, if applicable; (vii) whether the transaction is to open or close a position; and (viii) The Options Clearing Corporation ("OCC") clearing number of the broker-dealer that submitted the order (collectively, the "required information").[12]

The Exchange believes that the proposal would codify current practice, ensure that violations of FBMS in terms of failure to enter order receipt time are part of the Exchange's Minor Rule Plan, and harmonize Rule 1063(e) and OFPA C–2.[13]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [14] in general, and furthers the objectives of Section 6(b)(5) of the Act [15] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system. In particular, the Exchange proposes to codify current practice, ensure that violations of the Options Floor Broker Management System in terms of failure to enter order receipt time are part of the Exchange's Minor Rule Plan, and harmonize Rule 1063(e) and OFPA C–2.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act [16] and Rule 19b–4(f)(6) thereunder.[17]

At any time within 60 days of the filing of such 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.

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–2010–122 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary,

[8] FLEX options are flexible exchange-traded index, equity, or currency option contracts that provide investors the ability to customize basic option features including size, expiration date, exercise style, and certain exercise prices. FLEX options may have expiration dates within five years. *See* Rule 1079. FLEX currency option contracts traded on the Exchange are also known as FLEX WCO or FLEX FCO contracts.

[9] *See* supra note 3.

[10] The OFPA C–2 fine schedule is as follows:

FINE SCHEDULE (Implemented on a two-year calendar basis): 1st Occurrence—$500.00; 2nd Occurrence—$1,000.00;—3rd Occurrence—$2,000.00; 4th Occurrence and Thereafter—Sanction is discretionary with the Business Conduct Committee.

The Exchange does not propose any changes in this filing to the Fine Schedule.

[11] To ensure conformity of Rule 1063 and Advice C–2, which both contain the list of specific information, the exchange proposes to insert the word "cross" into Advice C–2.

[12] The Exchange notes also that Rule 17a–3(a)(7) pursuant to the Act states, in relevant part, that broker-dealers that transact a business in securities through members of a national securities exchange shall make and keep current the books and records relating to its business including, but not limited to, among other things: A memorandum of each purchase and sale for the account of the member, broker, or dealer showing the price and, to the extent feasible, the time of execution; and, in addition, where the purchase or sale is with a customer other than a broker or dealer, a memorandum of each order received, showing the time of receipt. 17 CFR 240.17a–3.

[13] The Exchange has filed a proposal to make unrelated changes to Rule 1063 and OFPA C–2 at SR–Phlx–2010–116 that we believe do not impact the changes proposed herein. We would update this rule change proposal should it become necessary in light of SR–Phlx–2010–116.

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(6). In addition, Phlx has given the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date on which the Exchange filed the proposed rule change. *See* 17 CFR 240.19b–4(f)(6)(iii).

Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2010–122. 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,[18] 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2010–122 and should be submitted on or before October 6, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–22945 Filed 9–14–10; 8:45 am]

BILLING CODE 8010–01–P

[18] The text of the proposed rule change is available on Exchange's Web site at *http://nasdaqtrader.com/micro.aspx?id=PHLXfilings,* on the Commission's Web site at *http://www.sec.gov,* at Phlx, and at the Commission's Public Reference Room.

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62874; File No. SR–NYSE–2010–59]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change To Amend NYSE Rule 452 and Listed Company Manual Section 402.08 To Eliminate Broker Discretionary Voting on Executive Compensation Matters

September 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act") [1] and Rule 19b-4 thereunder,[2] notice is hereby given that on August 26, 2010, New York Stock Exchange LLC ("NYSE" or the "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 NYSE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is approving the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend NYSE Rule 452, and corresponding NYSE Listed Company Manual Section 402.08, to prohibit member organizations from voting uninstructed shares if the matter voted on relates to executive compensation, in accordance with the provisions of Section 957 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), which was signed by the President on July 21, 2010.

The text of the proposed rule change is available at *http://www.nyse.com,* at the Exchange's principal office, at the Commission's Public Reference Room, and on the Commission's Web site at *http://www.sec.gov.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule changes. The text of these statements may be examined at the places specified in Item III below and is set forth in Sections A, B and C below.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to amend NYSE Rule 452, titled *Giving Proxies by Member Organizations,* and corresponding NYSE Listed Company Manual Section 402.08, to prohibit member organizations from voting uninstructed shares if the matter voted on relates to executive compensation, in accordance with the provisions of Section 957 of the Dodd-Frank Act, which was signed by the President on July 21, 2010. Because Section 957 of the Dodd-Frank Act does not provide for a transition phase, the Exchange is proposing to adopt the proposed rule changes pursuant to Section 19(b) of the Act to comply with Section 957 of the Dodd-Frank Act and is requesting that the Commission approve the proposal on an accelerated basis. We are also proposing to add the words "or authorize" in certain places throughout the rule to clarify that the rule includes not only the giving of a proxy but also the authorization of such proxy.

Current Requirements of NYSE Rule 452

Under current NYSE and Commission proxy rules, brokers must deliver proxy materials to beneficial owners and request voting instructions in return. If voting instructions have not been received by the tenth day preceding the meeting date, Rule 452 provides that a broker may vote on certain matters when the broker has no knowledge of any contest as to the action to be taken at the meeting and provided such action is adequately disclosed to stockholders, and does not include authorization for a merger, consolidation or any matter which may affect substantially the rights or privileges of such stock. In addition, the Rule currently identifies 20 matters with respect to which brokers may not vote without instructions from beneficial owners.

Enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Prior to the July 21, 2010 enactment of the Dodd-Frank Act, under Rule 452 and the Exchange's prior interpretations, member organizations were permitted to cast votes on some matters, including some executive compensation proposals, without specific instructions from beneficial owners of the stock. However, the Dodd-

Frank Act contains a provision explicitly requiring the elimination of broker discretionary voting on matters related to executive compensation.

Section 957 of the Dodd-Frank Act amends Section 6(b)[3] of the Exchange Act to require the rules of each national securities exchange to prohibit any member organization that is not the beneficial owner of a security registered under Section 12[4] of the Exchange Act from granting a proxy to vote the security in connection with certain stockholder votes, unless the beneficial owner of the security has instructed the member organization to vote the proxy in accordance with the voting instructions of the beneficial owner. The stockholder votes covered by Section 957 include any vote (i) with respect to the election of a member of the board of directors of an issuer (other than an uncontested election of a director of an investment company registered under the Investment Company Act of 1940 (the "Investment Company Act")), (ii) executive compensation or (iii) any other significant matter, as determined by the Commission, by rule.

The Exchange prohibits member organizations from voting uninstructed shares if the matter voted on is the election of directors (other than in the case of an issuer registered under the Investment Company Act, provided the matter is not the subject of a counter-solicitation). In addition, the Commission has not at this time identified other significant matters with respect to which the Exchange must prohibit member organizations from voting uninstructed shares. Accordingly, in order to carry out the requirements of Section 957 of the Dodd-Frank Act, the Exchange proposes to amend NYSE Rule 452, and corresponding NYSE Listed Company Manual Section 402.08, to prohibit member organizations from voting uninstructed shares if the matter voted on relates to executive compensation.

Specifically, the Exchange is proposing to add a new Item 21 and accompanying commentary to NYSE Rule 452.11 (When member organization may not vote without customer instructions), and corresponding NYSE Listed Company Manual Section 402.08(B) (When Member Organization May Not Vote Without Customer Instructions), to provide that a member organization may not give or authorize a proxy to vote without instructions from the beneficial owner when the matter to be voted upon relates to executive compensation.

The proposed commentary to Item 21 would clarify that a matter relating to executive compensation would include, among other things, the items referred to in Section 14A of the Exchange Act (added by Section 951 of the Dodd-Frank Act), including (i) an advisory vote to approve the compensation of executives, (ii) a vote on whether to hold such an advisory vote every one, two or three years, and (iii) an advisory vote to approve any type of compensation (whether present, deferred, or contingent) that is based on or otherwise relates to an acquisition, merger, consolidation, sale, or other disposition of all or substantially all of the assets of an issuer and the aggregate total of all such compensation that may (and the conditions upon which it may) be paid or become payable to or on behalf of an executive officer. In addition, a member organization may not give or authorize a proxy to vote without instructions on a matter relating to executive compensation, even if such matter would otherwise qualify for an exception from the requirements of Item 12, Item 13 or any other Item under NYSE Rule 452.11 and corresponding Listed Company Manual Section 402.08. Any vote on these or similar executive compensation-related matters would be subject to the requirements of NYSE Rule 452, as amended, and corresponding NYSE Listed Company Manual Section 402.08, as amended.

Effective Date

Because Section 957 of the Dodd-Frank Act does not provide for a transition phase, the Exchange is proposing to adopt the proposed rule changes pursuant to Section 19(b) of the Act to comply with Section 957 of the Dodd-Frank Act and is requesting that the Commission approve the proposal on an accelerated basis.

2. Statutory Basis

The basis under the Exchange Act for these proposed rule changes is the requirement under Section 6(b)(5)[5] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest. We are adopting these proposed rule changes to comply with the requirements of Section 957 of the Dodd-Frank Act, and therefore believe the proposed rule changes to be consistent with the Act, particularly with respect to the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule changes will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act, as amended by the Dodd-Frank Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule changes.

III. 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–NYSE–2010–59 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2010–59. 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

[3] 15 U.S.C. 78f(b). The Commission notes that Section 957 amends Section 6(b) of the Act by adding Section 6(b)(10).

[4] 15 U.S.C. 78l.

[5] 15 U.S.C. 78f(b)(5).

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 NYSE. 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 publicly available. All submissions should refer to File Number SR–NYSE–2010–59 and should be submitted on or before October 6, 2010.

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

In its filing, the Exchange requested that the Commission approve the proposal on an accelerated basis. The Exchange stated that it believed good cause existed to grant accelerated approval because Section 957 of the Dodd-Frank Act does not provide for a transition period.

After careful consideration, 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.[6] The Commission believes that the proposal is consistent with Section 6(b)(10)[7] of the Act, which requires that national securities exchanges adopt rules prohibiting members that are not beneficial holders of a security from voting uninstructed proxies with respect to the election of a member of the board of directors of an issuer (except for uncontested elections of directors for companies registered under the Investment Company Act), executive compensation, or any other significant matter, as determined by the Commission, by rule. The Commission also believes that the proposal is consistent with Section 6(b)(5)[8] of the Act, which provides, among other things, that the rules of the Exchange must be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission believes that the proposal is consistent with Section 6(b)(10) of the Act because it adopts revisions that comply with that section. As noted in the accompanying Senate Report, Section 957, which adopts Section 6(b)(10), reflects the principle that "final vote tallies should reflect the wishes of the beneficial owners of the stock and not be affected by the wishes of the broker that holds the shares."[9] The proposed rule change will make NYSE rules compliant with the new requirements of Section 6(b)(10) by prohibiting broker-dealers, who are not beneficial owners of a security, from voting uninstructed shares with respect to any matter on executive compensation.[10]

The Commission believes that the proposal is consistent with Section 6(b)(5) of the Act because the proposal will further investor protection and the public interest by assuring that shareholder votes on executive compensation matters are made by those with an economic interest in the company, rather than by a broker that has no such economic interest, which should enhance corporate governance and accountability to shareholders.[11]

The Commission notes that the NYSE's new rule prohibiting uninstructed broker votes on executive compensation covers the specific items identified in Section 951 of the Dodd-Frank Act, as well as any other matter concerning executive compensation, and has been drafted broadly to reflect the requirements of Section 6(b)(10) of the Act. The proposed rule language also specifically states that a broker vote on any executive compensation matter would not be permitted even if it would otherwise qualify for an exception from any item under Rule 452.11 or corresponding Listed Company Manual Section 402.08. The Commission believes this provision will make clear that any past practice or interpretation that may have permitted a broker vote on an executive compensation matter, under existing rules, will no longer be applicable and is superseded by the newly adopted provisions.

Finally, the Commission notes that the change to reflect that the NYSE rules prohibit not only the giving of a proxy, but also the authorization of the proxy, should help to clarify the intent of the NYSE proxy rules and is consistent with the requirements of Section 6 of the Act.

Based on the above, the Commission believes that the NYSE's proposal will further the purposes of Sections 6(b)(5) and 6(b)(10) of the Act by ensuring that brokers, holding shares on behalf of beneficial owners, are not voting uninstructed shares on matters relating to executive compensation, which should enhance corporate accountability to shareholders. The rule filing should also serve to fulfill the Congressional intent in adopting Section 6(b)(10) of the Act.

The Commission also finds good cause, pursuant to Section 19(b)(2) of the Act,[12] for approving the proposed rule change prior to the 30th day after the date of publication of notice in the **Federal Register**. As noted above, Section 6(b)(10) of the Act, enacted under Section 957 of the Dodd-Frank Act, does not provide for a transition phase, and requires rules of national securities exchanges to prohibit, among other things, broker voting on executive compensation. The Commission believes that good cause exists to grant accelerated approval to the Exchange's proposal, because it will conform NYSE Rule 452 and Section 402.08 of the Listed Company Manual to the requirements of Section 6(b)(10) of the Act.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[13] that the proposed rule change (SR–NYSE–2010–59) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–22934 Filed 9–14–10; 8:45 am]

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[6] In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[7] 15 U.S.C. 78f(b)(10).

[8] 15 U.S.C. 78f(b)(5).

[9] *See* S. Rep. No. 111–176, at 136 (2010).

[10] As noted above, Section 6(b)(10) also prohibits broker voting for director elections, except for uncontested director elections of registered investment companies, and also "any other significant matter, as determined by the Commission, by rule." NYSE already prohibits broker voting in director elections except for uncontested director elections for registered investment companies. *See* NYSE Rule 452.11(19) and Listed Company Manual Section 402.08(B)(19) and note 11, *infra.* As to other matters, the Commission has not, to date, adopted rules concerning other significant matters where uninstructed broker votes should be prohibited, although it may do so in the future. Should the Commission adopt such rules, we would expect the NYSE to adopt coordinating rules promptly to comply with the statute.

[11] As the Commission stated in approving NYSE rules prohibiting broker voting in the election of directors, having those with an economic interest in the company vote the shares, rather than the broker who has no such economic interest, furthers the goal of enfranchising shareholders. *See* Securities Exchange Act Release No. 60215 (July 1, 2009), 74 FR 33293 (July 10, 2009) (SR–NYSE–2006–92).

[12] 15 U.S.C. 78s(b)(2).

[13] 15 U.S.C. 78s(b)(2).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62869; File No. SR–BX–2010–062]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Market Maker Obligations

September 8, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on September 7, 2010, NASDAQ OMX BX, Inc. (the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act,[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Chapter VI, Section 6 (Market Maker Quotations) of the Rules of the Boston Options Exchange Group, LLC ("BOX"). The text of the proposed rule change is available from the principal office of the Exchange, on the Commission's Web site at *http://www.sec.gov,* at the Commission's Public Reference Room, and also on the Exchange's Internet Web site at *http://nasdaqomxbx.cchwallstreet.com/NASDAQOMXBX/Filings/.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to amend certain existing quoting obligations of Market Makers.

Presently, a Market Maker must participate in the pre-opening phase and thereafter make markets consistent with the applicable quoting requirements specified in the BOX Rules, such that on a daily basis a Market Maker must post valid quotes at least sixty percent (60%) of the time that the class(es) are open for trading.[5] Under the existing rules, any time a Market Maker's quote size falls below the ten (10) contract minimum size requirement, even after an execution which decrements the remaining size of the quote, the quote is deemed invalid for meeting the Market Maker's quoting obligations. The Exchange believes that its policy of the meaning of a "valid" quote should be updated to include an exception for quotes that have been depleted by executions below the ten (10) contract minimum size requirement. Modifying the quotations requirements in this manner will encourage more options trading firms to register as Market Makers on BOX and to provide more liquidity to BOX Options Participants.

Under proposed Section 6, in order to be deemed "valid" a Market Maker's initial quoted size must be for at least ten (10) contracts. This initial minimum size shall apply regardless of whether a Market Maker receives an RFQ message, is called upon by an Options Official to post a quote, or otherwise. The initial size of the Market Maker's valid quote may subsequently be depleted in size below the minimum size due to executions with the quote and the quote shall remain valid as long as the Market Maker has not changed or updated the quote as to price or size. This depleted quote size shall remain valid until (1) the Market Maker's quoted size is completely exhausted, whereupon the Market Maker must once again post a valid quote with a valid initial size of ten (10) contracts, or (2) the Market Maker updates or changes the posted quote, whereupon such quote must meet the minimum initial size of ten (10) contracts in order to be deemed valid.[6]

The Exchange notes that its minimum initial size of ten (10) contracts is ten times the market maker minimum quote size requirement (one contract) at some other options exchanges[7] and that no changes are being proposed regarding Market Makers' obligations, including obligations to participate in the pre-opening phase. Furthermore, a Market Maker may continue to be called upon by an Options Official[8] to submit a single valid two-sided quote in one or more of the series of an options class to which the Market Maker is appointed whenever, in the judgment of such official, it is necessary to do so in the interest of fair and orderly markets.[9] Because the Market Makers' obligations, including those mentioned above, will continue, the Exchange believes this justifies any benefits they receive due to their appointment as Market Maker on BOX.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[10] in general, and Section 6(b)(5) of the Act,[11] in particular, in that it is designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism for a free and open market and a national market system and, in general, to protect investors and the public interest. Modifying the quotations requirements in this manner will encourage more options trading firms to register as Market Makers on BOX and to provide more liquidity to BOX Options Participants. An overall

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Chapter VI, Section 6(d) of the BOX Rules.

[6] For example, Market Maker A posts a valid bid with a size of 15 contracts in a particular series. An order for 8 contracts executes against that bid and depletes the bid size to 7 contracts. Under the proposal the bid remains valid. Subsequently the Market Makers appointed to that class receive an RFQ message or are called upon by an Options Official to post a quote in that series. Market Maker A's bid of 7 contracts would be considered valid, and he does not need to respond. Market Maker B, who was not already posting a valid quote in that series, responds by posting an initial valid bid with a size of 10 contacts within 3 seconds of receiving the request. Then within the next 30 seconds an order for 10 contracts executes against all of Market Maker A's bid for 7 contracts. The remaining 3 contracts of the order execute against the bid of Market Maker B, depleting his bid size to 7 contracts. Since Market Maker A no longer has a bid and does not have a valid quote, he updates his quote for an initial bid of 10 contracts. Market Maker B's bid of 7 contracts remains valid.

[7] *See* Rule 6.37B (Market Maker Quotations-OX) of the Rules of NYSE Arca, Inc ("NYSE Arca").

[8] The term "Options Official" means an officer of BOX Regulation vested by the BOX Regulation Board with certain authority to supervise option trading on BOX. *See* BOX Rules Chapter I, Section 1(a)(44).

[9] *See* BOX Rules Chapter VI, Section 6(b)(iv).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

increase in liquidity will benefit investors and serve the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

This proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.[12]

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.

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–BX–2010–062 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–BX–2010–062. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2010–062 and should be submitted on or before October 6, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–22946 Filed 9–14–10; 8:45 am]

BILLING CODE 8010–01–P

[12] Rule 19b–4(f)(6)(iii) requires the self-regulatory organization to submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied the five-day pre-filing requirement.

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62875; File No. SR–NYSEArca–2010–71]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Change To List and Trade Shares of the ETFS White Metals Basket Trust

September 9, 2010.

I. Introduction

On July 22, 2010, NYSE Arca, Inc. ("Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares ("Shares") of the ETFS White Metals Basket Trust ("Trust") pursuant to NYSE Arca Equities Rule 8.201. The proposed rule change was published for comment in the **Federal Register** on August 6, 2010.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange proposes to list and trade Shares pursuant to NYSE Arca Equities Rule 8.201, which governs the listing and trading of Commodity-Based Trust Shares. ETFS Services USA LLC is the sponsor of the Trust ("Sponsor"), The Bank of New York Mellon is the trustee of the Trust ("Trustee"), and JPMorgan Chase Bank, N.A. is the custodian of the Trust ("Custodian").

The Shares represent units of fractional undivided beneficial interest in and ownership of the Trust. The investment objective of the Trust is for the Shares to reflect the performance of the price of physical silver, platinum, and palladium in the proportions held by the Trust, less the expenses of the Trust's operations.[4]

The Exchange deems the Shares to be equity securities, which subjects trading in the Shares to the Exchange's existing rules governing the trading of equity securities, and has represented that trading in the Shares on the Exchange will occur in accordance with NYSE Arca Equities Rule 7.34(a). The Exchange has also represented that it has appropriate rules to facilitate

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 62620 (July 30, 2010), 75 FR 47655 ("Notice").

[4] *See* the registration statement for the Trust on Form S–1, filed with the Commission on May 27, 2010 (No. 333–167166) ("Registration Statement").

transactions in the Shares during all trading sessions.

Additional information regarding the Trust, the Shares, the Trust's investment objectives, strategies, policies, and restrictions, fees and expenses, creation and redemption of Shares, the Bullion markets, availability of information, trading rules and halts, and surveillance procedures, among other things, can be found in the Notice and in the Registration Statement.[5]

III. Discussion and Commission's Findings

After careful consideration, the Commission finds that the proposed rule change to list and trade the Shares of the Fund is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[6] In particular, the Commission finds that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act,[7] which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in facilitating transactions in securities, 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 also finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,[8] which sets forth Congress's finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. Quotation and last-sale information for the Shares will be disseminated through the facilities of the Consolidated Tape Association. In addition, the Trust's website will provide an intraday indicative value ("IIV") per Share,[9] updated at least every 15 seconds, as calculated by the Exchange or a third party financial data provider, during the Exchange's Core Trading Session (9:30 a.m. to 4 p.m. E.T.). The Trust's website also will provide the following information: (1) The net asset value ("NAV") of the Trust, on a per Share basis, as calculated each business day by the Sponsor and the mid-point of the bid-ask price[10] at the close of trading in relation to such NAV ("Bid/Ask Price"), and a calculation of the premium or discount of such price against such NAV; (2) data in chart format displaying the frequency distribution of discounts and premiums of the Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters; (3) the Creation Basket Deposit; (4) the Trust's prospectus, and the two most recent reports to stockholders; and (5) the last sale price of the Shares as traded in the US market. Further, the Exchange will make available over the Consolidated Tape trading volume, closing prices and NAV for the Shares from the previous day. There is a considerable amount of Bullion market information available on public websites and through professional and subscription services. For example, investors may obtain on a 24-hour basis Bullion pricing information based on the spot price for an ounce of Bullion from various financial information service providers, such as Reuters and Bloomberg. Reuters and Bloomberg provide at no charge on their websites delayed information regarding the spot price of Bullion and last sale prices of Bullion futures, as well as information about news and developments in the Bullion market. Reuters and Bloomberg also offer a professional service to subscribers for a fee that provides information on Bullion prices directly from market participants. Meanwhile, other public websites provide information on Bullion, ranging from those specializing in precious metals to sites maintained by major newspapers, such as The Wall Street Journal. In addition, the London AM Fix and London PM Fix are publicly available at no charge at *http://www.thebulliondesk.com.*

The Commission further believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Exchange states that it will obtain a representation from the Trust that the NAV will be calculated daily and made available to all market participants at the same time.[11] Following the initial 12-month period following commencement of trading, the Exchange will consider the suspension of trading in Shares or removing Shares from listing if, among other things: (1) The value of the Bullion is no longer calculated or available on at least a 15-second delayed basis from a source unaffiliated with the sponsor, Trust, custodian or the Exchange; (2) the Exchange stops providing a hyperlink on its website to any such unaffiliated commodity value; or (3) the IIV is no longer made available on at least a 15-second delayed basis.[12] Under NYSE Arca Equities Rule 7.34(a)(5), if the Exchange becomes aware that the NAV is not being disseminated to all market participants at the same time, it must halt trading on the NYSE Marketplace until such time as the NAV is available to all market participants. With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. These may include: (1) The extent to which conditions in the underlying Bullion markets have caused disruptions and/or lack of trading; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. In addition, trading in Shares will be subject to trading halts caused by extraordinary market volatility pursuant to the Exchange's "circuit breaker" rule.[13]

Further, NYSE Arca Equities Rule 8.201 sets forth certain restrictions on ETP Holders acting as registered Market Makers in the Shares to facilitate surveillance. Pursuant to NYSE Arca Equities Rule 8.201(g), an ETP Holder acting as a registered Market Maker in the Shares is required to provide the Exchange with information relating to its trading in the applicable underlying Bullion, related futures or options on futures, or any other related derivatives. Commentary .04 of NYSE Arca Equities Rule 6.3 requires an ETP Holder acting as a registered Market Maker in Commodity-Based Trust Shares to establish, maintain and enforce written policies and procedures reasonably designed to prevent the misuse of any material nonpublic information with

[5] *See supra* notes 3 and 4.

[6] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[9] The IIV is calculated by multiplying the indicative spot price of Bullion by the quantity of Bullion backing each Share as of the last calculation date.

[10] The bid-ask price of the Trust is determined using the highest bid and lowest offer on the Consolidated Tape as of the time of calculation of the closing day NAV.

[11] *See* e-mail from Timothy J. Malinowski, Senior Director, NYSE Euronext, to Christopher W. Chow, Special Counsel, and Daniel T. Gien, Staff Attorney, Commission, dated August 31, 2010.

[12] *See* NYSE Arca Equities Rules 8.201(e)(2)(iv), (v).

[13] *See* NYSE Arca Equities Rule 7.12.

respect to such products, any components of the related products, any physical asset or commodity underlying the product, applicable currencies, underlying indexes, related futures or options on futures, and any related derivative instruments.

In support of this proposal, the Exchange has made representations, including the following:

(1) The Shares will be subject to the initial and continued listing criteria under NYSE Arca Equities Rule 8.201.

(2) The Exchange's surveillance procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.[14] In addition, the Exchange may obtain trading information via the Intermarket Surveillance Group ("ISG") from other exchanges who are members of the ISG.[15]

(3) Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Baskets (including noting that Shares are not individually redeemable); (2) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) how information regarding the IIV is disseminated; (4) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; (5) the possibility that trading spreads and the resulting premium or discount on the Shares may widen as a result of reduced liquidity of Bullion trading during the Core and Late Trading Sessions after the close of the major world Bullion markets; and (6) trading information.

This approval order is based on the Exchange's representations.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[16] that the proposed rule change (SR–NYSEArca–2010–71) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–22948 Filed 9–14–10; 8:45 am]

BILLING CODE 8010–01–P

[14] Pursuant to NYSE Arca Equities Rule 8.201(g), the Exchange is able to obtain information regarding trading in the Bullion, Bullion futures contracts, options on Bullion futures, or any other Bullion derivative, by ETP Holders acting as registered Market Makers.

[15] The Exchange notes that the New York Mercantile Exchange, of which the COMEX is a division, is an ISG member; however, the Tokyo Commodity Exchange, Inc. ("TOCOM") is not an ISG member and the Exchange does not have in place a comprehensive surveillance sharing agreement with such market.

[16] 15 U.S.C. 78s(b)(2).

[17] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 7107]

Industry Advisory Panel: Notice of Open Meeting

The Industry Advisory Panel of the Bureau of Overseas Buildings Operations will meet on Thursday, October 14, 2010 from 9:30 a.m. until 3:30 p.m. Eastern Daylight Time. The meeting is open to the public and will be held in the Loy Henderson Conference Room of the U.S. Department of State, located at 2201 C Street, NW., (entrance on 23rd Street) Washington, DC. For logistical and security reasons, it is imperative that everyone enter and exit using only the 23rd Street entrance.

The majority of the meeting will be devoted to an exchange of ideas between the Department's senior management and the panel members on design, operations, and building maintenance. There will be reasonable time provided for members of the public to provide comment.

Entry to the building is controlled; to obtain pre-clearance, members of the public planning to attend should provide, by October 1, their name, professional affiliation, date of birth, citizenship, and a valid government-issued ID number (*i.e.,* U.S. government ID, U.S. military ID, passport, or drivers license) via e-mail to: *IAPR@state.gov.* Requests for reasonable accommodation should be sent to the same e-mail address by October 1. Requests made after that date will be considered, but may not be able to be fulfilled.

Personal data is requested pursuant to Public Law 99–399 (Omnibus Diplomatic Security and Antiterrorism Act of 1986), as amended; Public Law 107–56 (USA PATRIOT Act); and Executive Order 13356. The purpose of the collection is to validate the identity of individuals who enter Department facilities. The data will be entered into the Visitor Access Control System (VACS–D) database. *Please see* the Privacy Impact Assessment for VACS–D at *http://www.state.gov/documents/organization/100305.pdf* for additional information.

Please contact Christy Foushee at *FousheeCT@state.gov* or (703) 875–5751 with any questions.

Dated: August 31, 2010.

Adam E. Namm,

Director, Acting, U.S. Department of State, Bureau of Overseas Buildings Operations.

[FR Doc. 2010–22989 Filed 9–14–10; 8:45 am]

BILLING CODE 4710–24–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2010–0105]

Agency Information Collection Activities: Notice of Request for Extension of Currently Approved Information Collection

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of request for extension of currently approved information collection.

SUMMARY: The FHWA invites public comments about our intention to request the Office of Management and Budget's (OMB's) approval for renewal of an existing information collection that is summarized below under **SUPPLEMENTARY INFORMATION**. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by November 15, 2010.

ADDRESSES: You may submit comments identified by DOT Docket ID Number 2010–0105 by any of the following methods:

Web Site: For access to the docket to read background documents or comments received go to the Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Fax: 1–202–493–2251.

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

Hand Delivery or Courier: 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. ET, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Kenneth Petty, (202) 366–6654, Office of Planning, Environment, and Realty, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Planning and Research Program Administration.

OMB Control #: 2125–0039.

Background: Under the provisions of Title 23, United States Code, Section 505, 2 percent of Federal-aid highway funds in certain categories that are apportioned to the States are set aside to be used only for State Planning and Research (SPR). At least 25 percent of the SPR funds apportioned annually must be used for research, development, and technology transfer activities. In accordance with government-wide grant management procedures, a grant application must be submitted for these funds. In addition, recipients must submit periodic progress and financial reports. In lieu of Standard Form 424, Application for Federal Assistance, the FHWA uses a work program as the grant application. The information contained in the work program includes task descriptions, assignments of responsibility for conducting the work effort, and estimated costs for the tasks. This information is necessary to determine how FHWA planning and research funds will be utilized by the State Transportation Departments and if the proposed work is eligible for Federal participation. The content and frequency of submission of progress and financial reports specified in 23 CFR Part 420 are specified in OMB Circular A–102 and the companion common grant management regulations.

Respondents: 52 State Transportation Departments, including the District of Columbia and Puerto Rico.

Frequency: Annual.

Estimated Average Annual Burden per Response: 560 hours per respondent.

Estimated Total Annual Burden Hours: 29,120 hours.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection of information is necessary for the U.S. DOT's performance, including whether the information will have practical utility; (2) the accuracy of the U.S. DOT's estimate of the burden of the proposed information collection; (3) ways to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of electronic technology, without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.48.

Issued on: September 8, 2010.

Judi Kane,

Acting Chief, Management, Programs and Analysis Division.

[FR Doc. 2010–22952 Filed 9–14–10; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD 2010 0082]

Information Collection Available for Public Comments and Recommendations

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Maritime Administration's (MARAD's) intention to request extension of approval for three years of a currently approved information collection.

DATES: Comments should be submitted on or before November 15, 2010.

FOR FURTHER INFORMATION CONTACT: Jerome Davis, Maritime Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone: 202–366–0688 or E-Mail: *Jerome.davis@dot.gov.* Copies of this collection also can be obtained from that office.

SUPPLEMENTARY INFORMATION:

Title of Collection: Voluntary Intermodal Sealift Agreement (VISA).

Type of Request: Extension of currently approved information collection.

OMB Control Number: 2133–0532.

Form Numbers: MA–1020.

Expiration Date of Approval: Three years after date of approval by the Office of Management and Budget.

Summary of Collection of Information: This information collection is in accordance with Section 708, Defense Production Act, 1950, as amended, under which participants agree to provide commercial sealift capacity and intermodal shipping services and systems necessary to meet national defense requirements. In order to meet national defense requirements, the government must assure the continued availability of commercial sealift resources.

Need and Use of the Information: The information collection is needed by MARAD and the Department of Defense (DOD), including representatives from the U.S. Transportation Command and its components, to evaluate and assess the applicants' eligibility for participation in the VISA program. The information will be used by MARAD and the U.S. Transportation Command, and its components, to assure the continued availability of commercial sealift resources to meet the DOD's military requirements.

Description of Respondents: Operators of qualified dry cargo vessels.

Annual Responses: 40.

Annual Burden: 200 hours.

Comments: Comments should refer to the docket number that appears at the top of this document. Written comments may be submitted to the Docket Clerk, U.S. DOT Dockets, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. Comments may also be submitted by electronic means via the Internet at *http://regulations.gov/search/index.jsp.* Specifically address whether this information collection is necessary for proper performance of the functions of the agency and will have practical utility, accuracy of the burden estimates, ways to minimize this burden, and ways to enhance the quality, utility, and clarity of the information to be collected. All comments received will be available for examination at the above address between 10 a.m. and 5 p.m. EDT (or EST), Monday through Friday, except Federal Holidays. An electronic version of this document is available on the World Wide Web, *http://regulations.gov/search/index.jsp.*

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

Authority: 49 CFR 1.66.

Dated: September 9, 2010.

By order of the Maritime Administrator.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. 2010–23010 Filed 9–14–10; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35415]

BNSF Railway Company and Union Pacific Railroad Company—Joint Relocation Project Exemption—in Lincoln, Neb.

On August 30, 2010, BNSF Railway Company (BNSF) and Union Pacific Railroad Company (UP) jointly filed a verified notice of exemption under 49 CFR 1180.2(d)(5) to participate in a joint project involving the relocation of certain tracks over which they currently both operate, or have authority to operate, in the City of Lincoln, Lancaster County, Neb. (the City).

The purpose of the joint relocation project is to facilitate the redevelopment of the West Haymarket District and Downtown Lincoln (referred to as the West Haymarket Project). To allow for the redevelopment to proceed, BNSF must remove certain existing tracks and relocate its operations over tracks that will run parallel to the existing lines. UP will allow a portion of a previously abandoned line to be utilized in the project.

BNSF and UP will jointly relocate tracks over which they both currently operate, or have authority to operate, as follows:

BNSF owns a rail line beginning south of Sun Valley Boulevard (near UP milepost 56.50) that crosses Salt Creek and continues into a wye a short distance east of Salt Creek. The east leg of the wye (Track 460) extends in an easterly direction to a connection with a BNSF main line, which, in turn, connects with the Omaha, Lincoln, & Beatrice Railway and extends beyond to Omaha, Neb. The west leg of the wye (Track 324) extends in an easterly and then southerly direction to BNSF's Hobson Yard in the City.

UP has overhead trackage rights over the east leg of the wye between BNSF milepost 0.65 and BNSF milepost 56.92. *See Union Pac. R.R.—Trackage Rights Exemption—The Burlington N. & Santa Fe Ry.,* FD 33403 (STB served June 3, 1997); *Union Pac. R.R.—Amendment of Trackage Rights Exemption—BNSF Ry.,* FD 30868 (Sub-No. 1) (STB served July 20, 2006). UP also leases: (1) The BNSF line near Sun Valley Boulevard (beginning near UP milepost 56.50) to the beginning point of the wye at BNSF milepost 0.62 (referred to as the Sun Valley Segment); and (2) the west leg of the BNSF wye from BNSF milepost 0.62 to BNSF milepost 59.4.

The joint relocation project that is the subject of this notice involves abandoning the Sun Valley Segment and relocating the existing wye tracks a short distance to the south. The underlying real estate will be conveyed to the City. BNSF will remove the tracks on the Sun Valley Segment and UP will reconstruct its parallel line which it had previously abandoned.[1] The new UP line will be located between UP milepost 56.50 and UP milepost 56.68, a short distance east of Salt Creek and crossing over Salt Creek using an existing UP bridge (UP track). The UP track will be owned and maintained by UP. BNSF will be granted trackage rights over the UP track.

The new east wye track will be located between new BNSF milepost 0.0 and BNSF milepost 59.24 where it will connect with BNSF's number 1 main line (new east wye). The new east wye will be owned and maintained by BNSF. UP will be granted trackage rights over the new east wye. The new west wye will be located between new milepost BNSF 0.0 and BNSF milepost 59.55 where it will connect with BNSF's number 1 main line (new west wye). The new west wye will be owned and maintained by BNSF. UP's lease of the existing west wye and the Sun Valley Segment will be terminated. UP will retain existing operating rights incidental to interchange to Hobson Yard which includes the new west wye.

Applicants state that the proposed joint relocation project will not disrupt service to shippers. There are no shippers on the Sun Valley Segment, the existing east wye or the existing west wye lines. Applicants also state that the construction of the UP track, the new east wye and the new west wye will not involve an expansion of service by either carrier into new territory, or alter the existing competitive situation, but will simply preserve BNSF's and UP's ability to continue to serve the existing customers in the area.

The Board will exercise jurisdiction over the abandonment, construction, or sale components of a relocation project, and require separate approval or exemption, only where the removal of track affects service to shippers or the construction of new track or transfer of existing track involves expansion into new territory. *See City of Detroit* v. *Canadian Nat'l Ry.,* 9 I.C.C.2d 1208 (1993), *aff'd sub nom. Detroit/Wayne Cnty. Port Authority v. ICC,* 59 F.3d 1314 (DC Cir. 1995); *Flats Indus. R.R. & Norfolk S. Ry.—Joint Relocation Project Exemption—in Cleveland, Ohio,* FD 34108 (STB served Nov. 15, 2001). Line relocation projects may embrace trackage rights transactions such as those involved here. *See Detroit, Toledo & Ironton R.R.—Trackage Rights—Between Washington Court House & Greggs, Ohio—Exemption,* 363 I.C.C. 878 (1981). Under these standards, the incidental abandonment, construction, lease and trackage rights components of this relocation project require no separate approval or exemption because the relocation project will not disrupt service to shippers, expand BNSF's or UP's service into a new territory, or alter the existing competitive situation, and thus, this joint relocation project qualifies for the class exemption at 49 CFR 1180.2(d)(5).

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk and Western Railway—Trackage Rights—Burlington Northern, Inc.,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Railway—Lease and Operate-California Western Railroad,* 360 I.C.C. 653 (1980).

The transaction may be consummated on or after September 29, 2010, the effective date of the exemption (30 days after the exemption was filed).

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 22, 2010 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35415, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on applicants' representatives: Karl Morell, Of Counsel, Ball Janik LLP, Suite 225, 1455 F Street, NW., Washington, DC 20005; and Mack H. Shummate, Jr., Senior General Attorney, 101 North Wacker Drive, #1920, Chicago, IL 60606.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: September 3, 2010.

[1] *See Union Pac. R.R.—Aban. Exemption—in Lancaster County, Neb.,* AB 33 (Sub-No. 207X) (STB served Sept. 30, 2003).

By the Board, Joseph H. Dettmar, Acting Director, Office of Proceedings.

Kulunie L. Cannon,

Clearance Clerk.

[FR Doc. 2010–22657 Filed 9–14–10; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35408]

Stillwater Central Railroad, Inc.—Trackage Rights Exemption—BNSF Railway Company

Pursuant to a written trackage rights agreement (Trackage Agreement) dated December 29, 2004, BNSF Railway Company (BNSF) granted approximately 5.5 miles of incidental overhead trackage rights to Stillwater Central Railroad, Inc. (SLWC), extending between: (1) Milepost 384.6 and milepost 390.0, on the Red Rock Subdivision, in Oklahoma City, Okla.; and (2) a point 500 feet west of the wye connecting the Packing Town Lead and the point of connection between the Packing Town Lead and BNSF's Red Rock Subdivision.[1] Now, pursuant to the Trackage Agreement and a First Amendment, BNSF has agreed to amend SLWC's existing overhead trackage rights to grant SLWC: (1) Overhead trackage rights between milepost 383.0, at Oklahoma City, and milepost 394.5, south of Flynn Yard in Oklahoma City, including the wye connecting the east end of the Packing Town Lead to the Red Rock Subdivision; and (2) local trackage rights to serve the Cargill Animal Nutrition Facility (Cargill Facility) on the Packing Town Lead using tracks 7405–0801 and 7405–0802.

The transaction is scheduled to be consummated on September 29, 2010, the effective date of the exemption (30 days after the exemption was filed). The purpose of the First Amendment is to permit SLWC to provide local service to the Cargill Facility. According to SLWC, the First Amendment will also correct a minor typographical error in the Trackage Agreement and an inadvertent error in the description of the mileposts set forth in SLWC's notice of exemption in Docket No. FD 34610.[2]

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk & Western Railway—Trackage Rights—Burlington Northern, Inc.,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Railway, Inc.—Lease and Operate—California Western Railroad,* 360 I.C.C. 653 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Stay petitions must be filed by September 22, 2010 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35408, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Karl Morell, Of Counsel, Ball Janik LLP, Suite 225, 1455 F Street, NW., Washington, DC 20005.

Board decisions and notices are available on our Web site at "*WWW.STB.DOT.GOV.*"

Decided: September 10, 2010.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Kulunie L. Cannon,

Clearance Clerk.

[FR Doc. 2010–22960 Filed 9–14–10; 8:45 am]

BILLING CODE 4915–01–P

[1] In *Stillwater Central Railroad, Inc.—Lease Exemption—The Burlington Northern and Santa Fe Railway Co.,* FD 34610 (STB served Jan. 19, 2005), SLWC was authorized to acquire by lease and to operate approximately 12.6 miles of rail line from BNSF between: (1) Milepost 549.01 at Wheatland, Okla., and milepost 542.0 at Oklahoma City, including the Dayton Lead in Wheatland; (2) milepost 540.0 west of the BNSF North Yard, in Oklahoma City, and milepost 536.4 in Oklahoma City, including the North Yard; and (3) milepost 0.0 on the Packing Town Lead, and a point 500 feet west of the wye connecting the Packing Town Lead with BNSF's Red Rock Subdivision, in addition to the 5.5 miles of incidental overhead trackage rights described herein.

[2] On September 8, 2010, SLWC filed a letter stating that it had incorrectly sought overhead trackage rights between mileposts 384.6 and 390.0 on the Red Rock Subdivision granted in FD 34610. SLWC states that the correct mileposts should have been 383.0 and 394.5, as reflected in its notice of exemption in FD 35408.

Federal Register

Wednesday,
September 15, 2010

Part II

Department of Justice

28 CFR Parts 35 and 36

Nondiscrimination on the Basis of Disability in State and Local Government Services; Final Rules

DEPARTMENT OF JUSTICE

28 CFR Parts 35

[CRT Docket No. 105; AG Order No. 3180–2010]

RIN 1190–AA46

Nondiscrimination on the Basis of Disability in State and Local Government Services

AGENCY: Department of Justice, Civil Rights Division.

ACTION: Final rule.

SUMMARY: This final rule revises the regulation of the Department of Justice (Department) that implements title II of the Americans with Disabilities Act (ADA), relating to nondiscrimination on the basis of disability in State and local government services. The Department is issuing this final rule in order to adopt enforceable accessibility standards under the ADA that are consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board (Access Board), and to update or amend certain provisions of the title II regulation so that they comport with the Department's legal and practical experiences in enforcing the ADA since 1991. Concurrently with the publication of this final rule for title II, the Department is publishing a final rule amending its ADA title III regulation, which covers nondiscrimination on the basis of disability by public accommodations and in commercial facilities.

DATES: *Effective Date:* March 15, 2011.

FOR FURTHER INFORMATION CONTACT: Janet L. Blizard, Deputy Chief, or Barbara J. Elkin, Attorney Advisor, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, at (202) 307–0663 (voice or TTY). This is not a toll-free number. Information may also be obtained from the Department's toll-free ADA Information Line at (800) 514–0301 (voice) or (800) 514–0383 (TTY).

This rule is also available in an accessible format on the ADA Home Page at *http://www.ada.gov.* You may obtain copies of this rule in large print or on computer disk by calling the ADA Information Line listed above.

SUPPLEMENTARY INFORMATION:

The Roles of the Access Board and the Department of Justice

The Access Board was established by section 502 of the Rehabilitation Act of 1973. 29 U.S.C. 792. The Board consists of 13 members appointed by the President from among the general public, the majority of whom must be individuals with disabilities, and the heads of 12 Federal departments and agencies specified by statute, including the heads of the Department of Justice and the Department of Transportation (DOT). Originally, the Access Board was established to develop and maintain accessibility guidelines for facilities designed, constructed, altered, or leased with Federal dollars under the Architectural Barriers Act of 1968 (ABA). 42 U.S.C. 4151 *et seq.* The passage of the ADA expanded the Access Board's responsibilities.

The ADA requires the Access Board to "issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of subchapters II and III of this chapter * * * to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities." 42 U.S.C. 12204. The ADA requires the Department to issue regulations that include enforceable accessibility standards applicable to facilities subject to title II or title III that are consistent with the "minimum guidelines" issued by the Access Board, 42 U.S.C. 12134(c); 42 U.S.C. 12186(c), but vests in the Attorney General sole responsibility for the promulgation of those standards that fall within the Department's jurisdiction and for enforcement of the regulations.

The ADA also requires the Department to develop regulations with respect to existing facilities subject to title II (subtitle A) and title III. How and to what extent the Access Board's guidelines are used with respect to the barrier removal requirement applicable to existing facilities under title III of the ADA and to the provision of program accessibility under title II of the ADA are solely within the discretion of the Department.

Enactment of the ADA and Issuance of the 1991 Regulations

On July 26, 1990, President George H.W. Bush signed into law the ADA, a comprehensive civil rights law prohibiting discrimination on the basis of disability.[1] The ADA broadly protects the rights of individuals with disabilities in employment, access to State and local government services, places of public accommodation, transportation, and other important areas of American life. The ADA also requires newly designed and constructed or altered State and local government facilities, public accommodations, and commercial facilities to be readily accessible to and usable by individuals with disabilities. 42 U.S.C. 12101 *et seq.* Section 204(a) of the ADA directs the Attorney General to issue regulations implementing part A of title II but exempts matters within the scope of the authority of the Secretary of Transportation under section 223, 229, or 244. *See* 42 U.S.C. 12134. Section 229(a) and section 244 of the ADA direct the Secretary of Transportation to issue regulations implementing part B of title II, except for section 223. *See* 42 U.S.C 12149; 42 U.S.C. 12164. Title II, which this rule addresses, applies to State and local government entities, and, in subtitle A, protects qualified individuals with disabilities from discrimination on the basis of disability in services, programs, and activities provided by State and local government entities. Title II extends the prohibition on discrimination established by section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, to all activities of State and local governments regardless of whether these entities receive Federal financial assistance. 42 U.S.C. 12131B65.

Title III prohibits discrimination on the basis of disability in the activities of places of public accommodation (businesses that are generally open to the public and that fall into one of twelve categories listed in the ADA, such as restaurants, movie theaters, schools, day care facilities, recreational facilities, and doctors' offices) and requires newly constructed or altered places of public accommodation—as well as commercial facilities (privately owned, nonresidential facilities like factories, warehouses, or office buildings)—to comply with the ADA Standards. 42 U.S.C. 12181B89.

On July 26, 1991, the Department issued rules implementing title II and title III, which are codified at 28 CFR part 35 (title II) and part 36 (title III). Appendix A of the 1991 title III regulation, which is republished as Appendix D to 28 CFR part 36, contains the ADA Standards for Accessible Design (1991 Standards), which were based upon the version of the

[1] On September 25, 2008, President George W. Bush signed into law the Americans with Disabilities Amendments Act of 2008 (ADA Amendments Act), Public Law 110–325. The ADA Amendments Act amended the ADA definition of disability to clarify its coverage of persons with disabilities and to provide guidance on the application of the definition. This final rule does not contain regulatory language implementing the ADA Amendments Act. The Department intends to publish a supplemental rule to amend the regulatory definition of "disability" to implement the changes mandated by that law.

Americans with Disabilities Act Accessibility Guidelines (1991 ADAAG) published by the Access Board on the same date. Under the Department's 1991 title III regulation, places of public accommodation and commercial facilities currently are required to comply with the 1991 Standards with respect to newly constructed or altered facilities. The Department's 1991 title II regulation gives public entities the option of complying with the Uniform Federal Accessibility Standards (UFAS) or the 1991 Standards with respect to newly constructed or altered facilities.

The Access Board's publication of the 2004 ADA/ABA Guidelines was the culmination of a long-term effort to facilitate ADA compliance by eliminating, to the extent possible, inconsistencies among Federal accessibility requirements and between Federal accessibility requirements and State and local building codes. In support of this effort, the Department is amending its regulation implementing title II and is adopting standards consistent with ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the 2004 ADA/ABA Guidelines, naming them the 2010 ADA Standards for Accessible Design. The Department is also amending its title III regulation, which prohibits discrimination on the basis of disability by public accommodations and in commercial facilities, concurrently with the publication of this rule in this issue of the **Federal Register**.

Development of the 2004 ADA/ABA Guidelines

In 1994, the Access Board began the process of updating the 1991 ADAAG by establishing an advisory committee composed of members of the design and construction industry, the building code community, and State and local government entities, as well as individuals with disabilities. In 1998, the Access Board added specific guidelines on State and local government facilities, 63 FR 2000 (Jan. 13, 1998), and building elements designed for use by children, 63 FR 2060 (Jan. 13, 1998). In 1999, based largely on the report and recommendations of the advisory committee, the Access Board issued a Notice of Proposed Rulemaking (NPRM) to update and revise its ADA and ABA Accessibility Guidelines. *See* 64 FR 62248 (Nov. 16, 1999). In 2000, the Access Board added specific guidelines on play areas. *See* 65 FR 62498 (Oct. 18, 2000). The Access Board released an interim draft of its guidelines to the public on April 2, 2002, 67 FR 15509, in order to provide an opportunity for entities with model codes to consider amendments that would promote further harmonization. In September of 2002, the Access Board set forth specific guidelines on recreational facilities. 67 FR 56352 (Sept. 3, 2002).

By the date of its final publication on July 23, 2004, the 2004 ADA/ABA Guidelines had been the subject of extraordinary review and public participation. The Access Board received more than 2,500 comments from individuals with disabilities, affected industries, State and local governments, and others. The Access Board provided further opportunity for participation by holding public hearings.

The Department was involved extensively in the development of the 2004 ADA/ABA Guidelines. As a Federal member of the Access Board, the Attorney General's representative voted to approve the revised guidelines. ADA Chapter 1 and ADA Chapter 2 of the 2004 ADA/ABA Guidelines provided scoping requirements for facilities subject to the ADA; "scoping" is a term used in the 2004 ADA/ABA Guidelines to describe requirements that prescribe which elements and spaces—and, in some cases, how many—must comply with the technical specifications. ABA Chapter 1 and ABA Chapter 2 provide scoping requirements for facilities subject to the ABA (*i.e.*, facilities designed, built, altered, or leased with Federal funds). Chapters 3 through 10 provide uniform technical specifications for facilities subject to either the ADA or ABA. This revised format is designed to eliminate unintended conflicts between the two sets of Federal accessibility standards and to minimize conflicts between the Federal regulations and the model codes that form the basis of many State and local building codes. For the purposes of this final rule, the Department will refer to ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the 2004 ADA/ABA Guidelines as the 2004 ADAAG.

These amendments to the 1991 ADAAG have not been adopted previously by the Department as ADA Standards. Through this rule, the Department is adopting revised ADA Standards consistent with the 2004 ADAAG, including all of the amendments to the 1991 ADAAG since 1998. For the purposes of title II, the Department's revised standards are entitled "The 2010 Standards for Accessible Design" and consist of the 2004 ADAAG and the requirements in § 35.151. Because the Department has adopted the 2004 ADAAG as part of its title II and title III regulations, once the Department's final rules become effective, the 2004 ADAAG will have legal effect with respect to the Department's title II and title III regulations and will cease to be mere guidance for those areas regulated by the Department. In 2006, the (DOT) adopted the 2004 ADAAG. With respect to those areas regulated by DOT, these guidelines, as adopted by DOT have had legal effect since 2006.

The Department's Rulemaking History

The Department published an advance notice of proposed rulemaking (ANPRM) on September 30, 2004, 69 FR 58768, for two reasons: (1) To begin the process of adopting the 2004 ADAAG by soliciting public input on issues relating to the potential application of the Access Board's revisions once the Department adopts them as revised standards; and (2) to request background information that would assist the Department in preparing a regulatory analysis under the guidance provided in Office of Management and Budget (OMB) Circular AB4, sections D (Analytical Approaches) and E (Identifying and Measuring Benefits and Costs) (Sept. 17, 2003), available at *http://www.whitehouse.gov/OMB/circulars/a004/a-4.pdf* (last visited June 24, 2010). While underscoring that the Department, as a member of the Access Board, already had reviewed comments provided to the Access Board during its development of the 2004 ADAAG, the Department specifically requested public comment on the potential application of the 2004 ADAAG to existing facilities. The extent to which the 2004 ADAAG is used with respect to the program access requirement in title II (as well as with respect to the barrier removal requirement applicable to existing facilities under title III) is within the sole discretion of the Department. The ANPRM dealt with the Department's responsibilities under both title II and title III.

The public response to the ANPRM was substantial. The Department extended the comment deadline by four months at the public's request. 70 FR 2992 (Jan. 19, 2005). By the end of the extended comment period, the Department had received more than 900 comments covering a broad range of issues. Many of the commenters responded to questions posed specifically by the Department, including questions regarding the Department's application of the 2004 ADAAG once adopted by the Department and the Department's regulatory assessment of the costs and benefits of particular elements. Many other commenters addressed areas of

desired regulation or of particular concern.

To enhance accessibility strides made since the enactment of the ADA, commenters asked the Department to focus on previously unregulated areas such as ticketing in assembly areas; reservations for hotel rooms, rental cars, and boat slips; and captioning. They also asked for clarification on some issues in the 1991 regulations, such as the requirements regarding service animals. Other commenters dealt with specific requirements in the 2004 ADAAG or responded to questions regarding elements scoped for the first time in the 2004 ADAAG, including recreation facilities and play areas. Commenters also provided some information on how to assess the cost of elements in small facilities, office buildings, hotels and motels, assembly areas, hospitals and long-term care facilities, residential units, recreation facilities, and play areas. Still other commenters addressed the effective date of the proposed standards, the triggering event by which the effective date is calculated for new construction, and variations on a safe harbor that would excuse elements built in compliance with the 1991 Standards from compliance with the proposed standards.

After careful consideration of the public comments in response to the ANPRM, on June 17, 2008, the Department published an NPRM covering title II (73 FR 34466). The Department also published an NPRM on that day covering title III (73 FR 34508). The NPRMs addressed the issues raised in the public's comments to the ANPRM and sought additional comment, generally and in specific areas, such as the Department's adoption of the 2004 ADAAG, the Department's regulatory assessment of the costs and benefits of the rule, its updates and amendments of certain provisions of the existing title II and III regulations, and areas that were in need of additional clarification or specificity.

A public hearing was held on July 15, 2008, in Washington, D.C. Forty-five individuals testified in person or by phone. The hearing was streamed live over the Internet. By the end of the 60-day comment period, the Department had received 4,435 comments addressing a broad range of issues many of which were common to the title II and title III NPRMs, from representatives of businesses and industries, State and local government agencies, disability advocacy organizations, and private individuals, many of which addressed issues common to both NPRMs.

The Department notes that this rulemaking was unusual in that much of the proposed regulatory text and many of the questions asked across titles II and III were the same. Consequently, many of the commenters did not provide separate sets of documents for the proposed title II and title III rules, and in many instances, the commenters did not specify which title was being commented upon. As a result, where comments could be read to apply to both titles II and III, the Department included them in the comments and responses for each final rule.

Most of the commenters responded to questions posed specifically by the Department, including what were the most appropriate definitions for terms such as "wheelchair," "mobility device," and "service animal"; how to quantify various benefits that are difficult to monetize; what requirements to adopt for ticketing and assembly areas; whether to adopt safe harbors for small businesses; and how best to regulate captioning. Some comments addressed specific requirements in the 2004 ADAAG or responded to questions regarding elements scoped for the first time in the 2004 ADAAG, including recreation facilities and play areas. Other comments responded to questions posed by the Department concerning certain specific requirements in the 2004 ADAAG.

Relationship to Other Laws

The Department of Justice regulation implementing title II, 28 CFR 35.103, provides the following:

(a) *Rule of interpretation.* Except as otherwise provided in this part, this part shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 791) or the regulations issued by Federal agencies pursuant to that title.

(b) *Other laws.* This part does not invalidate or limit the remedies, rights, and procedures of any other Federal, State, or local laws (including State common law) that provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them.

These provisions remain unchanged by the final rule. The Department recognizes that public entities subject to title II of the ADA may also be subject to title I of the ADA, which prohibits discrimination on the basis of disability in employment; section 504 of the Rehabilitation Act of 1973 and other Federal statutes that prohibit discrimination on the basis of disability in the programs and activities of recipients of Federal financial assistance; and other Federal statutes such as the Air Carrier Access Act (ACAA), 49 U.S.C. 41705 *et seq.,* and the Fair Housing Act (FHAct), 42 U.S.C. 3601 *et seq.* Compliance with the Department's title II and title III regulations does not necessarily ensure compliance with other Federal statutes.

Public entities that are subject to the ADA as well as other Federal disability discrimination laws must be aware of the requirements of all applicable laws and must comply with these laws and their implementing regulations. Although in many cases similar provisions of different statutes are interpreted to impose similar requirements, there are circumstances in which similar provisions are applied differently because of the nature of the covered entity or activity or because of distinctions between the statutes. For example, emotional support animals that do not qualify as service animals under the Department's title II regulation may nevertheless qualify as permitted reasonable accommodations for persons with disabilities under the FHAct and the ACAA. *See, e.g., Overlook Mutual Homes, Inc.* v. *Spencer,* 666 F. Supp. 2d 850 (S.D. Ohio 2009). Public entities that operate housing facilities must ensure that they apply the reasonable accommodation requirements of the FHAct in determining whether to allow a particular animal needed by a person with a disability into housing and may not use the ADA definition as a justification for reducing their FHAct obligations. In addition, nothing in the ADA prevents a covered entity subject to one statute from modifying its policies and providing greater access in order to assist individuals with disabilities in achieving access to entities subject to other Federal statutes. For example, a public airport is a title II facility that houses air carriers subject to the ACAA. The public airport operator is required to comply with the title II requirements, but is not covered by the ACAA. Conversely, the air carrier is required to comply with the ACAA, but is not covered by title II of the ADA. If a particular animal is a service animal for purposes of the ACAA and is thus allowed on an airplane, but is not a service animal for purposes of the ADA, nothing in the ADA prohibits an airport from allowing a ticketed passenger with a disability who is traveling with a service animal that meets the ACAA's definition of a service animal to bring that animal into the facility even though under the ADA's definition of service animal the animal could be lawfully excluded.

In addition, public entities (including AMTRAK) that provide public transportation services that are subject to subtitle B of title II should be reminded that the Department's regulation, at 28 CFR 35.102, provides: "(a) Except as provided in paragraph (b) of this section, this part applies to all services, programs, and activities provided or made available by public entities. (b) To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA, 42 U.S.C. 12141 *et seq.,* they are not subject to the requirements of this part." The ADA regulations of DOT at 49 CFR 37.21(c) state that entities subject to DOT's ADA regulations may also be subject to the ADA regulations of the Department of Justice. As stated in the preamble to § 37.21(c) in DOT's 1991 regulation, "[t]he DOT rules apply only to the entity's transportation facilities, vehicles, or services; the DOJ rules may cover the entity's activities more broadly." 56 FR 45584, 45736 (Sept. 6, 1991). Nothing in this final rule alters these provisions.

The Department recognizes that DOT has its own independent regulatory responsibilities under subtitle B of title II of the ADA. To the extent that the public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA, they are subject to the DOT regulations at 49 CFR parts 37 and 39. Matters covered by subtitle A are covered by this rule. However, this rule should not be read to prohibit DOT from elaborating on the provisions of this rule in its own ADA rules in the specific regulatory contexts for which it is responsible, after appropriate consultation with the Department. For example, DOT may issue such specific provisions with respect to the use of non-traditional mobility devices, *e.g.,* Segways®, on any transportation vehicle subject to subtitle B. While DOT may establish transportation-specific requirements that are more stringent or expansive than those set forth in this rule, any such requirements cannot reduce the protections and requirements set forth in this rule.

In addition, activities not specifically addressed by DOT's ADA regulation may be covered by DOT's regulation implementing section 504 of the Rehabilitation Act for its federally assisted programs and activities at 49 CFR part 27. Like other programs of public entities that are also recipients of Federal financial assistance, those programs would be covered by both the section 504 regulation and this part. Airports operated by public entities are not subject to DOT's ADA regulation, but they are subject to subpart A of title II and to this rule. The Department of Justice regulation implementing title II generally, and the DOT regulations specifically implementing subtitle B of title II, may overlap. If there is overlap in areas covered by subtitle B which DOT regulates, these provisions shall be harmonized in accordance with the DOT regulation at 49 CFR 37.21(c).

Organization of This Rule

Throughout this rule, the original ADA Standards, which are republished as Appendix D to 28 CFR part 36, will be referred to as the "1991 Standards." The original title II regulation, 28 CFR part 35, will be referred to as the "1991 title II regulation." ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the 2004 ADA/ABA Guidelines, codified at 36 CFR part 1191, app. B and D (2009) will be referred to as the "2004 ADAAG." The Department's Notice of Proposed Rulemaking, 73 FR 34466 (June 17, 2008), will be referred to as the "NPRM." As noted above, the 2004 ADAAG, taken together with the requirements contained in § 35.151 (New Construction and Alterations) of the final rule, will be referred to as the "2010 Standards." The amendments made to the 1991 title II regulation and the adoption of the 2004 ADAAG, taken together, will be referred to as the "final rule."

In performing the required periodic review of its existing regulation, the Department has reviewed the title II regulation section by section, and, as a result, has made several clarifications and amendments in this rule. Appendix A of the final rule, "Guidance on Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services," codified as Appendix A to 28 CFR part 35, provides the Department's response to comments and its explanations of the changes to the regulation. The section entitled "Section-by-Section Analysis and Response to Comments" in Appendix A provides a detailed discussion of the changes to the title II regulation. The Section-by-Section Analysis follows the order of the 1991 title II regulation, except that regulatory sections that remain unchanged are not referenced. The discussion within each section explains the changes and the reasoning behind them, as well as the Department's response to related public comments. Subject areas that deal with more than one section of the regulation include references to the related sections, where appropriate. The Section-by-Section Analysis also discusses many of the questions asked by the Department for specific public response. The section of Appendix A entitled "Other Issues" discusses public comments on several issues of concern to the Department that were the subject of questions that are not specifically addressed in the Section-by-Section Analysis.

The Department's description of the 2010 Standards, as well as a discussion of the public comments on specific sections of the 2004 ADAAG, is found in Appendix B of the final title III rule, "Analysis and Commentary on the 2010 ADA Standards for Accessible Design," and codified as Appendix B to 28 CFR part 36.

The provisions of this rule generally take effect six months from its publication in the **Federal Register**. The Department has determined, however, that compliance with the 2010 Standards shall not be required until 18 months from the publication date of this rule. This exception is set forth in § 35.151(c) and is discussed in greater detail in Appendix A. *See* Appendix A discussion entitled "Section 35.151(c) New construction and alterations."

This final rule only addresses issues that were identified in the NPRM as subjects the Department intended to regulate through this rulemaking proceeding. Because the Department indicated in the NPRM that it did not intend to regulate certain areas, including equipment and furniture, accessible golf cars, and movie captioning and video description, as part of this rulemaking proceeding, the Department believes it would be appropriate to solicit more public comment about these areas prior to making them the subject of a rulemaking. The Department intends to engage in additional rulemaking in the near future addressing accessibility in these areas and others, including next generation 9–1–1 and accessibility of Web sites operated by covered public entities and public accommodations.

Additional Information

Regulatory Process Matters (SBREFA, Regulatory Flexibility Act, and Executive Orders)

The Department must provide two types of assessments as part of its final rule: an analysis of the costs and benefits of adopting the changes contained in this rule, and a periodic review of its existing regulations to consider their impact on small entities, including small businesses, small nonprofit organizations, and small governmental jurisdictions. *See* E.O. 12866, 58 FR 51735, 3 CFR, 1994

Comp., p. 638, as amended; Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 610(a); OMB Circular A–4, available at *http://www.whitehouse.gov/OMB/circulars/a004/a-4.pdf* (last visited June 24, 2010); E.O. 13272, 67 FR 53461, 3 CFR, 2003 Comp., p. 247.

In the NPRM, the Department kept open the possibility that, if warranted by public comments received on an issue raised by the 2004 ADAAG, or by the results of the Department's Initial Regulatory Impact Analysis (available at *ada.gov/NPRM2008/ria.htm*) showing that the likely costs of making a particular feature or facility accessible were disproportionate to the benefits (including both monetized and non-monetized benefits) to persons with disabilities, the Attorney General, as a member of the Access Board, could return the issue to the Access Board for further consideration. After careful consideration, the Department has determined that it is unnecessary to return any issues to the Access Board for additional consideration.

Executive Order 12866

This rule has been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866. The Department has evaluated its existing regulations for title II and title III section by section, and many of the provisions in the final rule for both titles reflect its efforts to mitigate any negative effects on small entities. A Final Regulatory Impact Analysis (Final RIA or RIA) was prepared by the Department's contractor, HDR|HLB Decision Economics, Inc. (HDR). In accordance with Executive Order 12866, as amended, and OMB Circular A–4, the Department has reviewed and considered the Final RIA and has accepted the results of this analysis as its assessment of the benefits and costs of the final rules.

Executive Order 12866 refers explicitly not only to monetizable costs and benefits but also to "distributive impacts" and "equity," *see* E.O. 12866, section 1(a), and it is important to recognize that the ADA is intended to provide important benefits that are distributional and equitable in character. The ADA states, "[i]t is the purpose of this [Act] (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; [and] (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities[.]" 42 U.S.C. 12101(b). Many of the benefits of this rule stem from the provision of such standards, which will promote inclusion, reduce stigma and potential embarrassment, and combat isolation, segregation, and second-class citizenship of individuals with disabilities. Some of these benefits are, in the words of Executive Order 12866, "difficult to quantify, but nevertheless essential to consider." E.O. 12866, section 1(a). The Department has considered such benefits here.

Final Regulatory Impact Analysis

The Final RIA embodies a comprehensive benefit-cost analysis of the final rules for both title II and title III and assesses the incremental benefits and costs of the 2010 Standards relative to a primary baseline scenario (1991 Standards). In addition, the Department conducted additional research and analyses for requirements having the highest negative net present values under the primary baseline scenario. This approach was taken because, while the 1991 Standards are the only uniform set of accessibility standards that apply to public accommodations, commercial facilities, and State and local government facilities nationwide, it is also understood that many State and local jurisdictions have already adopted IBC/ANSI model code provisions that mirror those in the 2004 ADAAG. The assessments based on this approach assume that covered entities currently implementing codes that mirror the 2004 ADAAG will not need to modify their code requirements once the rules are finalized. They also assume that, even without the final rules, the current level of compliance would be unchanged. The Final RIA contains specific information, including data in chart form, detailing which States have already adopted the accessibility standards for this subset of six requirements. The Department believes that the estimates resulting from this approach represent a reasonable upper and lower measure of the likely effects these requirements will have that the Department was able to quantify and monetize.

The Final RIA estimates the benefits and costs for all new (referred to as "supplemental") requirements and revised requirements across all types of newly constructed and existing facilities. The Final RIA also incorporates a sophisticated risk analysis process that quantifies the inherent uncertainties in estimating costs and benefits and then assesses (through computer simulations) the relative impact of these factors when varied simultaneously. A copy of the Final RIA will be made available online for public review on the Department's ADA Home Page (*http://www.ada.gov*).

From an economic perspective (as specified in OMB Circular A–4), the results of the Final RIA demonstrate that the Department's final rules increase social resources and thus represent a public good because monetized benefits exceed monetized costs—that is, the regulations have a positive net present value (NPV). Indeed, under every scenario assessed in the Final RIA, the final rules have a positive NPV. The Final RIA's first scenario examines the incremental impact of the final rules using the "main" set of assumptions (*i.e.,* assuming a primary baseline (1991 Standards), that the safe harbor applies, and that for title III entities barrier removal is readily achievable for 50 percent of elements subject to supplemental requirements).

EXPECTED IMPACT OF THE RULES [2]

[In billions]

Discount rate	Expected NPV	Total expected PV (benefits)	Total expected PV (costs)
3%	$40.4	$66.2	$25.8
7%	9.3	22.0	12.8

[2] The analysis assumes these regulations will be in force for 15 years. Incremental costs and benefits are calculated for all construction, alterations, and barrier removal that is expected to occur during these 15 years. The analysis also assumes that any new or revised ADA rules enacted 15 years from now will include a safe harbor provision. Thus, any facilities constructed in year 14 of the final rules are assumed to continue to generate benefits to users, and to incur any operating or replacement costs for the life of these buildings, which is assumed to be 40 years.

Under this set of assumptions, the final rules have an expected NPV of $9.3 billion (7 percent discount rate) and $40.4 billion (3 percent discount rate). *See* Final RIA, table ES–1 & figure ES–2.

Water Closet Clearances

The Department gave careful consideration to the costs and benefits of its adoption of the standards relating to water closet clearances in single-user toilet rooms. The primary effect of the Department's proposed final rules governing water closet clearances in single-user toilet rooms with in-swinging and out-swinging doors is to allow sufficient room for "side" or "parallel" methods of transferring from a wheelchair to a toilet. Under the current 1991 Standards, the requisite clearance space in single-user toilet rooms between and around the toilet and the lavatory does not permit these methods of transfer. Side or parallel transfers are used by large numbers of persons who use wheelchairs and are regularly taught in rehabilitation and occupational therapy. Currently, persons who use side or parallel transfer methods from their wheelchairs are faced with a stark choice at establishments with single-user toilet rooms—*i.e.,* patronize the establishment but run the risk of needing assistance when using the restroom, travel with someone who would be able to provide assistance in toileting, or forgo the visit entirely. The revised water closet clearance regulations would make single-user toilet rooms accessible to all persons who use wheelchairs, not just those with the physical strength, balance, and dexterity and the training to use a front-transfer method. Single-user toilet rooms are located in a wide variety of public and private facilities, including restaurants, fast-food establishments, schools, retail stores, parks, sports stadiums, and hospitals. Final promulgation of these requirements might thus, for example, enable a person who uses a side or parallel transfer method to use the restroom (or use the restroom independently) at his or her local coffee shop for the first time.

Because of the complex nature of its cost-benefit analysis, the Department is providing "plain language" descriptions of the benefits calculations for the two revised requirements with the highest estimated total costs: Water closet clearance in single-user toilet rooms with out-swinging doors (RIA Req. # 28) (section 604.3 of the 2010 Standards) and water closet clearance in single-user toilet rooms with in-swinging doors (RIA Req. # 32) (sections 604.3 and 603.2.3 Exception 2 of the 2010 Standards). Since many of the concepts and calculations in the Final RIA are highly technical, it is hoped that, by providing "lay" descriptions of how benefits are monetized for an illustrative set of requirements, the Final RIA will be more transparent and afford readers a more complete understanding of the benefits model generally. Because of the widespread adoption of the water closet clearance standards in existing State and local building codes, the following calculations use the IBC/ANSI baseline.

General description of monetized benefits for water closet clearance in single-user toilet rooms—out-swinging doors (Req. # 28). In order to assess monetized benefits for the requirement covering water closet clearances in single-user toilet rooms with out-swinging doors, a determination needed to be made concerning the population of users with disabilities who would likely benefit from this revised standard. Based on input received from a panel of experts jointly convened by HDR and the Department to discuss benefits-related estimates and assumptions used in the RIA model, it was assumed that accessibility changes brought about by this requirement would benefit persons with any type of ambulatory (*i.e.,* mobility-related) disability, such as persons who use wheelchairs, walkers, or braces. Recent census figures estimate that about 11.9 percent of Americans ages 15 and older have an ambulatory disability, or about 35 million people. This expert panel also estimated that single-user toilet rooms with out-swinging doors would be used slightly less than once every other visit to a facility with such toilet rooms covered by the final rules (or, viewed another way, about once every two hours spent at a covered facility assumed to have one or more single-user toilet rooms with out-swinging doors) by an individual with an ambulatory disability. The expert panel further estimated that, for such individuals, the revised requirement would result in an average time savings of about five and a half minutes when using the restroom. This time savings is due to the revised water closet clearance standard, which permits, among other things, greater flexibility in terms of access to the toilet by parallel or side transfer, thereby perhaps reducing the wait for another person to assist with toileting and the need to twist or struggle to access the toilet independently. Based on average hourly wage rates compiled by the U.S. Department of Labor, the time savings for Req. # 28 is valued at just under $10 per hour.

For public and private facilities covered by the final rules, it is estimated that there are currently about 11 million single-user toilet rooms with out-swinging doors. The majority of these types of single-user toilet rooms, nearly 7 million, are assumed to be located at "Indoor Service Establishments," a broad facility group that encompasses various types of indoor retail stores such as bakeries, grocery stores, clothing stores, and hardware stores. Based on construction industry data, it was estimated that approximately 3 percent of existing single-user toilet rooms with out-swinging doors would be altered each year, and that the number of newly constructed facilities with these types of toilet rooms would increase at the rate of about 1 percent each year. However, due to the widespread adoption at the State and local level of model code provisions that mirror Req. # 28, it is further understood that about half of all existing facilities assumed to have single-user toilet rooms with out-swinging doors already are covered by State or local building codes that require equivalent water closet clearances. Due to the general element-by-element safe harbor provision in the final rules, no unaltered single-user toilet rooms that comply with the current 1991 Standards will be required to retrofit to meet the revised clearance requirements in the final rules.

With respect to new construction, it is assumed that each single-user toilet room with an out-swinging door will last the life of the building, about 40 years. For alterations, the amount of time such a toilet room will be used depends upon the remaining life of the building (*i.e.*, a period of time between 1 and 39 years).

Summing up monetized benefits to users with disabilities across all types of public and private facilities covered by the final rules, and assuming 46 percent of covered facilities nationwide are located in jurisdictions that have adopted the relevant equivalent IBC/ANSI model code provisions, it is expected that the revised requirement for water closet clearance in single-user toilet rooms with out-swinging doors will result in net benefits of approximately $900 million over the life of these regulations.

General description of monetized benefits for water closet clearance in single-user toilet rooms—in-swinging doors (Req. # 32). For the water closet clearance in single-user toilet rooms with the in-swinging door requirement (Req. #32), the expert panel determined that the primary beneficiaries would be persons who use wheelchairs. As compared to single-user toilet rooms with out-swinging doors, those with in-swinging doors tend to be larger (in

terms of square footage) in order to accommodate clearance for the in-swinging door and, thus, are already likely to have adequate clear floor space for persons with disabilities who use other types of mobility aids such as walkers and crutches.

The expert benefits panel estimated that single-user toilet rooms with in-swinging doors are used less frequently on average—about once every 20 visits to a facility with such a toilet room by a person who uses a wheelchair—than their counterpart toilet rooms with out-swinging doors. This panel also determined that, on average, each user would realize a time savings of about 9 minutes as a result of the enhanced clearances required by this revised standard.

The RIA estimates that there are about 4 million single-user toilet rooms with in-swinging doors in existing facilities. About half of the single-user toilet rooms with in-swinging doors are assumed to be located in single-level stores, and about a quarter of them are assumed to be located in restaurants. Based on construction industry data, it was estimated that approximately 3 percent of existing single-user toilet rooms with in-swinging doors would be altered each year, and that the number of newly constructed facilities with these types of toilet rooms would increase at the rate of about 1 percent each year. However, due to the widespread adoption at the State and local level of model code provisions that mirror Req. #32, it is further understood that slightly more than 70 percent of all existing facilities assumed to have single-user toilet rooms with in-swinging doors already are covered by State or local building codes that require equivalent water closet clearances. Due to the general element-by-element safe harbor provision in the final rules, no unaltered single-user toilet rooms that comply with the current 1991 Standards will be required to retrofit to meet the revised clearance requirements in the final rules.

Similar to the assumptions for Req. #28, it is assumed that newly constructed single-user toilet rooms with in-swinging doors will last the life of the building, about 40 years. For alterations, the amount of time such a toilet room will be used depends upon the remaining life of the building (*i.e.*, a period of time between 1 and 39 years). Over this time period, the total estimated value of benefits to users of water closets with in-swinging doors from the time they will save and decreased discomfort they will experience is nearly $12 million.

Additional benefits of water closet clearance standards. The standards requiring sufficient space in single-user toilet rooms for a wheelchair user to effect a side or parallel transfer are among the most costly (in monetary terms) of the new provisions in the Access Board's guidelines that the Department adopts in this rule—but also, the Department believes, one of the most beneficial in non-monetary terms. Although the monetized costs of these requirements substantially exceed the monetized benefits, the additional benefits that persons with disabilities will derive from greater safety, enhanced independence, and the avoidance of stigma and humiliation—benefits that the Department's economic model could not put in monetary terms—are, in the Department's experience and considered judgment, likely to be quite high. Wheelchair users, including veterans returning from our Nation's wars with disabilities, are taught to transfer onto toilets from the side. Side transfers are the safest, most efficient, and most independence-promoting way for wheelchair users to get onto the toilet. The opportunity to effect a side transfer will often obviate the need for a wheelchair user or individual with another type of mobility impairment to obtain the assistance of another person to engage in what is, for most people, among the most private of activities. Executive Order 12866 refers explicitly not only to monetizable costs and benefits but also to "distributive impacts" and "equity," *see* E.O. 12866, section 1(a), and it is important to recognize that the ADA is intended to provide important benefits that are distributional and equitable in character. These water closet clearance provisions will have non-monetized benefits that promote equal access and equal opportunity for individuals with disabilities, and will further the ADA's purpose of providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1).

The Department's calculations indicated that, in fact, people with the relevant disabilities would have to place only a very small monetary value on these quite substantial benefits for the costs and benefits of these water closet clearance standards to break even. To make these calculations, the Department separated out toilet rooms with out-swinging doors from those with in-swinging doors, because the costs and benefits of the respective water closet clearance requirements are significantly different. The Department estimates that, assuming 46 percent of covered facilities nationwide are located in jurisdictions that have adopted the relevant equivalent IBC/ANSI model code provisions, the costs of the requirement as applied to toilet rooms with out-swinging doors will exceed the monetized benefits by $454 million, an annualized net cost of approximately $32.6 million. But a large number of people with disabilities will realize benefits of independence, safety, and avoided stigma and humiliation as a result of the requirement's application in this context. Based on the estimates of its expert panel and its own experience, the Department believes that both wheelchair users and people with a variety of other mobility disabilities will benefit. The Department estimates that people with the relevant disabilities will use a newly accessible single-user toilet room with an out-swinging door approximately 677 million times per year. Dividing the $32.6 million annual cost by the 677 million annual uses, the Department concludes that for the costs and benefits to break even in this context, people with the relevant disabilities will have to value safety, independence, and the avoidance of stigma and humiliation at just under 5 cents per visit. The Department believes, based on its experience and informed judgment, that 5 cents substantially understates the value people with the relevant disabilities would place on these benefits in this context.

There are substantially fewer single-user toilet rooms with in-swinging doors, and substantially fewer people with disabilities will benefit from making those rooms accessible. While both wheelchair users and individuals with other ambulatory disabilities will benefit from the additional space in a room with an out-swinging door, the Department believes, based on the estimates of its expert panel and its own experience, that wheelchair users likely will be the primary beneficiaries of the in-swinging door requirement. The Department estimates that people with the relevant disabilities will use a newly accessible single-user toilet room with an in-swinging door approximately 8.7 million times per year. Moreover, the alteration costs to make a single-user toilet room with an in-swinging door accessible are substantially higher (because of the space taken up by the door) than the equivalent costs of making a room with an out-swinging door accessible. Thus, the Department calculates that, assuming 72 percent of covered facilities nationwide are located in jurisdictions that have adopted the

relevant equivalent IBC/ANSI model code provisions, the costs of applying the toilet room accessibility standard to rooms with in-swinging doors will exceed the monetized benefits of doing so by $266.3 million over the life of the regulations, or approximately $19.14 million per year. Dividing the $19.14 million annual cost by the 8.7 million annual uses, the Department concludes that for the costs and benefits to break even in this context, people with the relevant disabilities will have to value safety, independence, and the avoidance of stigma and humiliation at approximately $2.20 per visit. The Department believes, based on its experience and informed judgment, that this figure approximates, and probably understates, the value wheelchair users place on safety, independence, and the avoidance of stigma and humiliation in this context.

Alternate Scenarios

Another scenario in the Final RIA explores the incremental impact of varying the assumptions concerning the percentage of existing elements subject to supplemental requirements for which barrier removal would be readily achievable. Readily achievable barrier removal rates are modeled at 0 percent, 50 percent, and 100 percent levels. The results of this scenario show that the expected NPV is positive for each readily achievable barrier removal rate and that varying this assumed rate has little impact on expected NPV. *See* Final RIA, figure ES–3.

A third set of analyses in the Final RIA demonstrates the impact of using alternate baselines based on model codes instead of the primary baseline. The IBC model codes, which have been widely adopted by State and local jurisdictions around the country, are significant because many of the requirements in the final rules mirror accessibility provisions in the IBC model codes (or standards incorporated therein by reference, such as ANSI A117.1). The actual economic impact of the Department's final rules is, therefore, tempered by the fact that many jurisdictions nationwide have already adopted and are enforcing portions of the final rules—indeed, this was one of the goals underlying the Access Board's efforts to harmonize the 2004 ADAAG Standards with the model codes. However, capturing the economic impact of this reality poses a difficult modeling challenge due to the variety of methods by which States and localities have adopted the IBC/ANSI model codes (*e.g.*, in whole, in part, and with or without amendments), as well as the lack of a national "facility census" establishing the location, type, and age of existing ADA-covered facilities.

As a result, in the first set of alternate IBC baseline analyses, the Final RIA assumes that all of the three IBC model codes—IBC 2000, IBC 2003, and IBC 2006—have been fully adopted by all jurisdictions and apply to all facilities nationwide. As with the primary baseline scenarios examined in the Final RIA, use of these three alternate IBC baselines results in positive expected NPVs in all cases. *See* Final RIA, figure ES–4. These results also indicate that IBC 2000 and IBC 2006 respectively have the highest and lowest expected NPVs. These results are due to changes in the make-up of the set of requirements that is included in each alternative baseline.

Additionally, a second, more limited alternate baseline analysis in the Final RIA uses a State-specific and requirement-specific alternate IBC/ANSI baseline in order to demonstrate the likely actual incremental impact of an illustrative subset of 20 requirements under current conditions nationwide. For this analysis, research was conducted on a subset of 20 requirements in the final rules that have negative net present values under the primary baseline and readily identifiable IBC/ANSI counterparts to determine the extent to which they each respectively have been adopted at the State or local level. With respect to facilities, the population of adopting jurisdictions was used as a proxy for facility location. In other words, it was assumed that the number of ADA-covered facilities respectively compliant with these 20 requirements was equal to the percentage of the United States population (based on statistics from the Census Bureau) currently residing in those States or local jurisdictions that have adopted the IBC/ANSI counterparts to these requirements. The results of this more limited analysis, using State-specific and requirement-specific alternate IBC/ANSI baselines for these 20 requirements, demonstrate that the widespread adoption of IBC model codes by States and localities significantly lessens the financial impact of these specific requirements. Indeed, the Final RIA estimates that, if the NPVs for these 20 requirements resulting from the requirement-specific alternate IBC/ANSI baseline are substituted for their respective results under the primary baseline, the overall NPV for the final rules increases from $9.2 billion to $12.0 billion. *See* Final RIA, section 6.2.2 & table 10.

Benefits Not Monetized in the Formal Analysis

Finally, the RIA recognizes that additional benefits are likely to result from the new standards. Many of these benefits are more difficult to quantify. Among the potential benefits that have been discussed by researchers and advocates are reduced administrative costs due to harmonized guidelines, increased business opportunities, increased social development, and improved health benefits. For example, the final rules will substantially increase accessibility at newly scoped facilities such as recreation facilities and judicial facilities, which previously have been very difficult for persons with disabilities to access. Areas where the Department believes entities may incur benefits that are not monetized in the formal analysis include, but may not be limited to, the following:

Use benefits accruing to persons with disabilities. The final rules should improve the overall sense of well-being of persons with disabilities, who will know that public entities and places of public accommodation are generally accessible, and who will have improved individual experiences. Some of the most frequently cited qualitative benefits of increased access are the increase in one's personal sense of dignity that arises from increased access and the decrease in possibly humiliating incidents due to accessibility barriers. Struggling to join classmates on a stage, to use a bathroom with too little clearance, or to enter a swimming pool all negatively affect a person's sense of independence and can lead to humiliating accidents, derisive comments, or embarrassment. These humiliations, together with feelings of being stigmatized as different or inferior from being relegated to use other, less comfortable or pleasant elements of a facility (such as a bathroom instead of a kitchen sink for rinsing a coffee mug at work), all have a negative effect on persons with disabilities.

Use benefits accruing to persons without disabilities. Improved accessibility can affect more than just the rule's target population; persons without disabilities may also benefit from many of the requirements. Even though the requirements were not designed to benefit persons without disabilities, any time savings or easier access to a facility experienced by persons without disabilities are also benefits that should properly be attributed to that change in accessibility. Curb cuts in sidewalks make life easier for those using wheeled suitcases or pushing a baby stroller. For people with

a lot of luggage or a need to change clothes, the larger bathroom stalls can be highly valued. A ramp into a pool can allow a child (or adult) with a fear of water to ease into that pool. All are examples of "unintended" benefits of the rule. And ideally, all should be part of the calculus of the benefits to society of the rule.

Social benefits. Evidence supports the notion that children with and without disabilities benefit in their social development from interaction with one another. Therefore, there will likely be social development benefits generated by an increase in accessible play areas. However, these benefits are nearly impossible to quantify for several reasons. First, there is no guarantee that accessibility will generate play opportunities between children with and without disabilities. Second, there may be substantial overlap between interactions at accessible play areas and interactions at other facilities, such as schools and religious facilities. Third, it is not certain what the unit of measurement for social development should be.

Non-use benefits. There are additional, indirect benefits to society that arise from improved accessibility. For instance, resource savings may arise from reduced social service agency outlays when people are able to access centralized points of service delivery rather than receiving home-based care. Home-based and other social services may include home health care visits and welfare benefits. Third-party employment effects can arise when enhanced accessibility results in increasing rates of consumption by disabled and non-disabled populations, which in turn results in reduced unemployment.

Two additional forms of benefits are discussed less often, let alone quantified: Option value and existence value. Option value is the value that people with and without disabilities derive from the option of using accessible facilities at some point in the future. As with insurance, people derive benefit from the knowledge that the option to use the accessible facility exists, even if it ultimately goes unused. Simply because an individual is a non-user of accessible elements today does not mean that he or she will remain so tomorrow. In any given year, there is some probability that an individual will develop a disability (either temporary or permanent) that will necessitate use of these features. For example, the 2000 Census found that 41.9 percent of adults 65 years and older identified themselves as having a disability. Census Bureau figures, moreover, project that the number of people 65 years and older will more than double between 2000 and 2030—from 35 million to 71.5 million. Therefore, even individuals who have no direct use for accessibility features today get a direct benefit from the knowledge of their existence should such individuals need them in the future.

Existence value is the benefit that individuals get from the plain existence of a good, service or resource—in this case, accessibility. It can also be described as the value that people both with and without disabilities derive from the guarantees of equal treatment and non-discrimination that are accorded through the provision of accessible facilities. In other words, people value living in a country that affords protections to individuals with disabilities, whether or not they themselves are directly or indirectly affected. Unlike use benefits and option value, existence value does not require an individual ever to use the resource or plan on using the resource in the future. There are numerous reasons why individuals might value accessibility even if they do not require it now and do not anticipate needing it in the future.

Costs Not Monetized in the Formal Analysis

The Department also recognizes that in addition to benefits that cannot reasonably be quantified or monetized, there may be negative consequences and costs that fall into this category as well. The absence of a quantitative assessment of such costs in the formal regulatory analysis is not meant to minimize their importance to affected entities; rather, it reflects the inherent difficulty in estimating those costs. Areas where the Department believes entities may incur costs that are not monetized in the formal analysis include, but may not be limited to, the following:

Costs from deferring or forgoing alterations. Entities covered by the final rules may choose to delay otherwise desired alterations to their facilities due to the increased incremental costs imposed by compliance with the new requirements. This may lead to facility deterioration and decrease in the value of such facilities. In extreme cases, the costs of complying with the new requirements may lead some entities to opt to not build certain facilities at all. For example, the Department estimates that the incremental costs of building a new wading pool associated with the final rules will increase by about $142,500 on average. Some facilities may opt to not build such pools to avoid incurring this increased cost.

Loss of productive space while modifying an existing facility. During complex alterations, such as where moving walls or plumbing systems will be necessary to comply with the final rules, productive space may be unavailable until the alterations are complete. For example, a hotel altering its bathrooms to comply with the final rules will be unable to allow guests to occupy these rooms while construction activities are underway, and thus the hotel may forgo revenue from these rooms during this time. While the amount of time necessary to perform alterations varies significantly, the costs associated with unproductive space could be high in certain cases, especially if space is already limited or if an entity or facility is located in an area where real estate values are particularly high (*e.g.,* New York or San Francisco).

Expert fees. Another type of cost to entities that is not monetized in the formal analysis is legal fees to determine what, if anything, a facility needs to do in order to comply with the new rules or to respond to lawsuits. Several commenters indicated that entities will incur increased legal costs because the requirements are changing for the first time since 1991. Since litigation risk could increase, entities could spend more on legal fees than in the past. Likewise, covered entities may face incremental costs when undertaking alterations because their engineers, architects, or other consultants may also need to consider what modifications are necessary to comply with the new requirements. The Department has not quantified the incremental costs of the services of these kinds of experts.

Reduction in facility value and losses to individuals without disabilities due to the new accessibility requirements. It is possible that some changes made by entities to their facilities in order to comply with the new requirements may result in fewer individuals without disabilities using such facilities (because of decreased enjoyment) and may create a disadvantage for individuals without disabilities, even though the change might increase accessibility for individuals with disabilities. For example, the new requirements for wading pools might decrease the value of the pool to the entity that owns it due to fewer individuals using it (because the new requirements for a sloped entry might make the pool too shallow). Similarly, several commenters from the miniature golf industry expressed concern that it would be difficult to comply with the

regulations for accessible holes without significantly degrading the experience for other users. Finally, with respect to costs to individuals who do not have disabilities, a very tall person, for example, may be inconvenienced by having to reach further for a lowered light switch.

Section 610 Review

The Department is also required to conduct a periodic regulatory review pursuant to section 610 of the RFA. The review requires agencies to consider five factors: (1) The continued need for the rule; (2) the nature of complaints or comments received concerning the rule from the public; (3) the complexity of the rule; (4) the extent to which the rule overlaps, duplicates, or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule. *See* 5 U.S.C. 610(b). Based on these factors, the agency is required to determine whether to continue the rule without change or to amend or rescind the rule, to minimize any significant economic impact of the rule on a substantial number of small entities. *See id.* 610(a).

In developing the 2010 Standards, the Department reviewed the 1991 Standards section by section and, as a result, has made several clarifications and amendments in both the title II and title III implementing regulations. The changes reflect the Department's analysis and review of complaints or comments from the public, as well as changes in technology. Many of the amendments aim to clarify and simplify the obligations of covered entities. As discussed in greater detail above, one significant goal of the development of the 2004 ADAAG was to eliminate duplication or overlap in Federal accessibility guidelines, as well as to harmonize the Federal guidelines with model codes. The Department has also worked to create harmony where appropriate between the requirements of titles II and III. Finally, while the regulation is required by statute and there is a continued need for it as a whole, the Department proposes several modifications that are intended to reduce its effects on small entities.

The Department has consulted with the Small Business Administration's Office of Advocacy about this process. The Office of Advocacy has advised that although the process followed by the Department was ancillary to the proposed adoption of revised ADA Standards, the steps taken to solicit public input and to respond to public concerns are functionally equivalent to the process required to complete a section 610 review. Therefore, this rulemaking fulfills the Department's obligations under section 610 of the RFA.

Final Regulatory Flexibility Analysis

The final rule also has been reviewed by the Small Business Administration's Office of Advocacy (Advocacy) in accordance with Executive Order 13272, 67 FR 53461, 3 CFR, 2003 Comp., p. 247. Chapter Seven of the Final RIA demonstrates that the final rule will not have a significant economic impact on a substantial number of small governmental jurisdictions or facilities. The Department has also conducted a final regulatory flexibility analysis (FRFA) as a component of this rulemaking. Collectively, the ANPRM, NPRM, Initial RIA, Final RIA, and 2010 Standards, include all of the elements of a FRFA required by the Regulatory Flexibility Act (RFA). *See* 5 U.S.C. 604(a)(1)–(5).

Section 604(a) lists the specific requirements for a FRFA. The Department has addressed these RFA requirements throughout the ANPRM, NPRM, the 2010 Standards, and the RIA. In summary, the Department has satisfied its FRFA obligations under section 604(a) by providing the following:

1. *Succinct summaries of the need for, and objectives of, the final rules.* The Department is issuing this final rule in order to comply with its obligations under both the ADA and the SBREFA. The Department is also updating or amending certain provisions of the existing title II regulations so that they are consistent with the title III regulations and accord with the Department's legal and practical experiences in enforcing the ADA.

The ADA requires the Department to adopt enforceable accessibility standards under the ADA that are consistent with the Access Board's minimum accessibility guidelines and requirements. Accordingly, this rule adopts ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the 2004 ADA/ABA Guidelines as part of the 2010 Standards, which will give the guidelines legal effect with respect to the Department's title II and title III regulations.

Under the SBREFA, the Department is required to perform a periodic review of its 1991 rule because the rule may have a significant economic impact on a substantial number of small entities. The SBREFA also requires the Department to make a regulatory assessment of the costs and benefits of any significant regulatory action. *See* preamble sections of the final rules for titles II and III entitled, "Summary" and "The Department's Rulemaking History"; Department of Justice ANPRM, 69 FR 58768, 58768–70 (Sept. 30, 2004) (outlining the regulatory history, goals, and rationale underlying DOJ's proposal to revise its regulations implementing titles II and III of the ADA); Department of Justice NPRM, 73 FR 34508, 34508–14 (June 17, 2008) (outlining the regulatory history and rationale underlying DOJ's proposal to revise its regulations implementing titles II and III of the ADA).

2. *Summaries of significant issues raised by public comments in response to the Department's initial regulatory flexibility analysis (IRFA) and discussions of regulatory revisions made as a result of such comments.* The Department received no comments addressing specific substantive issues regarding the IRFA for the title II NPRM. However, the Office of Advocacy (Advocacy) of the U.S. Small Business Administration did provide specific comments on the title III NPRM, which may be relevant to the title II IRFA. Accordingly, the Department has included those comments here.

Advocacy acknowledged how the Department took into account the comments and concerns of small entities. However, Advocacy remained concerned about certain items in the Department's NPRM and requested clarification or additional guidance on certain items.

General Safe Harbor. Advocacy expressed support for the Department's proposal to allow an element-by-element safe harbor for elements that now comply with the 1991 ADA Standards and encouraged the Department to include specific technical assistance in the Small Business Compliance Guide that the Department is required to publish pursuant to section 212 of the SBREFA. Advocacy requested that technical assistance outlining which standards are subject to the safe harbor be included in the Department's guidance. The Department has provided a list of the new requirements in the 2010 Standards that are not eligible for the safe harbor in § 35.150(b)(2)(ii)(A) through § 35.150(b)(2)(ii)(L) of the final rule and plans to include additional information about the application of the safe harbor in the Department's Small Business Compliance Guide. Advocacy also requested that guidance regarding the two effective dates for regulations also be provided and the Department plans

to include such guidance in its Small Business Compliance Guide.

Indirect Costs. Advocacy expressed concern that small entities would incur substantial indirect costs under the final rules for accessibility consultants, legal counsel, training, and the development of new policies and procedures. The Department believes that such "indirect costs," even assuming they would occur as described by Advocacy, are not properly attributed to the Department's final rules implementing the ADA.

The vast majority of the new requirements are incremental changes subject to a safe harbor. All small entities currently in compliance with the 1991 Standards will neither need to undertake further retrofits nor require the services of a consultant to tell them so. If, on the other hand, elements at an existing facility are not currently in compliance with the 1991 Standards, then the cost of making such a determination and bringing these elements into compliance are not properly attributed to the final rules, but to lack of compliance with the 1991 Standards.

For the limited number of requirements in the final rule that are supplemental (*i.e.,* relating to accessibility at courthouses, play areas, and recreation facilities), the Department believes that covered entities simply need to determine whether they have an element covered by a supplemental requirement (*e.g.,* a swimming pool) and then conduct any work necessary to provide program access either in-house or by contacting a local contractor. Determining whether such an element exists is expected to take only a minimal amount of staff time. Nevertheless, Chapter 5.3 of the Final RIA has a high-end estimate of the additional management costs of such evaluation (from 1 to 8 hours of staff time).

The Department also anticipates that small entities will incur minimal costs for accessibility consultants to ensure compliance with the new requirements for New Construction and Alterations in the final rules. Both the 2004 ADAAG and the proposed requirements have been made public for some time and are already being incorporated into design plans by architects and builders. Further, in adopting the final rules, the Department has sought to harmonize, to the greatest extent possible, the ADA Standards with model codes that have been adopted on a widespread basis by State and local jurisdictions across the country. Accordingly, many of the requirements in the final rules are already incorporated into building codes nationwide. Additionally, it is assumed to be part of the regular course of business—and thereby incorporated into standard professional services or construction contracts—for architects and contractors to keep abreast of changes in applicable Federal, State, and local laws and building codes. Given these considerations, the Department has determined that the additional costs, if any, for architectural or contractor services that arise out of the final rules are expected to be minimal.

Some business commenters stated that the final rules would require them to develop new policies or manuals to retrain employees on the revised ADA standards. However, it is the Department's view that because the revised and supplemental requirements address architectural issues and features, the final rules would require minimal, if any, changes to the overall policies and procedures of covered entities.

Finally, commenters representing business interests expressed the view that the final rules would cause businesses to incur significant legal costs in order to defend ADA lawsuits. However, regulatory impact analyses are not an appropriate forum for assessing the cost covered entities may bear, or the repercussions they may face, for failing to comply (or allegedly failing to comply) with current law. *See* Final RIA, Ch. 3, section 3.1.4, *id.,* at Ch. 5, *id.* at table 15.

3. *Estimates of the number and type of small entities to which the final rules will apply.* The Department estimates that the final rules will apply to approximately 89,000 facilities operated by small governmental jurisdictions covered by title II. *See* Final RIA, Ch. 7, "Small Business Impact Analysis," table 17, and app. 5, "Small Business Data of the RIA" (available for review at *http://www.ada.gov*); *see also* 73 FR 36964 (June 30, 2008), app. B: Initial Regulatory Assessment, sections entitled, "Regulatory Alternatives," "Regulatory Proposals with Cost Implications," and "Measurement of Incremental Benefits" (estimating the number of small entities the Department believes may be impacted by the NPRM and calculating the likely incremental economic impact of these rules on small facilities or entities versus "typical" (*i.e.,* average-sized) facilities or entities).

4. *A description of the projected reporting, record-keeping, and other compliance requirements of the final rules, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.* The final rules impose no new record-keeping or reporting requirements. *See* preamble sections of the final rule for titles II and III entitled, "Paperwork Reduction Act." Small entities may incur costs as a result of complying with the final rules. These costs are detailed in the Final RIA, Chapter 7, "Small Business Impact Analysis" and accompanying Appendix 5, "Small Business Data" (available for review at *http://www.ada.gov*).

5. *Descriptions of the steps taken by the Department to minimize any significant economic impact on small entities consistent with the stated objectives of the ADA, including the reasons for selecting the alternatives adopted in the final rules and for rejecting other significant alternatives.* From the outset of this rulemaking, the Department has been mindful of small entities and has taken numerous steps to minimize the impact of the final rule on small governmental jurisdictions. Several of these steps are summarized below.

As an initial matter, the Department—as a voting member of the Access Board—was extensively involved in the development of the 2004 ADAAG. These guidelines, which are incorporated into the 2010 Standards, reflect a conscious effort to mitigate any significant economic impact on small entities in several respects. First, one of the express goals of the 2004 ADAAG is harmonization of Federal accessibility guidelines with industry standards and model codes that often form the basis of State and local building codes, thereby minimizing the impact of these guidelines on all covered entities, but especially small entities. Second, the 2004 ADAAG is the product of a 10-year rulemaking effort in which a host of private and public entities, including groups representing government entities, worked cooperatively to develop accessibility guidelines that achieved an appropriate balance between accessibility and cost. For example, as originally recommended by the Access Board's Recreation Access Advisory Committee, all holes on a miniature golf course would be required to be accessible except for sloped surfaces where the ball could not come to rest. *See, e.g.,* "ADA Accessibility Guidelines for Buildings and Facilities—Recreation Facilities and Outdoor Developed Areas," Access Board Advance Notice of Proposed Rulemaking, 59 FR 48542 (Sept. 21, 1994). Miniature golf trade groups and facility operators, who are nearly all small businesses or small governmental jurisdictions, expressed significant concern that such requirements would

be prohibitively expensive, require additional space, and might fundamentally alter the nature of their courses. *See, e.g.,* "ADA Accessibility Guidelines for Buildings and Facilities—Recreation Facilities," Access Board Notice of Proposed Rulemaking, 64 FR 37326 (July 9, 1999). In consideration of such concerns, and after holding informational meetings with miniature golf representatives and persons with disabilities, the Access Board significantly revised the final miniature golf guidelines. The final guidelines not only reduced significantly the number of holes required to be accessible to 50 percent of all holes (with one break in the sequence of consecutive holes permitted), but also added an exemption for carpets used on playing surfaces, modified ramp landing slope and size requirements, and reduced the space required for start of play areas. *See, e.g.,* "ADA Accessibility Guidelines for Buildings and Facilities—Recreation Facilities Final Rule," 67 FR 56352, 56375B76 (Sept. 3, 2002) (codified at 36 CFR parts 1190 and 1191).

The Department also published an ANPRM to solicit public input on the adoption of the 2004 ADAAG as the revised Federal accessibility standards implementing titles II and III of the ADA. Among other things, the ANPRM specifically invited comment from small entities regarding the proposed rules' potential economic impact and suggested regulatory alternatives to ameliorate any such impact. *See* ANPRM, 69 FR 58768, 58778-79 (Sept. 30, 2004). The Department received over 900 comments and small entities' interests figured prominently. *See* NPRM, 73 FR 34466, 34468, 34501 (June 17, 2008).

Subsequently, when the Department published its NPRM in June 2008, several regulatory proposals were included to address concerns raised by small businesses and small local governmental jurisdictions in ANPRM comments. First, to mitigate costs to existing facilities, the Department proposed an element-by-element safe harbor that would exempt elements in compliance with applicable technical and scoping requirements in the 1991 Standards from any program accessibility retrofit obligations under the revised title II rules. *Id.* at 34485. While this proposed safe harbor applied to title-II covered entities irrespective of size, it was small governmental jurisdictions that especially stood to benefit since, according to comments from small entities, such jurisdictions are more likely to operate in older buildings and facilities. Additionally, the NPRM sought public input on the inclusion of reduced scoping provisions for certain types of small existing recreational facilities (*i.e.,* swimming pools, play areas, and saunas). *Id.* at 34485-88.

During the NPRM comment period, the Department engaged in considerable public outreach to small entities. A public hearing was held in Washington, D.C, during which nearly 50 persons testified in person or by phone, including several small business owners. *See Transcript of the Public Hearing on Notices of Proposed Rulemaking* (July 15, 2008), available at *http://www.ada.gov/NPRM2008/public_hearing_transcript.htm.* This hearing was also streamed live over the Internet. By the end of the 60-day comment period, the Department had also received nearly 4,500 public comments on the NPRMs, including a significant number of comments reflecting the perspectives of small governmental jurisdictions on a wide range of regulatory issues.

In addition to soliciting input from small entities through the formal process for public comment, the Department also targeted small entities with less formal regulatory discussions, including a Small Business Roundtable convened by the Office of Advocacy and held at the offices of the Small Business Administration in Washington, DC, and an informational question-and-answer session concerning the title II and III NPRMs at the Department of Justice in which business representatives attended in-person and by telephone. These outreach efforts provided the small business community with information on the NPRM proposals being considered by the Department and gave small entities the opportunity to ask questions of the Department and provide feedback.

As a result of the feedback provided by representatives of small business interests on the title II NPRM, the Department was able to assess the impact of various alternatives on small governmental jurisdictions before adopting its final rule and took steps to minimize any significant impact on small entities. Most notably, the final rule retains the element-by-element safe harbor, for which the community of small businesses and small governmental jurisdictions voiced strong support. *See* Appendix A discussion of safe harbor (§ 35.150(b)(2)). The Department believes that this element-by-element safe harbor provision will go a long way toward mitigating the economic impact of the final rule on existing facilities owned or operated by small governmental jurisdictions.

Additional regulatory measures mitigating the economic impact of the final rule on entities covered by title II (including small governmental jurisdictions) include deletion of the proposed requirement for captioning of safety and emergency information on scoreboards at sporting venues, retention of the proposed path of travel safe harbor, and extension of the compliance date of the 2010 Standards as applied to new construction and alterations from 6 months to 18 months after publication of the final rule. *See* Appendix A discussions of captioning at sporting venues (§ 35.160), path of travel safe harbor (§ 35.151(b)(4)(ii)(C)), and accessibility standards compliance dates for new construction and alterations (§ 35.151(c)).

One set of proposed alternative measures that would have potentially provided some cost savings to small public entities—the reduced scoping for certain existing recreational facilities—was not adopted by the Department in the final rule. While these proposals were not specific to small entities, they nonetheless might have mitigated the impact of the final rule for some small governmental jurisdictions that owned or operated existing facilities at which these recreational elements were located. *See* Appendix A discussion of existing facilities. The Department gave careful consideration to how best to insulate small entities from overly burdensome costs under the 2010 Standards for existing small play areas, swimming pools, and saunas, while still ensuring accessible and integrated recreational facilities that are of great importance to persons with disabilities. The Department concluded that the existing program accessibility standard (coupled with the new general element-by-element safe harbor), rather than specific exemptions for these types of existing facilities, is the most efficacious method by which to protect small governmental jurisdictions.

Once the final rule is promulgated, small entities will also have a wealth of documents to assist them in complying with the 2010 Standards. For example, accompanying the title III final rule in the **Federal Register** is the Department's "Analysis and Commentary on the 2010 ADA Standards for Accessible Design" (codified as Appendix B to 28 CFR part 36), which provides a plain language description of the revised scoping and technical requirements in these Standards and provides illustrative figures. The Department also expects to publish guidance specifically tailored to small businesses in the form of a small

business compliance guide, as well as to publish technical assistance materials of general interest to all covered entities following promulgation of the final rule. Additionally, the Access Board has published a number of guides that discuss and illustrate application of the 2010 Standards to play areas and various types of recreational facilities.

Executive Order 13132

Executive Order 13132, 64 FR 43255, 3 CFR, 2000 Comp., p. 206, requires executive branch agencies to consider whether a rule will have federalism implications. That is, the rulemaking agency must determine whether the rule is likely to have substantial direct effects on State and local governments, a substantial direct effect on the relationship between the Federal Government and the States and localities, or a substantial direct effect on the distribution of power and responsibilities among the different levels of government. If an agency believes that a rule is likely to have federalism implications, it must consult with State and local elected officials about how to minimize or eliminate the effects.

Title II of the ADA covers State and local government programs, services, and activities and, therefore, clearly has some federalism implications. State and local governments have been subject to the ADA since 1991, and the majority have also been required to comply with the requirements of section 504. Hence, the ADA and the title II regulation are not novel for State and local governments. In its adoption of the 2010 Standards, the Department was mindful of its obligation to meet the objectives of the ADA while also minimizing conflicts between State law and Federal interests.

The 2010 Standards address and minimize federalism concerns. As a member of the Access Board, the Department was privy to substantial feedback from State and local governments throughout the development of the Board's 2004 guidelines. Before those guidelines were finalized as the 2004 ADA/ABA Guidelines, they addressed and minimized federalism concerns expressed by State and local governments during the development process. Because the Department adopted ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the 2004 ADA/ABA Guidelines as part of the 2010 Standards, the steps taken in the 2004 ADA/ABA Guidelines to address federalism concerns are reflected in the 2010 Standards.

The Department also solicited and received input from public entities in the September 2004 ANPRM and the June 2008 NPRM. Through the ANPRM and NPRM processes, the Department solicited comments from elected State and local officials and their representative national organizations about the potential federalism implications. The Department received comments addressing whether the ANPRM and NPRM directly affected State and local governments, the relationship between the Federal Government and the States, and the distribution of power and responsibilities among the various levels of government. This rule preempts State laws affecting entities subject to the ADA only to the extent that those laws conflict with the requirements of the ADA, as set forth in the rule.

Title III of the ADA covers public accommodations and commercial facilities. These facilities are generally subject to regulation by different levels of government, including Federal, State, and local governments. The ADA and the Department's implementing regulations set minimum civil rights protections for individuals with disabilities that in turn may affect the implementation of State and local laws, particularly building codes. The Department's implementing regulations address federalism concerns and mitigate federalism implications, particularly the provisions that streamline the administrative process for State and local governments seeking ADA code certification under title III.

National Technology Transfer and Advancement Act of 1995

The National Technology Transfer and Advancement Act of 1995 (NTTAA) directs that as a general matter, all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, which are private, generally non-profit organizations that develop technical standards or specifications using well-defined procedures that require openness, balanced participation among affected interests and groups, fairness and due process, and an opportunity for appeal, as a means to carry out policy objectives or activities. Public Law 104–113, section 12(d)(1) (15 U.S.C. 272 note). In addition, the NTTAA directs agencies to consult with voluntary, private sector, consensus standards bodies and requires that agencies participate with such bodies in the development of technical standards when such participation is in the public interest and is compatible with agency and departmental missions, authorities, priorities, and budget resources. *Id.* at section 12(d)(1). The Department, as a member of the Access Board, was an active participant in the lengthy process of developing the 2004 ADAAG, on which the 2010 Standards are based. As part of this update, the Board has made its guidelines more consistent with model building codes, such as the IBC, and industry standards. It coordinated extensively with model code groups and standard-setting bodies throughout the process so that differences could be reconciled. As a result, a historic level of harmonization has been achieved that has brought about improvements to the guidelines, as well as to counterpart provisions in the IBC and key industry standards, including those for accessible facilities issued through the American National Standards Institute.

Plain Language Instructions

The Department makes every effort to promote clarity and transparency in its rulemaking. In any regulation, there is a tension between drafting language that is simple and straightforward and drafting language that gives full effect to issues of legal interpretation. The Department operates a toll-free ADA Information Line (800) 514–0301 (voice); (800) 514–0383 (TTY) that the public is welcome to call at any time to obtain assistance in understanding anything in this rule. If any commenter has suggestions for how the regulation could be written more clearly, please contact Janet L. Blizard, Deputy Chief or Barbara J. Elkin, Attorney Advisor, Disability Rights Section, whose contact information is provided in the introductory section of this rule, entitled, "**FOR FURTHER INFORMATION CONTACT**."

Paperwork Reduction Act

The Paperwork Reduction Act of 1980 (PRA) requires agencies to clear forms and record keeping requirements with OMB before they can be introduced. 44 U.S.C. 3501 *et seq.* This rule does not contain any paperwork or record keeping requirements and does not require clearance under the PRA.

Unfunded Mandates Reform Act

Section 4(2) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1503(2), excludes from coverage under that Act any proposed or final Federal regulation that "establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability." Accordingly, this rulemaking is not subject to the

provisions of the Unfunded Mandates Reform Act.

List of Subjects for 28 CFR Part 35

Administrative practice and procedure, Buildings and facilities, Civil rights, Communications, Individuals with disabilities, Reporting and recordkeeping requirements, State and local governments.

■ By the authority vested in me as Attorney General by law, including 28 U.S.C. 509 and 510, 5 U.S.C. 301, and section 204 of the Americans with Disabilities Act of 1990, Pub. L. 101–336, 42 U.S.C. 12134, and for the reasons set forth in Appendix A to 28 CFR part 35, chapter I of title 28 of the Code of Federal Regulations shall be amended as follows—

PART 35—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES

■ 1. The authority citation for 28 CFR part 35 is revised to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12134.

Subpart A—General

■ 2. Amend § 35.104 by adding the following definitions of *1991 Standards, 2004 ADAAG, 2010 Standards, direct threat, existing facility, housing at a place of education, other power-driven mobility device, service animal, qualified reader, video remote interpreting (VRI) service,* and *wheelchair* in alphabetical order and revising the definitions of *auxiliary aids and services* and *qualified interpreter* to read as follows:

§ 35.104 Definitions.

1991 Standards means the requirements set forth in the ADA Standards for Accessible Design, originally published on July 26, 1991, and republished as Appendix D to 28 CFR part 36.

2004 ADAAG means the requirements set forth in appendices B and D to 36 CFR part 1191 (2009).

2010 Standards means the 2010 ADA Standards for Accessible Design, which consist of the 2004 ADAAG and the requirements contained in § 35.151.

Auxiliary aids and services includes—(1) Qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

(2) Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

* * * * *

Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services as provided in § 35.139.

* * * * *

Existing facility means a facility in existence on any given date, without regard to whether the facility may also be considered newly constructed or altered under this part.

* * * * *

Housing at a place of education means housing operated by or on behalf of an elementary, secondary, undergraduate, or postgraduate school, or other place of education, including dormitories, suites, apartments, or other places of residence.

* * * * *

Other power-driven mobility device means any mobility device powered by batteries, fuel, or other engines—whether or not designed primarily for use by individuals with mobility disabilities—that is used by individuals with mobility disabilities for the purpose of locomotion, including golf cars, electronic personal assistance mobility devices (EPAMDs), such as the Segway® PT, or any mobility device designed to operate in areas without defined pedestrian routes, but that is not a wheelchair within the meaning of this section. This definition does not apply to Federal wilderness areas; wheelchairs in such areas are defined in section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2).

* * * * *

Qualified interpreter means an interpreter who, via a video remote interpreting (VRI) service or an on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators.

* * * * *

Qualified reader means a person who is able to read effectively, accurately, and impartially using any necessary specialized vocabulary.

* * * * *

Service animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the handler's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.

* * * * *

Video remote interpreting (VRI) service means an interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection that delivers high-quality video images as provided in § 35.160(d).

* * * * *

Wheelchair means a manually-operated or power-driven device

designed primarily for use by an individual with a mobility disability for the main purpose of indoor or of both indoor and outdoor locomotion. This definition does not apply to Federal wilderness areas; wheelchairs in such areas are defined in section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2).

Subpart B—General Requirements

■ 3. Amend § 35.130 by adding paragraph (h) to read as follows:

§ 35.130 General prohibitions against discrimination.

* * * * *

* * * * *

(h) A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

■ 4. Amend § 35.133 by adding paragraph (c) to read as follows:

§ 35.133 Maintenance of accessible features.

* * * * *

(c) If the 2010 Standards reduce the technical requirements or the number of required accessible elements below the number required by the 1991 Standards, the technical requirements or the number of accessible elements in a facility subject to this part may be reduced in accordance with the requirements of the 2010 Standards.

* * * * *

■ 5. Add § 35.136 to read as follows:

§ 35.136 Service animals.

(a) *General.* Generally, a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability.

(b) *Exceptions.* A public entity may ask an individual with a disability to remove a service animal from the premises if—

(1) The animal is out of control and the animal's handler does not take effective action to control it; or

(2) The animal is not housebroken.

(c) *If an animal is properly excluded.* If a public entity properly excludes a service animal under § 35.136(b), it shall give the individual with a disability the opportunity to participate in the service, program, or activity without having the service animal on the premises.

(d) *Animal under handler's control.* A service animal shall be under the control of its handler. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (*e.g.,* voice control, signals, or other effective means).

(e) *Care or supervision.* A public entity is not responsible for the care or supervision of a service animal.

(f) *Inquiries.* A public entity shall not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal. A public entity may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A public entity shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. Generally, a public entity may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (*e.g.,* the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).

(g) *Access to areas of a public entity.* Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a public entity's facilities where members of the public, participants in services, programs or activities, or invitees, as relevant, are allowed to go.

(h) *Surcharges.* A public entity shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets. If a public entity normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal.

(i) *Miniature horses.* (1) *Reasonable modifications.* A public entity shall make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability.

(2) *Assessment factors.* In determining whether reasonable modifications in policies, practices, or procedures can be made to allow a miniature horse into a specific facility, a public entity shall consider—

(i) The type, size, and weight of the miniature horse and whether the facility can accommodate these features;

(ii) Whether the handler has sufficient control of the miniature horse;

(iii) Whether the miniature horse is housebroken; and

(iv) Whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation.

(C) *Other requirements.* Paragraphs 35.136(c) through (h) of this section, which apply to service animals, shall also apply to miniature horses.

■ 6. Add § 35.137 to read as follows:

§ 35.137 Mobility devices.

(a) *Use of wheelchairs and manually-powered mobility aids.* A public entity shall permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids, such as walkers, crutches, canes, braces, or other similar devices designed for use by individuals with mobility disabilities, in any areas open to pedestrian use.

(b)(1) *Use of other power-driven mobility devices.* A public entity shall make reasonable modifications in its policies, practices, or procedures to permit the use of other power-driven mobility devices by individuals with mobility disabilities, unless the public entity can demonstrate that the class of other power-driven mobility devices cannot be operated in accordance with legitimate safety requirements that the public entity has adopted pursuant to § 35.130(h).

(2) *Assessment factors.* In determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification under paragraph (b)(1) of this section, a public entity shall consider—

(i) The type, size, weight, dimensions, and speed of the device;

(ii) The facility's volume of pedestrian traffic (which may vary at different times of the day, week, month, or year);

(iii) The facility's design and operational characteristics (*e.g.,* whether its service, program, or activity is conducted indoors, its square footage, the density and placement of stationary devices, and the availability of storage for the device, if requested by the user);

(iv) Whether legitimate safety requirements can be established to

permit the safe operation of the other power-driven mobility device in the specific facility; and

(v) Whether the use of the other power-driven mobility device creates a substantial risk of serious harm to the immediate environment or natural or cultural resources, or poses a conflict with Federal land management laws and regulations.

(c)(1) *Inquiry about disability.* A public entity shall not ask an individual using a wheelchair or other power-driven mobility device questions about the nature and extent of the individual's disability.

(2) *Inquiry into use of other power-driven mobility device.* A public entity may ask a person using an other power-driven mobility device to provide a credible assurance that the mobility device is required because of the person's disability. A public entity that permits the use of an other power-driven mobility device by an individual with a mobility disability shall accept the presentation of a valid, State-issued, disability parking placard or card, or other State-issued proof of disability as a credible assurance that the use of the other power-driven mobility device is for the individual's mobility disability. In lieu of a valid, State-issued disability parking placard or card, or State-issued proof of disability, a public entity shall accept as a credible assurance a verbal representation, not contradicted by observable fact, that the other power-driven mobility device is being used for a mobility disability. A "valid" disability placard or card is one that is presented by the individual to whom it was issued and is otherwise in compliance with the State of issuance's requirements for disability placards or cards.

■ 7. Add § 35.138 to read as follows:

§ 35.138 Ticketing.

(a)(1) For the purposes of this section, "accessible seating" is defined as wheelchair spaces and companion seats that comply with sections 221 and 802 of the 2010 Standards along with any other seats required to be offered for sale to the individual with a disability pursuant to paragraph (d) of this section.

(2) *Ticket sales.* A public entity that sells tickets for a single event or series of events shall modify its policies, practices, or procedures to ensure that individuals with disabilities have an equal opportunity to purchase tickets for accessible seating—

(i) During the same hours;

(ii) During the same stages of ticket sales, including, but not limited to, pre-sales, promotions, lotteries, wait-lists, and general sales;

(iii) Through the same methods of distribution;

(iv) In the same types and numbers of ticketing sales outlets, including telephone service, in-person ticket sales at the facility, or third-party ticketing services, as other patrons; and

(v) Under the same terms and conditions as other tickets sold for the same event or series of events.

(b) *Identification of available accessible seating.* A public entity that sells or distributes tickets for a single event or series of events shall, upon inquiry—

(1) Inform individuals with disabilities, their companions, and third parties purchasing tickets for accessible seating on behalf of individuals with disabilities of the locations of all unsold or otherwise available accessible seating for any ticketed event or events at the facility;

(2) Identify and describe the features of available accessible seating in enough detail to reasonably permit an individual with a disability to assess independently whether a given accessible seating location meets his or her accessibility needs; and

(3) Provide materials, such as seating maps, plans, brochures, pricing charts, or other information, that identify accessible seating and information relevant thereto with the same text or visual representations as other seats, if such materials are provided to the general public.

(c) *Ticket prices.* The price of tickets for accessible seating for a single event or series of events shall not be set higher than the price for other tickets in the same seating section for the same event or series of events. Tickets for accessible seating must be made available at all price levels for every event or series of events. If tickets for accessible seating at a particular price level are not available because of inaccessible features, then the percentage of tickets for accessible seating that should have been available at that price level (determined by the ratio of the total number of tickets at that price level to the total number of tickets in the assembly area) shall be offered for purchase, at that price level, in a nearby or similar accessible location.

(d) *Purchasing multiple tickets.* (1) *General.* For each ticket for a wheelchair space purchased by an individual with a disability or a third-party purchasing such a ticket at his or her request, a public entity shall make available for purchase three additional tickets for seats in the same row that are contiguous with the wheelchair space, provided that at the time of purchase there are three such seats available. A public entity is not required to provide more than three contiguous seats for each wheelchair space. Such seats may include wheelchair spaces.

(2) *Insufficient additional contiguous seats available.* If patrons are allowed to purchase at least four tickets, and there are fewer than three such additional contiguous seat tickets available for purchase, a public entity shall offer the next highest number of such seat tickets available for purchase and shall make up the difference by offering tickets for sale for seats that are as close as possible to the accessible seats.

(3) *Sales limited to less than four tickets.* If a public entity limits sales of tickets to fewer than four seats per patron, then the public entity is only obligated to offer as many seats to patrons with disabilities, including the ticket for the wheelchair space, as it would offer to patrons without disabilities.

(4) *Maximum number of tickets patrons may purchase exceeds four.* If patrons are allowed to purchase more than four tickets, a public entity shall allow patrons with disabilities to purchase up to the same number of tickets, including the ticket for the wheelchair space.

(5) *Group sales.* If a group includes one or more individuals who need to use accessible seating because of a mobility disability or because their disability requires the use of the accessible features that are provided in accessible seating, the group shall be placed in a seating area with accessible seating so that, if possible, the group can sit together. If it is necessary to divide the group, it should be divided so that the individuals in the group who use wheelchairs are not isolated from their group.

(e) *Hold-and-release of tickets for accessible seating.* (1) *Tickets for accessible seating may be released for sale in certain limited circumstances.* A public entity may release unsold tickets for accessible seating for sale to individuals without disabilities for their own use for a single event or series of events only under the following circumstances—

(i) When all non-accessible tickets (excluding luxury boxes, club boxes, or suites) have been sold;

(ii) When all non-accessible tickets in a designated seating area have been sold and the tickets for accessible seating are being released in the same designated area; or

(iii) When all non-accessible tickets in a designated price category have been sold and the tickets for accessible seating are being released within the same designated price category.

(2) *No requirement to release accessible tickets.* Nothing in this paragraph requires a facility to release tickets for accessible seating to individuals without disabilities for their own use.

(3) *Release of series-of-events tickets on a series-of-events basis.* (i) *Series-of-events tickets sell-out when no ownership rights are attached.* When series-of-events tickets are sold out and a public entity releases and sells accessible seating to individuals without disabilities for a series of events, the public entity shall establish a process that prevents the automatic reassignment of the accessible seating to such ticket holders for future seasons, future years, or future series so that individuals with disabilities who require the features of accessible seating and who become newly eligible to purchase tickets when these series-of-events tickets are available for purchase have an opportunity to do so.

(ii) *Series-of-events tickets when ownership rights are attached.* When series-of-events tickets with an ownership right in accessible seating areas are forfeited or otherwise returned to a public entity, the public entity shall make reasonable modifications in its policies, practices, or procedures to afford individuals with mobility disabilities or individuals with disabilities that require the features of accessible seating an opportunity to purchase such tickets in accessible seating areas.

(f) *Ticket transfer.* Individuals with disabilities who hold tickets for accessible seating shall be permitted to transfer tickets to third parties under the same terms and conditions and to the same extent as other spectators holding the same type of tickets, whether they are for a single event or series of events.

(g) *Secondary ticket market.* (1) A public entity shall modify its policies, practices, or procedures to ensure that an individual with a disability may use a ticket acquired in the secondary ticket market under the same terms and conditions as other individuals who hold a ticket acquired in the secondary ticket market for the same event or series of events.

(2) If an individual with a disability acquires a ticket or series of tickets to an inaccessible seat through the secondary market, a public entity shall make reasonable modifications to its policies, practices, or procedures to allow the individual to exchange his ticket for one to an accessible seat in a comparable location if accessible seating is vacant at the time the individual presents the ticket to the public entity.

(h) *Prevention of fraud in purchase of tickets for accessible seating.* A public entity may not require proof of disability, including, for example, a doctor's note, before selling tickets for accessible seating.

(1) *Single-event tickets.* For the sale of single-event tickets, it is permissible to inquire whether the individual purchasing the tickets for accessible seating has a mobility disability or a disability that requires the use of the accessible features that are provided in accessible seating, or is purchasing the tickets for an individual who has a mobility disability or a disability that requires the use of the accessible features that are provided in the accessible seating.

(2) *Series-of-events tickets.* For series-of-events tickets, it is permissible to ask the individual purchasing the tickets for accessible seating to attest in writing that the accessible seating is for a person who has a mobility disability or a disability that requires the use of the accessible features that are provided in the accessible seating.

(3) *Investigation of fraud.* A public entity may investigate the potential misuse of accessible seating where there is good cause to believe that such seating has been purchased fraudulently.

■ 8. Add § 35.139 to read as follows:

§ 35.139 Direct threat.

(a) This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.

(b) In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

Subpart D—Program Accessibility

■ 9. Amend § 35.150 as follows—

■ a. Redesignate paragraph (b)(2) as paragraph (b)(3),

■ b. Add the words "or acquisition" after the word "redesign" in the first sentence of paragraph (b)(1) and add new paragraph (b)(2) to read as follows:

§ 35.150 Existing facilities.

* * * * *

(b) * * *

(2)(i) *Safe harbor.* Elements that have not been altered in existing facilities on or after March 15, 2012 and that comply with the corresponding technical and scoping specifications for those elements in either the 1991 Standards or in the Uniform Federal Accessibility Standards (UFAS), Appendix A to 41 CFR part 101–19.6 (July 1, 2002 ed.), 49 FR 31528, app. A (Aug. 7, 1984) are not required to be modified in order to comply with the requirements set forth in the 2010 Standards.

(ii) The safe harbor provided in § 35.150(b)(2)(i) does not apply to those elements in existing facilities that are subject to supplemental requirements (*i.e.,* elements for which there are neither technical nor scoping specifications in the 1991 Standards). Elements in the 2010 Standards not eligible for the element-by-element safe harbor are identified as follows—

(A) *Residential facilities dwelling units,* sections 233 and 809.

(B) *Amusement rides,* sections 234 and 1002; 206.2.9; 216.12.

(C) *Recreational boating facilities,* sections 235 and 1003; 206.2.10.

(D) *Exercise machines and equipment,* sections 236 and 1004; 206.2.13.

(E) *Fishing piers and platforms,* sections 237 and 1005; 206.2.14.

(F) *Golf facilities,* sections 238 and 1006; 206.2.15.

(G) *Miniature golf facilities,* sections 239 and 1007; 206.2.16.

(H) *Play areas,* sections 240 and 1008; 206.2.17.

(I) *Saunas and steam rooms,* sections 241 and 612.

(J) *Swimming pools, wading pools, and spas,* sections 242 and 1009.

(K) *Shooting facilities with firing positions,* sections 243 and 1010.

(L) *Miscellaneous.*

(*1*) Team or player seating, section 221.2.1.4.

(2) Accessible route to bowling lanes, section 206.2.11.

(*3*) Accessible route in court sports facilities, section 206.2.12.

* * * * *

■ 10. Amend § 35.151 as follows—

a. Revise paragraphs (a) through (d),

b. Revise the heading of paragraph (c),

c. Redesignate paragraph (e) as paragraph (i), and

d. Add paragraphs (e), (f), (g), (h), (j), and (k), to read as follows:

§ 35.151 New construction and alterations.

(a) *Design and construction.* (1) Each facility or part of a facility constructed

by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.

(2) *Exception for structural impracticability.* (i) Full compliance with the requirements of this section is not required where a public entity can demonstrate that it is structurally impracticable to meet the requirements. Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features.

(ii) If full compliance with this section would be structurally impracticable, compliance with this section is required to the extent that it is not structurally impracticable. In that case, any portion of the facility that can be made accessible shall be made accessible to the extent that it is not structurally impracticable.

(iii) If providing accessibility in conformance with this section to individuals with certain disabilities (*e.g.,* those who use wheelchairs) would be structurally impracticable, accessibility shall nonetheless be ensured to persons with other types of disabilities, (*e.g.,* those who use crutches or who have sight, hearing, or mental impairments) in accordance with this section.

(b) *Alterations.* (1) Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.

(2) The path of travel requirements of § 35.151(b)(4) shall apply only to alterations undertaken solely for purposes other than to meet the program accessibility requirements of § 35.150.

(3)(i) Alterations to historic properties shall comply, to the maximum extent feasible, with the provisions applicable to historic properties in the design standards specified in § 35.151(c).

(ii) If it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the building or facility, alternative methods of access shall be provided pursuant to the requirements of § 35.150.

(4) *Path of travel.* An alteration that affects or could affect the usability of or access to an area of a facility that contains a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area and the restrooms, telephones, and drinking fountains serving the altered area are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the cost and scope of such alterations is disproportionate to the cost of the overall alteration.

(i) *Primary function.* A "primary function" is a major activity for which the facility is intended. Areas that contain a primary function include, but are not limited to, the dining area of a cafeteria, the meeting rooms in a conference center, as well as offices and other work areas in which the activities of the public entity using the facility are carried out.

(A) Mechanical rooms, boiler rooms, supply storage rooms, employee lounges or locker rooms, janitorial closets, entrances, and corridors are not areas containing a primary function. Restrooms are not areas containing a primary function unless the provision of restrooms is a primary purpose of the area, *e.g.,* in highway rest stops.

(B) For the purposes of this section, alterations to windows, hardware, controls, electrical outlets, and signage shall not be deemed to be alterations that affect the usability of or access to an area containing a primary function.

(ii) A "path of travel" includes a continuous, unobstructed way of pedestrian passage by means of which the altered area may be approached, entered, and exited, and which connects the altered area with an exterior approach (including sidewalks, streets, and parking areas), an entrance to the facility, and other parts of the facility.

(A) An accessible path of travel may consist of walks and sidewalks, curb ramps and other interior or exterior pedestrian ramps; clear floor paths through lobbies, corridors, rooms, and other improved areas; parking access aisles; elevators and lifts; or a combination of these elements.

(B) For the purposes of this section, the term "path of travel" also includes the restrooms, telephones, and drinking fountains serving the altered area.

(C) *Safe harbor.* If a public entity has constructed or altered required elements of a path of travel in accordance with the specifications in either the 1991 Standards or the Uniform Federal Accessibility Standards before March 15, 2012, the public entity is not required to retrofit such elements to reflect incremental changes in the 2010 Standards solely because of an alteration to a primary function area served by that path of travel.

(iii) *Disproportionality.* (A) Alterations made to provide an accessible path of travel to the altered area will be deemed disproportionate to the overall alteration when the cost exceeds 20% of the cost of the alteration to the primary function area.

(B) Costs that may be counted as expenditures required to provide an accessible path of travel may include:

(*1*) Costs associated with providing an accessible entrance and an accessible route to the altered area, for example, the cost of widening doorways or installing ramps;

(*2*) Costs associated with making restrooms accessible, such as installing grab bars, enlarging toilet stalls, insulating pipes, or installing accessible faucet controls;

(*3*) Costs associated with providing accessible telephones, such as relocating the telephone to an accessible height, installing amplification devices, or installing a text telephone (TTY); and

(*4*) Costs associated with relocating an inaccessible drinking fountain.

(iv) *Duty to provide accessible features in the event of disproportionality.* (A) When the cost of alterations necessary to make the path of travel to the altered area fully accessible is disproportionate to the cost of the overall alteration, the path of travel shall be made accessible to the extent that it can be made accessible without incurring disproportionate costs.

(B) In choosing which accessible elements to provide, priority should be given to those elements that will provide the greatest access, in the following order—

(*1*) An accessible entrance;

(*2*) An accessible route to the altered area;

(*3*) At least one accessible restroom for each sex or a single unisex restroom;

(*4*) Accessible telephones;

(*5*) Accessible drinking fountains; and

(*6*) When possible, additional accessible elements such as parking, storage, and alarms.

(v) *Series of smaller alterations.* (A) The obligation to provide an accessible path of travel may not be evaded by performing a series of small alterations to the area served by a single path of travel if those alterations could have been performed as a single undertaking.

(B)(*1*) If an area containing a primary function has been altered without providing an accessible path of travel to that area, and subsequent alterations of that area, or a different area on the same path of travel, are undertaken within three years of the original alteration, the total cost of alterations to the primary

function areas on that path of travel during the preceding three year period shall be considered in determining whether the cost of making that path of travel accessible is disproportionate.

(*2*) Only alterations undertaken on or after March 15, 2011 shall be considered in determining if the cost of providing an accessible path of travel is disproportionate to the overall cost of the alterations.

(c) *Accessibility standards and compliance date.* (1) If physical construction or alterations commence after July 26, 1992, but prior to the September 15, 2010, then new construction and alterations subject to this section must comply with either UFAS or the 1991 Standards except that the elevator exemption contained at section 4.1.3(5) and section 4.1.6(1)(k) of the 1991 Standards shall not apply. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(2) If physical construction or alterations commence on or after September 15, 2010 and before March 15, 2012, then new construction and alterations subject to this section may comply with one of the following: The 2010 Standards, UFAS, or the 1991 Standards except that the elevator exemption contained at section 4.1.3(5) and section 4.1.6(1)(k) of the 1991 Standards shall not apply. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(3) If physical construction or alterations commence on or after March 15, 2012, then new construction and alterations subject to this section shall comply with the 2010 Standards.

(4) For the purposes of this section, ceremonial groundbreaking or razing of structures prior to site preparation do not commence physical construction or alterations.

(5) *Noncomplying new construction and alterations.* (i) Newly constructed or altered facilities or elements covered by §§ 35.151(a) or (b) that were constructed or altered before March 15, 2012, and that do not comply with the 1991 Standards or with UFAS shall before March 15, 2012, be made accessible in accordance with either the 1991 Standards, UFAS, or the 2010 Standards.

(ii) Newly constructed or altered facilities or elements covered by §§ 35.151(a) or (b) that were constructed or altered before March 15, 2012 and that do not comply with the 1991 Standards or with UFAS shall, on or after March 15, 2012, be made accessible in accordance with the 2010 Standards.

APPENDIX TO § 35.151(C)

Compliance dates for new construction and alterations	Applicable standards
Before September 15, 2010.	1991 Standards or UFAS.
On or after September 15, 2010 and before March 15, 2012.	1991 Standards, UFAS, or 2010 Standards.
On or after March 15, 2012.	2010 Standards.

(d) *Scope of coverage.* The 1991 Standards and the 2010 Standards apply to fixed or built-in elements of buildings, structures, site improvements, and pedestrian routes or vehicular ways located on a site. Unless specifically stated otherwise, the advisory notes, appendix notes, and figures contained in the 1991 Standards and the 2010 Standards explain or illustrate the requirements of the rule; they do not establish enforceable requirements.

(e) *Social service center establishments.* Group homes, halfway houses, shelters, or similar social service center establishments that provide either temporary sleeping accommodations or residential dwelling units that are subject to this section shall comply with the provisions of the 2010 Standards applicable to residential facilities, including, but not limited to, the provisions in sections 233 and 809.

(1) In sleeping rooms with more than 25 beds covered by this section, a minimum of 5% of the beds shall have clear floor space complying with section 806.2.3 of the 2010 Standards.

(2) Facilities with more than 50 beds covered by this section that provide common use bathing facilities shall provide at least one roll-in shower with a seat that complies with the relevant provisions of section 608 of the 2010 Standards. Transfer-type showers are not permitted in lieu of a roll-in shower with a seat, and the exceptions in sections 608.3 and 608.4 for residential dwelling units are not permitted. When separate shower facilities are provided for men and for women, at least one roll-in shower shall be provided for each group.

(f) *Housing at a place of education.* Housing at a place of education that is subject to this section shall comply with the provisions of the 2010 Standards applicable to transient lodging, including, but not limited to, the requirements for transient lodging guest rooms in sections 224 and 806 subject to the following exceptions. For the purposes of the application of this section, the term "sleeping room" is intended to be used interchangeably with the term "guest room" as it is used in the transient lodging standards.

(1) Kitchens within housing units containing accessible sleeping rooms with mobility features (including suites and clustered sleeping rooms) or on floors containing accessible sleeping rooms with mobility features shall provide turning spaces that comply with section 809.2.2 of the 2010 Standards and kitchen work surfaces that comply with section 804.3 of the 2010 Standards.

(2) Multi-bedroom housing units containing accessible sleeping rooms with mobility features shall have an accessible route throughout the unit in accordance with section 809.2 of the 2010 Standards.

(3) Apartments or townhouse facilities that are provided by or on behalf of a place of education, which are leased on a year-round basis exclusively to graduate students or faculty, and do not contain any public use or common use areas available for educational programming, are not subject to the transient lodging standards and shall comply with the requirements for residential facilities in sections 233 and 809 of the 2010 Standards.

(g) *Assembly areas.* Assembly areas subject to this section shall comply with the provisions of the 2010 Standards applicable to assembly areas, including, but not limited to, sections 221 and 802. In addition, assembly areas shall ensure that—

(1) In stadiums, arenas, and grandstands, wheelchair spaces and companion seats are dispersed to all levels that include seating served by an accessible route;

(2) Assembly areas that are required to horizontally disperse wheelchair spaces and companion seats by section 221.2.3.1 of the 2010 Standards and have seating encircling, in whole or in part, a field of play or performance area shall disperse wheelchair spaces and companion seats around that field of play or performance area;

(3) Wheelchair spaces and companion seats are not located on (or obstructed by) temporary platforms or other movable structures, except that when an entire seating section is placed on temporary platforms or other movable structures in an area where fixed seating is not provided, in order to increase seating for an event, wheelchair spaces

and companion seats may be placed in that section. When wheelchair spaces and companion seats are not required to accommodate persons eligible for those spaces and seats, individual, removable seats may be placed in those spaces and seats;

(4) Stadium-style movie theaters shall locate wheelchair spaces and companion seats on a riser or cross-aisle in the stadium section that satisfies at least one of the following criteria—

(i) It is located within the rear 60% of the seats provided in an auditorium; or

(ii) It is located within the area of an auditorium in which the vertical viewing angles (as measured to the top of the screen) are from the 40th to the 100th percentile of vertical viewing angles for all seats as ranked from the seats in the first row (1st percentile) to seats in the back row (100th percentile).

(h) *Medical care facilities.* Medical care facilities that are subject to this section shall comply with the provisions of the 2010 Standards applicable to medical care facilities, including, but not limited to, sections 223 and 805. In addition, medical care facilities that do not specialize in the treatment of conditions that affect mobility shall disperse the accessible patient bedrooms required by section 223.2.1 of the 2010 Standards in a manner that is proportionate by type of medical specialty.

* * * * *

(j) *Facilities with residential dwelling units for sale to individual owners.* (1) Residential dwelling units designed and constructed or altered by public entities that will be offered for sale to individuals shall comply with the requirements for residential facilities in the 2010 Standards, including sections 233 and 809.

(2) The requirements of paragraph (1) also apply to housing programs that are operated by public entities where design and construction of particular residential dwelling units take place only after a specific buyer has been identified. In such programs, the covered entity must provide the units that comply with the requirements for accessible features to those pre-identified buyers with disabilities who have requested such a unit.

(k) *Detention and correctional facilities.* (1) New construction of jails, prisons, and other detention and correctional facilities shall comply with the 2010 Standards except that public entities shall provide accessible mobility features complying with section 807.2 of the 2010 Standards for a minimum of 3%, but no fewer than one, of the total number of cells in a facility. Cells with mobility features shall be provided in each classification level.

(2) *Alterations to detention and correctional facilities.* Alterations to jails, prisons, and other detention and correctional facilities shall comply with the 2010 Standards except that public entities shall provide accessible mobility features complying with section 807.2 of the 2010 Standards for a minimum of 3%, but no fewer than one, of the total number of cells being altered until at least 3%, but no fewer than one, of the total number of cells in a facility shall provide mobility features complying with section 807.2. Altered cells with mobility features shall be provided in each classification level. However, when alterations are made to specific cells, detention and correctional facility operators may satisfy their obligation to provide the required number of cells with mobility features by providing the required mobility features in substitute cells (cells other than those where alterations are originally planned), provided that each substitute cell—

(i) Is located within the same prison site;

(ii) Is integrated with other cells to the maximum extent feasible;

(iii) Has, at a minimum, equal physical access as the altered cells to areas used by inmates or detainees for visitation, dining, recreation, educational programs, medical services, work programs, religious services, and participation in other programs that the facility offers to inmates or detainees; and

(iv) If it is technically infeasible to locate a substitute cell within the same prison site, a substitute cell must be provided at another prison site within the corrections system.

(3) With respect to medical and long-term care facilities in jails, prisons, and other detention and correctional facilities, public entities shall apply the 2010 Standards technical and scoping requirements for those facilities irrespective of whether those facilities are licensed.

■ 11. Add § 35.152 to read as follows:

§ 35.152 Jails, detention and correctional facilities, and community correctional facilities.

(a) *General.* This section applies to public entities that are responsible for the operation or management of adult and juvenile justice jails, detention and correctional facilities, and community correctional facilities, either directly or through contractual, licensing, or other arrangements with public or private entities, in whole or in part, including private correctional facilities.

(b) *Discrimination prohibited.* (1) Public entities shall ensure that qualified inmates or detainees with disabilities shall not, because a facility is inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of, the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(2) Public entities shall ensure that inmates or detainees with disabilities are housed in the most integrated setting appropriate to the needs of the individuals. Unless it is appropriate to make an exception, a public entity—

(i) Shall not place inmates or detainees with disabilities in inappropriate security classifications because no accessible cells or beds are available;

(ii) Shall not place inmates or detainees with disabilities in designated medical areas unless they are actually receiving medical care or treatment;

(iii) Shall not place inmates or detainees with disabilities in facilities that do not offer the same programs as the facilities where they would otherwise be housed; and

(iv) Shall not deprive inmates or detainees with disabilities of visitation with family members by placing them in distant facilities where they would not otherwise be housed.

(3) Public entities shall implement reasonable policies, including physical modifications to additional cells in accordance with the 2010 Standards, so as to ensure that each inmate with a disability is housed in a cell with the accessible elements necessary to afford the inmate access to safe, appropriate housing.

Subpart E—Communications

■ 12. Amend § 35.160 by revising paragraphs (a) and (b), and adding paragraphs (c) and (d) to read as follows:

§ 35.160 General.

(a)(1) A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.

(2) For purposes of this section, "companion" means a family member, friend, or associate of an individual seeking access to a service, program, or activity of a public entity, who, along with such individual, is an appropriate person with whom the public entity should communicate.

(b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.

(2) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

(c)(1) A public entity shall not require an individual with a disability to bring another individual to interpret for him or her.

(2) A public entity shall not rely on an adult accompanying an individual with a disability to interpret or facilitate communication except—

(i) In an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available; or

(ii) Where the individual with a disability specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.

(3) A public entity shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.

(d) *Video remote interpreting (VRI) services.* A public entity that chooses to provide qualified interpreters via VRI services shall ensure that it provides—

(1) Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;

(2) A sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers, and the participating individual's face, arms, hands, and fingers, regardless of his or her body position;

(3) A clear, audible transmission of voices; and

(4) Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI.

■ 13. Revise § 35.161 to read as follows:

§ 35.161 Telecommunications.

(a) Where a public entity communicates by telephone with applicants and beneficiaries, text telephones (TTYs) or equally effective telecommunications systems shall be used to communicate with individuals who are deaf or hard of hearing or have speech impairments.

(b) When a public entity uses an automated-attendant system, including, but not limited to, voicemail and messaging, or an interactive voice response system, for receiving and directing incoming telephone calls, that system must provide effective real-time communication with individuals using auxiliary aids and services, including TTYs and all forms of FCC-approved telecommunications relay systems, including Internet-based relay systems.

(c) A public entity shall respond to telephone calls from a telecommunications relay service established under title IV of the ADA in the same manner that it responds to other telephone calls.

Subpart F—Compliance Procedures

■ 14. Amend § 35.171 by revising paragraph (a)(2) to read as follows:

§ 35.171 Acceptance of complaints.

(a) * * *

(2)(i) If an agency other than the Department of Justice determines that it does not have section 504 jurisdiction and is not the designated agency, it shall promptly refer the complaint to the appropriate designated agency, the agency that has section 504 jurisdiction, or the Department of Justice, and so notify the complainant.

(ii) When the Department of Justice receives a complaint for which it does not have jurisdiction under section 504 and is not the designated agency, it may exercise jurisdiction pursuant to § 35.190(e) or refer the complaint to an agency that does have jurisdiction under section 504 or to the appropriate agency designated in subpart G of this part or, in the case of an employment complaint that is also subject to title I of the Act, to the Equal Employment Opportunity Commission.

* * * * *

■ 15. Revise § 35.172 to read as follows:

§ 35.172 Investigations and compliance reviews.

(a) The designated agency shall investigate complaints for which it is responsible under § 35.171.

(b) The designated agency may conduct compliance reviews of public entities in order to ascertain whether there has been a failure to comply with the nondiscrimination requirements of this part.

(c) Where appropriate, the designated agency shall attempt informal resolution of any matter being investigated under this section, and, if resolution is not achieved and a violation is found, issue to the public entity and the complainant, if any, a Letter of Findings that shall include—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found (including compensatory damages where appropriate); and

(3) Notice of the rights and procedures available under paragraph (d) of this section and §§ 35.173 and 35.174.

(d) At any time, the complainant may file a private suit pursuant to section 203 of the Act, 42 U.S.C. 12133, whether or not the designated agency finds a violation.

Subpart G—Designated Agencies

■ 16. Amend § 35.190 by adding paragraph (e) to read as follows:

§ 35.190 Designated Agencies.

* * * * *

(e) When the Department receives a complaint directed to the Attorney General alleging a violation of this part that may fall within the jurisdiction of a designated agency or another Federal agency that may have jurisdiction under section 504, the Department may exercise its discretion to retain the complaint for investigation under this part.

■ 17. Redesignate Appendix A to part 35 as Appendix B to part 35 and add Appendix A to read as follows:

Appendix A to Part 35—Guidance to Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services

Note: This Appendix contains guidance providing a section-by-section analysis of the revisions to 28 CFR part 35 published on September 15, 2010.

Section-By-Section Analysis and Response to Public Comments

This section provides a detailed description of the Department's changes to the title II regulation, the reasoning behind those changes, and responses to public comments received on these topics. The Section-by-Section Analysis follows the order of the title II regulation itself, except that, if the Department has not changed a regulatory section, the unchanged section has not been mentioned.

Subpart A—General

Section 35.104 Definitions.

"1991 Standards" and "2004 ADAAG"

The Department has included in the final rule new definitions of both the "1991 Standards" and the "2004 ADAAG." The term "1991 Standards" refers to the ADA Standards for Accessible Design, originally published on July 26, 1991, and republished as Appendix D to part 36. The term "2004 ADAAG" refers to ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the Americans with Disabilities Act and Architectural Barriers Act Accessibility Guidelines, which were issued by the Access Board on July 23, 2004, 36 CFR 1191, app. B and D (2009), and which the Department has adopted in this final rule. These terms are included in the definitions section for ease of reference.

"2010 Standards"

The Department has added to the final rule a definition of the term "2010 Standards." The term "2010 Standards" refers to the 2010 ADA Standards for Accessible Design, which consist of the 2004 ADAAG and the requirements contained in § 35.151.

"Auxiliary Aids and Services"

In the NPRM, the Department proposed revisions to the definition of auxiliary aids and services under § 35.104 to include several additional types of auxiliary aids that have become more readily available since the promulgation of the 1991 title II regulation, and in recognition of new technology and devices available in some places that may provide effective communication in some situations.

The NPRM proposed adding an explicit reference to written notes in the definition of "auxiliary aids." Although this policy was already enunciated in the Department's 1993 Title II Technical Assistance Manual at II–7.1000, the Department proposed inclusion in the regulation itself because some Title II entities do not understand that exchange of written notes using paper and pencil is an available option in some circumstances. *See* Department of Justice, *The Americans with Disabilities Act, Title II Technical Assistance Manual Covering State and Local Government Programs and Services* (1993), available at *http://www.ada.gov/taman2.html.* Comments from several disability advocacy organizations and individuals discouraged the Department from including the exchange of written notes in the list of available auxiliary aids in § 35.104. Advocates and persons with disabilities requested explicit limits on the use of written notes as a form of auxiliary aid because, they argue, most exchanges are not simple and are not communicated effectively using handwritten notes. One major advocacy organization, for example, noted that the speed at which individuals communicate orally or use sign language averages about 200 words per minute or more while exchange of notes often leads to truncated or incomplete communication. For persons whose primary language is American Sign Language (ASL), some commenters pointed out, using written English in exchange of notes often is ineffective because ASL syntax and vocabulary is dissimilar from English. By contrast, some commenters from professional medical associations sought more specific guidance on when notes are allowed, especially in the context of medical offices and health care situations.

Exchange of notes likely will be effective in situations that do not involve substantial conversation, for example, blood work for routine lab tests or regular allergy shots. Video Interpreting Services (hereinafter referred to as "video remote interpreting services" or VRI) or an interpreter should be used when the matter involves greater complexity, such as in situations requiring communication of medical history or diagnoses, in conversations about medical procedures and treatment decisions, or when giving instructions for care at home or elsewhere. In the Section-By-Section Analysis of § 35.160 (Communications) below, the Department discusses in greater detail the kinds of situations in which interpreters or captioning would be necessary. Additional guidance on this issue can be found in a number of agreements entered into with health-care providers and hospitals that are available on the Department's Web site at *http://www.ada.gov.*

In the NPRM, in paragraph (1) of the definition in § 35.104, the Department proposed replacing the term "telecommunications devices for deaf persons (TDD)" with the term "text telephones (TTYs)." TTY has become the commonly accepted term and is consistent with the terminology used by the Access Board in the 2004 ADAAG. Commenters representing advocates and persons with disabilities expressed approval of the substitution of TTY for TDD in the proposed regulation.

Commenters also expressed the view that the Department should expand paragraph (1) of the definition of auxiliary aids to include "TTY's and other voice, text, and video-based telecommunications products and systems such as videophones and captioned telephones." The Department has considered these comments and has revised the definition of "auxiliary aids" to include references to voice, text, and video-based telecommunications products and systems, as well as accessible electronic and information technology.

In the NPRM, the Department also proposed including a reference in paragraph (1) to a new technology, Video Interpreting Services (VIS). The reference remains in the final rule. VIS is discussed in the Section-By-Section Analysis below in reference to § 35.160 (Communications), but is referred to as VRI in both the final rule and Appendix A to more accurately reflect the terminology used in other regulations and among users of the technology.

In the NPRM, the Department noted that technological advances in the 18 years since the ADA's enactment had increased the range of auxiliary aids and services for those who are blind or have low vision. As a result the Department proposed additional examples to paragraph (2) of the definition, including Brailled materials and displays, screen reader software, optical readers, secondary auditory programs (SAP), and accessible electronic and information technology. Some commenters asked for more detailed requirements for auxiliary aids for persons with vision disabilities. The Department has decided it will not make additional changes to that provision at this time.

Several comments suggested expanding the auxiliary aids provision for persons who are both deaf and blind, and in particular, to include in the list of auxiliary aids a new category, "support service providers (SSP)," which was described in comments as a navigator and communication facilitator. The Department believes that services provided by communication facilitators are already encompassed in the requirement to provide qualified interpreters. Moreover, the Department is concerned that as described by the commenters, the category of support service providers would include some services that would be considered personal services and that do not qualify as auxiliary aids. Accordingly, the Department declines to add this new category to the list at this time.

Some commenters representing advocacy organizations and individuals asked the Department to explicitly require title II entities to make any or all of the devices or technology available in all situations upon the request of the person with a disability. The Department recognizes that such devices or technology may provide effective communication and in some circumstances may be effective for some persons, but the Department does not intend to require that every entity covered by title II provide every device or all new technology at all times as long as the communication that is provided is as effective as communication with others. The Department recognized in the preamble to the 1991 title II regulation that the list of auxiliary aids was "not an all-inclusive or exhaustive catalogue of possible or available auxiliary aids or services. It is not possible to provide an exhaustive list, and an attempt to do so would omit the new devices that will become available with emerging technology." 28 CFR part 35, app. A at 560 (2009). The Department continues to endorse that view; thus, the inclusion of a list of examples of possible auxiliary aids in the definition of "auxiliary aids" should not be read as a mandate for a title II entity to offer every possible auxiliary aid listed in the definition in every situation.

"Direct Threat"

In Appendix A of the Department's 1991 title II regulation, the Department included a detailed discussion of "direct threat" that, among other things, explained that "the

principles established in § 36.208 of the Department's [title III] regulation" were "applicable" as well to title II, insofar as "questions of safety are involved." 28 CFR part 35, app. A at 565 (2009). In the final rule, the Department has included an explicit definition of "direct threat" that is parallel to the definition in the title III rule and placed it in the definitions section at § 35.104.

"Existing Facility"

The 1991 title II regulation provided definitions for "new construction" at § 35.151(a) and "alterations" at § 35.151(b). In contrast, the term "existing facility" was not explicitly defined, although it is used in the statute and regulations for title II. *See* 42 U.S.C. 12134(b); 28 CFR 35.150. It has been the Department's view that newly constructed or altered facilities are also existing facilities with continuing program access obligations, and that view is made explicit in this rule.

The classification of facilities under the ADA is neither static nor mutually exclusive. Newly constructed or altered facilities are also existing facilities. A newly constructed facility remains subject to the accessibility standards in effect at the time of design and construction, with respect to those elements for which, at that time, there were applicable ADA Standards. And at some point, the facility may undergo alterations, which are subject to the alterations requirements in effect at the time. *See* § 35.151(b)–(c). The fact that the facility is also an existing facility does not relieve the public entity of its obligations under the new construction and alterations requirements in this part.

For example, a facility constructed or altered after the effective date of the original title II regulations but prior to the effective date of the revised title II regulation and Standards, must have been built or altered in compliance with the Standards (or UFAS) in effect at that time, in order to be in compliance with the ADA. In addition, a "newly constructed" facility or "altered" facility is also an "existing facility" for purposes of application of the title II program accessibility requirements. Once the 2010 Standards take effect, they will become the new reference point for determining the program accessibility obligations of all existing facilities. This is because the ADA contemplates that as our knowledge and understanding of accessibility advances and evolves, this knowledge will be incorporated into and result in increased accessibility in the built environment. Under title II, this goal is accomplished through the statute's program access framework. While newly constructed or altered facilities must meet the accessibility standards in effect at the time, the fact that these facilities are also existing facilities ensures that the determination of whether a program is accessible is not frozen at the time of construction or alteration. Program access may require consideration of potential barriers to access that were not recognized as such at the time of construction or alteration, including, but not limited to, the elements that are first covered in the 2010 Standards, as that term is defined in § 35.104. Adoption of the 2010 Standards establishes a new reference point for title II entities that choose to make structural changes to existing facilities to meet their program access requirements.

The NPRM included the following proposed definition of "existing facility." "A facility that has been constructed and remains in existence on any given date." 73 FR 34466, 34504 (June 17, 2008). The Department received a number of comments on this issue. The commenters urged the Department to clarify that all buildings remain subject to the standards in effect at the time of their construction, that is, that a facility designed and constructed for first occupancy between January 26, 1992, and the effective date of the final rule is still considered "new construction" and that alterations occurring between January 26, 1992, and the effective date of the final rule are still considered "alterations."

The final rule includes clarifying language to ensure that the Department's interpretation is accurately reflected. As established by this rule, existing facility means a facility in existence on any given date, without regard to whether the facility may also be considered newly constructed or altered under this part. Thus, this definition reflects the Department's interpretation that public entities have program access requirements that are independent of, but may coexist with, requirements imposed by new construction or alteration requirements in those same facilities.

"Housing at a Place of Education"

The Department has added a new definition to § 35.104, "housing at a place of education," to clarify the types of educational housing programs that are covered by this title. This section defines "housing at a place of education" as "housing operated by or on behalf of an elementary, secondary, undergraduate, or postgraduate school, or other place of education, including dormitories, suites, apartments, or other places of residence." This definition does not apply to social service programs that combine residential housing with social services, such as a residential job training program.

"Other Power-Driven Mobility Device" and "Wheelchair"

Because relatively few individuals with disabilities were using nontraditional mobility devices in 1991, there was no pressing need for the 1991 title II regulation to define the terms "wheelchair" or "other power-driven mobility device," to expound on what would constitute a reasonable modification in policies, practices, or procedures under § 35.130(b)(7), or to set forth within that section specific requirements for the accommodation of mobility devices. Since the issuance of the 1991 title II regulation, however, the choices of mobility devices available to individuals with disabilities have increased dramatically. The Department has received complaints about and has become aware of situations where individuals with mobility disabilities have utilized devices that are not designed primarily for use by an individual with a mobility disability, including the Segway® Personal Transporter (Segway® PT), golf cars, all-terrain vehicles (ATVs), and other locomotion devices.

The Department also has received questions from public entities and individuals with mobility disabilities concerning which mobility devices must be accommodated and under what circumstances. Indeed, there has been litigation concerning the legal obligations of covered entities to accommodate individuals with mobility disabilities who wish to use an electronic personal assistance mobility device (EPAMD), such as the Segway® PT, as a mobility device. The Department has participated in such litigation as *amicus curiae. See Ault* v. *Walt Disney World Co.,* No. 6:07–cv–1785–Orl–31KRS, 2009 WL 3242028 (M.D. Fla. Oct. 6, 2009). Much of the litigation has involved shopping malls where businesses have refused to allow persons with disabilities to use EPAMDs. *See, e.g., McElroy* v. *Simon Property Group,* No. 08–404 RDR, 2008 WL 4277716 (D. Kan. Sept. 15, 2008) (enjoining mall from prohibiting the use of a Segway® PT as a mobility device where an individual agrees to all of a mall's policies for use of the device, except indemnification); Shasta Clark, *Local Man Fighting Mall Over Right to Use Segway,* WATE 6 News, July 26, 2005, available at *http://www.wate.com/Global/story.asp?s=3643674* (last visited June 24, 2010).

In response to questions and complaints from individuals with disabilities and covered entities concerning which mobility devices must be accommodated and under what circumstances, the Department began developing a framework to address the use of unique mobility devices, concerns about their safety, and the parameters for the circumstances under which these devices must be accommodated. As a result, the Department's NPRM proposed two new approaches to mobility devices. First, the Department proposed a two-tiered mobility device definition that defined the term "wheelchair" separately from "other power-driven mobility device." Second, the Department proposed requirements to allow the use of devices in each definitional category. In § 35.137(a), the NPRM proposed that wheelchairs and manually-powered mobility aids used by individuals with mobility disabilities shall be permitted in any areas open to pedestrian use. Section 35.137(b) of the NPRM provided that a public entity "shall make reasonable modifications in its policies, practices, and procedures to permit the use of other power-driven mobility devices by individuals with disabilities, unless the public entity can demonstrate that the use of the device is not reasonable or that its use will result in a fundamental alteration of the public entity's service, program, or activity." 73 FR 34466, 34504 (June 17, 2008).

The Department sought public comment with regard to whether these steps would, in fact, achieve clarity on these issues. Toward this end, the Department's NPRM asked several questions relating to the definitions of "wheelchair," "other power-driven mobility device," and "manually-powered mobility aids"; the best way to categorize different classes of mobility devices; the types of devices that should be included in each category; and the circumstances under which

certain mobility devices must be accommodated or may be excluded pursuant to the policy adopted by the public entity.

Because the questions in the NPRM that concerned mobility devices and their accommodation were interrelated, many of the commenters' responses did not identify the specific question to which they were responding. Instead, the commenters grouped the questions together and provided comments accordingly. Most commenters spoke to the issues addressed in the Department's questions in broad terms and general concepts. As a result, the responses to the questions posed are discussed below in broadly grouped issue categories rather than on a question-by-question basis.

Two-tiered definitional approach. Commenters supported the Department's proposal to use a two-tiered definition of mobility device. Commenters nearly universally said that wheelchairs always should be accommodated and that they should never be subject to an assessment with regard to their admission to a particular public facility. In contrast, the vast majority of commenters indicated they were in favor of allowing public entities to conduct an assessment as to whether, and under which circumstances, other power-driven mobility devices would be allowed on-site.

Many commenters indicated their support for the two-tiered approach in responding to questions concerning the definition of "wheelchair" and "other-powered mobility device." Nearly every disability advocacy group said that the Department's two-tiered approach strikes the proper balance between ensuring access for individuals with disabilities and addressing fundamental alteration and safety concerns held by public entities; however, a minority of disability advocacy groups wanted other power-driven mobility devices to be included in the definition of "wheelchair." Most advocacy, nonprofit, and individual commenters supported the concept of a separate definition for "other power-driven mobility device" because it maintains existing legal protections for wheelchairs while recognizing that some devices that are not designed primarily for individuals with mobility disabilities have beneficial uses for individuals with mobility disabilities. They also favored this concept because it recognizes technological developments and that the innovative uses of varying devices may provide increased access to individuals with mobility disabilities.

Many environmental, transit system, and government commenters indicated they opposed in its entirety the concept of "other power-driven mobility devices" as a separate category. They believe that the creation of a second category of mobility devices will mean that other power-driven mobility devices, specifically ATVs and off-highway vehicles, must be allowed to go anywhere on national park lands, trails, recreational areas, etc.; will conflict with other Federal land management laws and regulations; will harm the environment and natural and cultural resources; will pose safety risks to users of these devices, as well as to pedestrians not expecting to encounter motorized devices in these settings; will interfere with the recreational enjoyment of these areas; and will require too much administrative work to regulate which devices are allowed and under which circumstances. These commenters all advocated a single category of mobility devices that excludes all fuel-powered devices.

Whether or not they were opposed to the two-tier approach in its entirety, virtually every environmental commenter and most government commenters associated with providing public transportation services or protecting land, natural resources, fish and game, etc., said that the definition of "other power-driven mobility device" is too broad. They suggested that they might be able to support the dual category approach if the definition of "other power-driven mobility device" were narrowed. They expressed general and program-specific concerns about permitting the use of other power-driven mobility devices. They noted the same concerns as those who opposed the two-tiered concept—that these devices create a host of environmental, safety, cost, administrative and conflict of law issues. Virtually all of these commenters indicated that their support for the dual approach and the concept of other power-driven mobility devices is, in large measure, due to the other power-driven mobility device assessment factors in § 35.137(c) of the NPRM.

By maintaining the two-tiered approach to mobility devices and defining "wheelchair" separately from "other power-driven mobility device," the Department is able to preserve the protection users of traditional wheelchairs and other manually powered mobility aids have had since the ADA was enacted, while also recognizing that human ingenuity, personal choice, and new technologies have led to the use of devices that may be more beneficial for individuals with certain mobility disabilities.

Moreover, the Department believes the two-tiered approach gives public entities guidance to follow in assessing whether reasonable modifications can be made to permit the use of other power-driven mobility devices on-site and to aid in the development of policies describing the circumstances under which persons with disabilities may use such devices. The two-tiered approach neither mandates that all other power-driven mobility devices be accommodated in every circumstance, nor excludes these devices. This approach, in conjunction with the factor assessment provisions in § 35.137(b)(2), will serve as a mechanism by which public entities can evaluate their ability to accommodate other power-driven mobility devices. As will be discussed in more detail below, the assessment factors in § 35.137(b)(2) are designed to provide guidance to public entities regarding whether it is appropriate to bar the use of a specific "other power-driven mobility device in a specific facility. In making such a determination, a public entity must consider the device's type, size, weight, dimensions, and speed; the facility's volume of pedestrian traffic; the facility's design and operational characteristics; whether the device conflicts with legitimate safety requirements; and whether the device poses a substantial risk of serious harm to the immediate environment or natural or cultural resources, or conflicts with Federal land management laws or regulations. In addition, if under § 35.130(b)(7), the public entity claims that it cannot make reasonable modifications to its policies, practices, or procedures to permit the use of other power-driven mobility devices by individuals with disabilities, the burden of proof to demonstrate that such devices cannot be operated in accordance with legitimate safety requirements rests upon the public entity.

Categorization of wheelchair versus other power-driven mobility devices. Implicit in the creation of the two-tiered mobility device concept is the question of how to categorize which devices are wheelchairs and which are other power-driven mobility devices. Finding weight and size to be too restrictive, the vast majority of advocacy, nonprofit, and individual commenters opposed using the Department of Transportation's definition of "common wheelchair" to designate the mobility device's appropriate category. Commenters who generally supported using weight and size as the method of categorization did so because of their concerns about potentially detrimental impacts on the environment and cultural and natural resources; on the enjoyment of the facility by other recreational users, as well as their safety; on the administrative components of government agencies required to assess which devices are appropriate on narrow, steeply sloped, or foot-and-hoof only trails; and about the impracticality of accommodating such devices in public transportation settings.

Many environmental, transit system, and government commenters also favored using the device's intended-use to categorize which devices constitute wheelchairs and which are other power-driven mobility devices. Furthermore, the intended-use determinant received a fair amount of support from advocacy, nonprofit, and individual commenters, either because they sought to preserve the broad accommodation of wheelchairs or because they sympathized with concerns about individuals without mobility disabilities fraudulently bringing other power-driven mobility devices into public facilities.

Commenters seeking to have the Segway® PT included in the definition of "wheelchair" objected to classifying mobility devices on the basis of their intended use because they felt that such a classification would be unfair and prejudicial to Segway® PT users and would stifle personal choice, creativity, and innovation. Other advocacy and nonprofit commenters objected to employing an intended-use approach because of concerns that the focus would shift to an assessment of the device, rather than the needs or benefits to the individual with the mobility disability. They were of the view that the mobility-device classification should be based on its function—whether it is used for a mobility disability. A few commenters raised the concern that an intended-use approach might embolden public entities to assess whether an individual with a mobility disability really needs to use the other power-driven mobility device at issue or to question why a wheelchair would not

provide sufficient mobility. Those citing objections to the intended use determinant indicated it would be more appropriate to make the categorization determination based on whether the device is being used for a mobility disability in the context of the impact of its use in a specific environment. Some of these commenters preferred this approach because it would allow the Segway® PT to be included in the definition of "wheelchair."

Many environmental and government commenters were inclined to categorize mobility devices by the way in which they are powered, such as battery-powered engines versus fuel or combustion engines. One commenter suggested using exhaust level as the determinant. Although there were only a few commenters who would make the determination based on indoor or outdoor use, there was nearly universal support for banning the indoor use of devices that are powered by fuel or combustion engines.

A few commenters thought it would be appropriate to categorize the devices based on their maximum speed. Others objected to this approach, stating that circumstances should dictate the appropriate speed at which mobility devices should be operated—for example, a faster speed may be safer when crossing streets than it would be for sidewalk use—and merely because a device can go a certain speed does not mean it will be operated at that speed.

The Department has decided to maintain the device's intended use as the appropriate determinant for which devices are categorized as "wheelchairs." However, because wheelchairs may be intended for use by individuals who have temporary conditions affecting mobility, the Department has decided that it is more appropriate to use the phrase "primarily designed" rather than "solely designed" in making such categorizations. The Department will not foreclose any future technological developments by identifying or banning specific devices or setting restrictions on size, weight, or dimensions. Moreover, devices designed primarily for use by individuals with mobility disabilities often are considered to be medical devices and are generally eligible for insurance reimbursement on this basis. Finally, devices designed primarily for use by individuals with mobility disabilities are less subject to fraud concerns because they were not designed to have a recreational component. Consequently, rarely, if ever, is any inquiry or assessment as to their appropriateness for use in a public entity necessary.

Definition of "wheelchair." In seeking public feedback on the NPRM's definition of "wheelchair," the Department explained its concern that the definition of "wheelchair" in section 508(c)(2) of the ADA (formerly section 507(c)(2), July 26, 1990, 104 Stat. 372, 42 U.S.C. 12207, renumbered section 508(c)(2), Public Law 110–325 section 6(a)(2), Sept. 25, 2008, 122 Stat. 3558), which pertains to Federal wilderness areas, is not specific enough to provide clear guidance in the array of settings covered by title II and that the stringent size and weight requirements for the Department of Transportation's definition of "common wheelchair" are not a good fit in the context of most public entities. The Department noted in the NPRM that it sought a definition of "wheelchair" that would include manually-operated and power-driven wheelchairs and mobility scooters (*i.e.,* those that typically are single-user, have three to four wheels, and are appropriate for both indoor and outdoor pedestrian areas), as well as a variety of types of wheelchairs and mobility scooters with individualized or unique features or models with different numbers of wheels. The NPRM defined a wheelchair as "a device designed solely for use by an individual with a mobility impairment for the primary purpose of locomotion in typical indoor and outdoor pedestrian areas. A wheelchair may be manually-operated or power-driven." 73 FR 34466, 34479 (June 17, 2008). Although the NPRM's definition of "wheelchair" excluded mobility devices that are not designed solely for use by individuals with mobility disabilities, the Department, noting that the use of the Segway® PT by individuals with mobility disabilities is on the upswing, inquired as to whether this device should be included in the definition of "wheelchair."

Many environment and Federal government employee commenters objected to the Department's proposed definition of "wheelchair" because it differed from the definition of "wheelchair" found in section 508(c)(2) of the ADA—a definition used in the statute only in connection with a provision relating to the use of a wheelchair in a designated wilderness area. *See* 42 U.S.C. 12207(c)(1). Other government commenters associated with environmental issues wanted the phrase "outdoor pedestrian use" eliminated from the definition of "wheelchair." Some transit system commenters wanted size, weight, and dimensions to be part of the definition because of concerns about costs associated with having to accommodate devices that exceed the dimensions of the "common wheelchair" upon which the 2004 ADAAG was based.

Many advocacy, nonprofit, and individual commenters indicated that as long as the Department intends the scope of the term "mobility impairments" to include other disabilities that cause mobility impairments (*e.g.,* respiratory, circulatory, stamina, etc.), they were in support of the language. Several commenters indicated a preference for the definition of "wheelchair" in section 508(c)(2) of the ADA. One commenter indicated a preference for the term "assistive device," as it is defined in the Rehabilitation Act of 1973, over the term "wheelchair." A few commenters indicated that strollers should be added to the preamble's list of examples of wheelchairs because parents of children with disabilities frequently use strollers as mobility devices until their children get older.

In the final rule, the Department has rearranged some wording and has made some changes in the terminology used in the definition of "wheelchair," but essentially has retained the definition, and therefore the rationale, that was set forth in the NPRM. Again, the text of the ADA makes the definition of "wheelchair" contained in section 508(c)(2) applicable only to the specific context of uses in designated wilderness areas, and therefore does not compel the use of that definition for any other purpose. Moreover, the Department maintains that limiting the definition to devices suitable for use in an "indoor pedestrian area" as provided for in section 508(c)(2) of the ADA, would ignore the technological advances in wheelchair design that have occurred since the ADA went into effect and that the inclusion of the phrase "indoor pedestrian area" in the definition of "wheelchair" would set back progress made by individuals with mobility disabilities who, for many years now, have been using devices designed for locomotion in indoor *and* outdoor settings. The Department has concluded that same rationale applies to placing limits on the size, weight, and dimensions of wheelchairs.

With regard to the term "mobility impairments," the Department intended a broad reading so that a wide range of disabilities, including circulatory and respiratory disabilities, that make walking difficult or impossible, would be included. In response to comments on this issue, the Department has revisited the issue and has concluded that the most apt term to achieve this intent is "mobility disability."

In addition, the Department has decided that it is more appropriate to use the phrase "primarily" designed for use by individuals with disabilities in the final rule, rather than "solely" designed for use by individuals with disabilities—the phrase proposed in the NPRM. The Department believes that this phrase more accurately covers the range of devices the Department intends to fall within the definition of "wheelchair."

After receiving comments that the word "typical" is vague and the phrase "pedestrian areas" is confusing to apply, particularly in the context of similar, but not identical, terms used in the proposed Standards, the Department decided to delete the term "typical indoor and outdoor pedestrian areas" from the final rule. Instead, the final rule references "indoor or of both indoor and outdoor locomotion," to make clear that the devices that fall within the definition of "wheelchair" are those that are used for locomotion on indoor and outdoor pedestrian paths or routes and not those that are intended exclusively for traversing undefined, unprepared, or unimproved paths or routes. Thus, the final rule defines the term "wheelchair" to mean "a manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor or of both indoor and outdoor locomotion."

Whether the definition of "wheelchair" includes the Segway® PT. As discussed above, because individuals with mobility disabilities are using the Segway® PT as a mobility device, the Department asked whether it should be included in the definition of "wheelchair." The basic Segway® PT model is a two-wheeled, gyroscopically-stabilized, battery-powered personal transportation device. The user stands on a platform suspended three inches

off the ground by wheels on each side, grasps a T-shaped handle, and steers the device similarly to a bicycle. Most Segway® PTs can travel up to 12½ miles per hour, compared to the average pedestrian walking speed of three to four miles per hour and the approximate maximum speed for power-operated wheelchairs of six miles per hour. In a study of trail and other non-motorized transportation users including EPAMDs, the Federal Highway Administration (FHWA) found that the eye height of individuals using EPAMDs ranged from approximately 69 to 80 inches. *See* Federal Highway Administration, *Characteristics of Emerging Road and Trail Users and Their Safety* (Oct. 14, 2004), available at *http://www.tfhrc.gov/safety/pubs/04103* (last visited June 24, 2010). Thus, the Segway® PT can operate at much greater speeds than wheelchairs, and the average user stands much taller than most wheelchair users.

The Segway® PT has been the subject of debate among users, pedestrians, disability advocates, State and local governments, businesses, and bicyclists. The fact that the Segway® PT is not designed primarily for use by individuals with disabilities, nor used primarily by persons with disabilities, complicates the question of to what extent individuals with disabilities should be allowed to operate them in areas and facilities where other power-driven mobility devices are not allowed. Those who question the use of the Segway® PT in pedestrian areas argue that the speed, size, and operating features of the devices make them too dangerous to operate alongside pedestrians and wheelchair users.

Comments regarding whether to include the Segway® PT in the definition of "wheelchair" were, by far, the most numerous received in the category of comments regarding wheelchairs and other power-driven mobility devices. Significant numbers of veterans with disabilities, individuals with multiple sclerosis, and those advocating on their behalf made concise statements of general support for the inclusion of the Segway® PT in the definition of "wheelchair." Two veterans offered extensive comments on the topic, along with a few advocacy and nonprofit groups and individuals with disabilities for whom sitting is uncomfortable or impossible.

While there may be legitimate safety issues for EPAMD users and bystanders in some circumstances, EPAMDs and other non-traditional mobility devices can deliver real benefits to individuals with disabilities. Among the reasons given by commenters to include the Segway® PT in the definition of "wheelchair" were that the Segway® PT is well-suited for individuals with particular conditions that affect mobility including multiple sclerosis, Parkinson's disease, chronic obstructive pulmonary disease, amputations, spinal cord injuries, and other neurological disabilities, as well as functional limitations, such as gait limitation, inability to sit or discomfort in sitting, and diminished stamina issues. Such individuals often find that EPAMDs are more comfortable and easier to use than more traditional mobility devices and assist with balance, circulation, and digestion in ways that wheelchairs do not. *See* Rachel Metz, *Disabled Embrace Segway,* New York Times, Oct. 14, 2004. Commenters specifically cited pressure relief, reduced spasticity, increased stamina, and improved respiratory, neurologic, and muscular health as secondary medical benefits from being able to stand.

Other arguments for including the Segway® PT in the definition of "wheelchair" were based on commenters' views that the Segway® PT offers benefits not provided by wheelchairs and mobility scooters, including its intuitive response to body movement, ability to operate with less coordination and dexterity than is required for many wheelchairs and mobility scooters, and smaller footprint and turning radius as compared to most wheelchairs and mobility scooters. Several commenters mentioned improved visibility, either due to the Segway® PT's raised platform or simply by virtue of being in a standing position. And finally, some commenters advocated for the inclusion of the Segway® PT simply based on civil rights arguments and the empowerment and self-esteem obtained from having the power to select the mobility device of choice.

Many commenters, regardless of their position on whether to include the Segway® PT in the definition of "wheelchair," noted that the Segway® PT's safety record is as good as, if not better, than the record for wheelchairs and mobility scooters.

Most environmental, transit system, and government commenters were opposed to including the Segway® PT in the definition of "wheelchair" but were supportive of its inclusion as an "other power-driven mobility device." Their concerns about including the Segway® PT in the definition of "wheelchair" had to do with the safety of the operators of these devices (*e.g.,* height clearances on trains and sloping trails in parks) and of pedestrians, particularly in confined and crowded facilities or in settings where motorized devices might be unexpected; the potential harm to the environment; the additional administrative, insurance, liability, and defensive litigation costs; potentially detrimental impacts on the environment and cultural and natural resources; and the impracticality of accommodating such devices in public transportation settings.

Other environmental, transit system, and government commenters would have banned all fuel-powered devices as mobility devices. In addition, these commenters would have classified non-motorized devices as "wheelchairs" and would have categorized motorized devices, such as the Segway® PT, battery-operated wheelchairs, and mobility scooters as "other power-driven mobility devices." In support of this position, some of these commenters argued that because their equipment and facilities have been designed to comply with the dimensions of the "common wheelchair" upon which the ADAAG is based, any device that is larger than the prototype wheelchair would be misplaced in the definition of "wheelchair."

Still others in this group of commenters wished for only a single category of mobility devices and would have included wheelchairs, mobility scooters, and the Segway® PT as "mobility devices" and excluded fuel-powered devices from that definition.

Many disability advocacy and nonprofit commenters did not support the inclusion of the Segway® PT in the definition of "wheelchair." Paramount to these commenters was the maintenance of existing protections for wheelchair users. Because there was unanimous agreement that wheelchair use rarely, if ever, may be restricted, these commenters strongly favored categorizing wheelchairs separately from the Segway® PT and other power-driven mobility devices and applying the intended-use determinant to assign the devices to either category. They indicated that while they support the greatest degree of access in public entities for all persons with disabilities who require the use of mobility devices, they recognize that under certain circumstances, allowing the use of other power-driven mobility devices would result in a fundamental alteration of programs, services, or activities, or run counter to legitimate safety requirements necessary for the safe operation of a public entity. While these groups supported categorizing the Segway® PT as an "other power-driven mobility device," they universally noted that in their view, because the Segway® PT does not present environmental concerns and is as safe to use as, if not safer than, a wheelchair, it should be accommodated in most circumstances.

The Department has considered all the comments and has concluded that it should not include the Segway® PT in the definition of "wheelchair." The final rule provides that the test for categorizing a device as a wheelchair or an other power-driven mobility device is whether the device is designed primarily for use by individuals with mobility disabilities. Mobility scooters are included in the definition of "wheelchair" because they are designed primarily for users with mobility disabilities. However, because the current generation of EPAMDs, including the Segway® PT, was designed for recreational users and not primarily for use by individuals with mobility disabilities, the Department has decided to continue its approach of excluding EPAMDs from the definition of "wheelchair" and including them in the definition of "other power-driven mobility device." Although EPAMDs, such as the Segway® PT, are not included in the definition of a "wheelchair," public entities must assess whether they can make reasonable modifications to permit individuals with mobility disabilities to use such devices on their premises. The Department recognizes that the Segway® PT provides many benefits to those who use them as mobility devices, including a measure of privacy with regard to the nature of one's particular disability, and believes that in the vast majority of circumstances, the application of the factors described in § 35.137 for providing access to other-powered mobility devices will result in the admission of the Segway® PT.

Treatment of "manually-powered mobility aids." The Department's NPRM did not define the term "manually-powered mobility aids." Instead, the NPRM included a non-

exhaustive list of examples in § 35.137(a). The NPRM queried whether the Department should maintain this approach to manually-powered mobility aids or whether it should adopt a more formal definition.

Only a few commenters addressed "manually-powered mobility aids." Virtually all commenters were in favor of maintaining a non-exhaustive list of examples of "manually-powered mobility aids" rather than adopting a definition of the term. Of those who commented, a few sought clarification of the term "manually-powered." One commenter suggested that the term be changed to "human-powered." Other commenters requested that the Department include ordinary strollers in the non-exhaustive list of "manually-powered mobility aids." Since strollers are not devices designed primarily for individuals with mobility disabilities, the Department does not consider them to be manually-powered mobility aids; however, strollers used in the context of transporting individuals with disabilities are subject to the same assessment required by the ADA's title II reasonable modification standards at § 35.130(b)(7). The Department believes that because the existing approach is clear and understood easily by the public, no formal definition of the term "manually-powered mobility aids" is required.

Definition of "*other power-driven mobility device.*" The Department's NPRM defined the term "other power-driven mobility device" in § 35.104 as "any of a large range of devices powered by batteries, fuel, or other engines—whether or not designed solely for use by individuals with mobility impairments—that are used by individuals with mobility impairments for the purpose of locomotion, including golf cars, bicycles, electronic personal assistance mobility devices (EPAMDs), or any mobility aid designed to operate in areas without defined pedestrian routes." 73 FR 34466, 34504 (June 17, 2008).

Nearly all environmental, transit systems, and government commenters who supported the two-tiered concept of mobility devices said that the Department's definition of "other power-driven mobility device" is overbroad because it includes fuel-powered devices. These commenters sought a ban on fuel-powered devices in their entirety because they believe they are inherently dangerous and pose environmental and safety concerns. They also argued that permitting the use of many of the contemplated other power-driven mobility devices, fuel-powered ones especially, would fundamentally alter the programs, services, or activities of public entities.

Advocacy, nonprofit, and several individual commenters supported the definition of "other power-driven mobility device" because it allows new technologies to be added in the future, maintains the existing legal protections for wheelchairs, and recognizes that some devices, particularly the Segway® PT, which are not designed primarily for individuals with mobility disabilities, have beneficial uses for individuals with mobility disabilities. Despite support for the definition of "other power-driven mobility device," however, most advocacy and nonprofit commenters expressed at least some hesitation about the inclusion of fuel-powered mobility devices in the definition. While virtually all of these commenters noted that a blanket exclusion of any device that falls under the definition of "other power-driven mobility device" would violate basic civil rights concepts, they also specifically stated that certain devices, particularly, off-highway vehicles, cannot be permitted in certain circumstances. They also made a distinction between the Segway® PT and other power-driven mobility devices, noting that the Segway® PT should be accommodated in most circumstances because it satisfies the safety and environmental elements of the policy analysis. These commenters indicated that they agree that other power-driven mobility devices must be assessed, particularly as to their environmental impact, before they are accommodated.

Although many commenters had reservations about the inclusion of fuel-powered devices in the definition of other power-driven mobility devices, the Department does not want the definition to be so narrow that it would foreclose the inclusion of new technological developments (whether powered by fuel or by some other means). It is for this reason that the Department has maintained the phrase "any mobility device designed to operate in areas without defined pedestrian routes" in the final rule's definition of other power-driven mobility devices. The Department believes that the limitations provided by "fundamental alteration" and the ability to impose legitimate safety requirements will likely prevent the use of fuel and combustion engine-driven devices indoors, as well as in outdoor areas with heavy pedestrian traffic. The Department notes, however, that in the future, technological developments may result in the production of safe fuel-powered mobility devices that do not pose environmental and safety concerns. The final rule allows consideration to be given as to whether the use of a fuel-powered device would create a substantial risk of serious harm to the environment or natural or cultural resources, and to whether the use of such a device conflicts with Federal land management laws or regulations; this aspect of the final rule will further limit the inclusion of fuel-powered devices where they are not appropriate. Consequently, the Department has maintained fuel-powered devices in the definition of "other power-driven mobility device." The Department has also added language to the definition of "other power-driven mobility device" to reiterate that the definition does not apply to Federal wilderness areas, which are not covered by title II of the ADA; the use of wheelchairs in such areas is governed by section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2).

"Qualified Interpreter"

In the NPRM, the Department proposed adding language to the definition of "qualified interpreter" to clarify that the term includes, but is not limited to, sign language interpreters, oral interpreters, and cued-speech interpreters. As the Department explained, not all interpreters are qualified for all situations. For example, a qualified interpreter who uses American Sign Language (ASL) is not necessarily qualified to interpret orally. In addition, someone with only a rudimentary familiarity with sign language or finger spelling is not qualified, nor is someone who is fluent in sign language but unable to translate spoken communication into ASL or to translate signed communication into spoken words.

As further explained, different situations will require different types of interpreters. For example, an oral interpreter who has special skill and training to mouth a speaker's words silently for individuals who are deaf or hard of hearing may be necessary for an individual who was raised orally and taught to read lips or was diagnosed with hearing loss later in life and does not know sign language. An individual who is deaf or hard of hearing may need an oral interpreter if the speaker's voice is unclear, if there is a quick-paced exchange of communication (*e.g.,* in a meeting), or when the speaker does not directly face the individual who is deaf or hard of hearing. A cued-speech interpreter functions in the same manner as an oral interpreter except that he or she also uses a hand code or cue to represent each speech sound.

The Department received many comments regarding the proposed modifications to the definition of "interpreter." Many commenters requested that the Department include within the definition a requirement that interpreters be certified, particularly if they reside in a State that licenses or certifies interpreters. Other commenters opposed a certification requirement as unduly limiting, noting that an interpreter may well be qualified even if that same interpreter is not certified. These commenters noted the absence of nationwide standards or universally accepted criteria for certification.

On review of this issue, the Department has decided against imposing a certification requirement under the ADA. It is sufficient under the ADA that the interpreter be qualified. However, as the Department stated in the original preamble, this rule does not invalidate or limit State or local laws that impose standards for interpreters that are equal to or more stringent than those imposed by this definition. *See* 28 CFR part 35, app. A at 566 (2009). For instance, the definition would not supersede any requirement of State law for use of a certified interpreter in court proceedings.

With respect to the proposed additions to the rule, most commenters supported the expansion of the list of qualified interpreters, and some advocated for the inclusion of other types of interpreters on the list as well, such as deaf-blind interpreters, certified deaf interpreters, and speech-to-speech interpreters. As these commenters explained, deaf-blind interpreters are interpreters who have specialized skills and training to interpret for individuals who are deaf and blind; certified deaf interpreters are deaf or hard of hearing interpreters who work with hearing sign language interpreters to meet the specific communication needs of deaf individuals; and speech-to-speech interpreters have special skill and training to interpret for individuals who have speech disabilities.

The list of interpreters in the definition of qualified interpreter is illustrative, and the Department does not believe it necessary or appropriate to attempt to provide an exhaustive list of qualified interpreters. Accordingly, the Department has decided not to expand the proposed list. However, if a deaf and blind individual needs interpreter services, an interpreter who is qualified to handle the needs of that individual may be required. The guiding criterion is that the public entity must provide appropriate auxiliary aids and services to ensure effective communication with the individual. Commenters also suggested various definitions for the term "cued-speech interpreters," and different descriptions of the tasks they performed. After reviewing the various comments, the Department has determined that it is more accurate and appropriate to refer to such individuals as "cued-language transliterators." Likewise, the Department has changed the term "oral interpreters" to "oral transliterators." These two changes have been made to distinguish between sign language interpreters, who translate one language into another language (*e.g.,* ASL to English and English to ASL), from transliterators who interpret within the same language between deaf and hearing individuals. A cued-language transliterator is an interpreter who has special skill and training in the use of the Cued Speech system of handshapes and placements, along with non-manual information, such as facial expression and body language, to show auditory information visually, including speech and environmental sounds. An oral transliterator is an interpreter who has special skill and training to mouth a speaker's words silently for individuals who are deaf or hard of hearing. While the Department included definitions for "cued-speech interpreter" and "oral interpreter" in the regulatory text proposed in the NPRM, the Department has decided that it is unnecessary to include such definitions in the text of the final rule.

Many commenters questioned the proposed deletion of the requirement that a qualified interpreter be able to interpret both receptively and expressively, noting the importance of both these skills. Commenters stated that this phrase was carefully crafted in the original regulation to make certain that interpreters both (1) are capable of understanding what a person with a disability is saying and (2) have the skills needed to convey information back to that individual. These are two very different skill sets and both are equally important to achieve effective communication. For example, in a medical setting, a sign language interpreter must have the necessary skills to understand the grammar and syntax used by an ASL user (receptive skills) and the ability to interpret complicated medical information—presented by medical staff in English—back to that individual in ASL (expressive skills). The Department agrees and has put the phrase "both receptively and expressively" back in the definition.

Several advocacy groups suggested that the Department make clear in the definition of qualified interpreter that the interpreter may appear either on-site or remotely using a video remote interpreting (VRI) service. Given that the Department has included in this rule both a definition of VRI services and standards that such services must satisfy, such an addition to the definition of qualified interpreter is appropriate.

After consideration of all relevant information submitted during the public comment period, the Department has modified the definition from that initially proposed in the NPRM. The final definition now states that "[q]ualified interpreter means an interpreter who, via a video remote interpreting (VRI) service or an on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators."

"Qualified Reader"

The 1991 title II regulation identifies a qualified reader as an auxiliary aid, but did not define the term. *See* 28 CFR 35.104(2). Based upon the Department's investigation of complaints alleging that some entities have provided ineffective readers, the Department proposed in the NPRM to define "qualified reader" similarly to "qualified interpreter" to ensure that entities select qualified individuals to read an examination or other written information in an effective, accurate, and impartial manner. This proposal was suggested in order to make clear to public entities that a failure to provide a qualified reader to a person with a disability may constitute a violation of the requirement to provide appropriate auxiliary aids and services.

The Department received comments supporting inclusion in the regulation of a definition of a "qualified reader." Some commenters suggested the Department add to the definition a requirement prohibiting the use of a reader whose accent, diction, or pronunciation makes full comprehension of material being read difficult. Another commenter requested that the Department include a requirement that the reader "will follow the directions of the person for whom he or she is reading." Commenters also requested that the Department define "accurately" and "effectively" as used in this definition.

While the Department believes that its proposed regulatory definition adequately addresses these concerns, the Department emphasizes that a reader, in order to be "qualified," must be skilled in reading the language and subject matter and must be able to be easily understood by the individual with the disability. For example, if a reader is reading aloud the questions for a college microbiology examination, that reader, in order to be qualified, must know the proper pronunciation of scientific terminology used in the text, and must be sufficiently articulate to be easily understood by the individual with a disability for whom he or she is reading. In addition, the terms "effectively" and "accurately" have been successfully used and understood in the Department's existing definition of "qualified interpreter" since 1991 without specific regulatory definitions. Instead, the Department has relied upon the common use and understanding of those terms from standard English dictionaries. Thus, the definition of "qualified reader" has not been changed from that contained in the NPRM. The final rule defines "qualified reader" to mean "a person who is able to read effectively, accurately, and impartially using any necessary specialized vocabulary."

"Service Animal"

Although there is no specific language in the 1991 title II regulation concerning service animals, title II entities have the same legal obligations as title III entities to make reasonable modifications in policies, practices, or procedures to allow service animals when necessary in order to avoid discrimination on the basis of disability, unless the entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. *See* 28 CFR 35.130(b)(7). The 1991 title III regulation, 28 CFR 36.104, defines a "service animal" as "any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items." Section 36.302(c)(1) of the 1991 title III regulation requires that "[g]enerally, a public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability." Section 36.302(c)(2) of the 1991 title III regulation states that "a public accommodation [is not required] to supervise or care for a service animal."

The Department has issued guidance and provided technical assistance and publications concerning service animals since the 1991 regulations became effective. In the NPRM, the Department proposed to modify the definition of service animal, added the definition to title II, and asked for public input on several issues related to the service animal provisions of the title II regulation: whether the Department should clarify the phrase "providing minimal protection" in the definition or remove it; whether there are any circumstances where a service animal "providing minimal protection" would be appropriate or expected; whether certain species should be eliminated from the definition of "service animal," and, if so, which types of animals should be excluded; whether "common domestic animal" should be part of the definition; and whether a size or weight limitation should be imposed for common domestic animals even if the animal satisfies the "common domestic animal" part of the NPRM definition.

The Department received extensive comments on these issues, as well as requests to clarify the obligations of State and local government entities to accommodate individuals with disabilities who use service animals, and has modified the final rule in response. In the interests of avoiding unnecessary repetition, the Department has elected to discuss the issues raised in the NPRM questions about service animals and

the corresponding public comments in the following discussion of the definition of "service animal."

The Department's final rule defines "service animal" as "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the handler's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition."

This definition has been designed to clarify a key provision of the ADA. Many covered entities indicated that they are confused regarding their obligations under the ADA with regard to individuals with disabilities who use service animals. Individuals with disabilities who use trained guide or service dogs are concerned that if untrained or unusual animals are termed "service animals," their own right to use guide or service dogs may become unnecessarily restricted or questioned. Some individuals who are not individuals with disabilities have claimed, whether fraudulently or sincerely (albeit mistakenly), that their animals are service animals covered by the ADA, in order to gain access to courthouses, city or county administrative offices, and other title II facilities. The increasing use of wild, exotic, or unusual species, many of which are untrained, as service animals has also added to the confusion.

Finally, individuals with disabilities who have the legal right under the Fair Housing Act (FHAct) to use certain animals in their homes as a reasonable accommodation to their disabilities have assumed that their animals also qualify under the ADA. This is not necessarily the case, as discussed below.

The Department recognizes the diverse needs and preferences of individuals with disabilities protected under the ADA, and does not wish to unnecessarily impede individual choice. Service animals play an integral role in the lives of many individuals with disabilities and, with the clarification provided by the final rule, individuals with disabilities will continue to be able to use their service animals as they go about their daily activities and civic interactions. The clarification will also help to ensure that the fraudulent or mistaken use of other animals not qualified as service animals under the ADA will be deterred. A more detailed analysis of the elements of the definition and the comments responsive to the service animal provisions of the NPRM follows.

Providing minimal protection. As previously noted, the 1991 title II regulation does not contain specific language concerning service animals. The 1991 title III regulation included language stating that "minimal protection" was a task that could be performed by an individually trained service animal for the benefit of an individual with a disability. In the Department's "ADA Business Brief on Service Animals" (2002), the Department interpreted the "minimal protection" language within the context of a seizure (*i.e.,* alerting and protecting a person who is having a seizure). The Department received many comments in response to the question of whether the "minimal protection" language should be clarified. Many commenters urged the removal of the "minimal protection" language from the service animal definition for two reasons: (1) The phrase can be interpreted to allow any dog that is trained to be aggressive to qualify as a service animal simply by pairing the animal with a person with a disability; and (2) the phrase can be interpreted to allow any untrained pet dog to qualify as a service animal, since many consider the mere presence of a dog to be a crime deterrent, and thus sufficient to meet the minimal protection standard. These commenters argued, and the Department agrees, that these interpretations were not contemplated under the original title III regulation, and, for the purposes of the final title II regulations, the meaning of "minimal protection" must be made clear.

While many commenters stated that they believe that the "minimal protection" language should be eliminated, other commenters recommended that the language be clarified, but retained. Commenters favoring clarification of the term suggested that the Department explicitly exclude the function of attack or exclude those animals that are trained solely to be aggressive or protective. Other commenters identified non-violent behavioral tasks that could be construed as minimally protective, such as interrupting self-mutilation, providing safety checks and room searches, reminding the handler to take medications, and protecting the handler from injury resulting from seizures or unconsciousness.

Several commenters noted that the existing direct threat defense, which allows the exclusion of a service animal if the animal exhibits unwarranted or unprovoked violent behavior or poses a direct threat, prevents the use of "attack dogs" as service animals. One commenter noted that the use of a service animal trained to provide "minimal protection" may impede access to care in an emergency, for example, where the first responder, usually a title II entity, is unable or reluctant to approach a person with a disability because the individual's service animal is in a protective posture suggestive of aggression.

Many organizations and individuals stated that in the general dog training community, "protection" is code for attack or aggression training and should be removed from the definition. Commenters stated that there appears to be a broadly held misconception that aggression-trained animals are appropriate service animals for persons with post traumatic stress disorder (PTSD). While many individuals with PTSD may benefit by using a service animal, the work or tasks performed appropriately by such an animal would not involve unprovoked aggression but could include actively cuing the handler by nudging or pawing the handler to alert to the onset of an episode and removing the individual from the anxiety-provoking environment.

The Department recognizes that despite its best efforts to provide clarification, the "minimal protection" language appears to have been misinterpreted. While the Department maintains that protection from danger is one of the key functions that service animals perform for the benefit of persons with disabilities, the Department recognizes that an animal individually trained to provide aggressive protection, such as an attack dog, is not appropriately considered a service animal. Therefore, the Department has decided to modify the "minimal protection" language to read "non-violent protection," thereby excluding so-called "attack dogs" or dogs with traditional "protection training" as service animals. The Department believes that this modification to the service animal definition will eliminate confusion, without restricting unnecessarily the type of work or tasks that service animals may perform. The Department's modification also clarifies that the crime-deterrent effect of a dog's presence, by itself, does not qualify as work or tasks for purposes of the service animal definition.

Alerting to intruders. The phrase "alerting to intruders" is related to the issues of minimal protection and the work or tasks an animal may perform to meet the definition of a service animal. In the original 1991 regulatory text, this phrase was intended to identify service animals that alert individuals who are deaf or hard of hearing to the presence of others. This language has been misinterpreted by some to apply to dogs that are trained specifically to provide aggressive protection, resulting in the assertion that such training qualifies a dog as a service animal under the ADA. The Department reiterates that title II entities are not required to admit any animal whose use poses a direct threat under § 35.139. In addition, the Department has decided to remove the word "intruders" from the service animal definition and replace it with the phrase "the presence of people or sounds." The Department believes this clarifies that so-called "attack training" or other aggressive response types of training that cause a dog to provide an aggressive response do not qualify a dog as a service animal under the ADA.

Conversely, if an individual uses a breed of dog that is perceived to be aggressive because of breed reputation, stereotype, or the history or experience the observer may have with other dogs, but the dog is under the control of the individual with a disability and does not exhibit aggressive behavior, the title II entity cannot exclude the individual

or the animal from a State or local government program, service, or facility. The animal can only be removed if it engages in the behaviors mentioned in § 35.136(b) (as revised in the final rule) or if the presence of the animal constitutes a fundamental alteration to the nature of the service, program, or activity of the title II entity.

Doing "work" or "performing tasks." The NPRM proposed that the Department maintain the requirement, first articulated in the 1991 title III regulation, that in order to qualify as a service animal, the animal must "perform tasks" or "do work" for the individual with a disability. The phrases "perform tasks" and "do work" describe what an animal must do for the benefit of an individual with a disability in order to qualify as a service animal.

The Department received a number of comments in response to the NPRM proposal urging the removal of the term "do work" from the definition of a service animal. These commenters argued that the Department should emphasize the performance of tasks instead. The Department disagrees. Although the common definition of work includes the performance of tasks, the definition of work is somewhat broader, encompassing activities that do not appear to involve physical action.

One service dog user stated that in some cases, "critical forms of assistance can't be construed as physical tasks," noting that the manifestations of "brain-based disabilities," such as psychiatric disorders and autism, are as varied as their physical counterparts. The Department agrees with this statement but cautions that unless the animal is individually trained to do something that qualifies as work or a task, the animal is a pet or support animal and does not qualify for coverage as a service animal. A pet or support animal may be able to discern that the handler is in distress, but it is what the animal is trained to do in response to this awareness that distinguishes a service animal from an observant pet or support animal.

The NPRM contained an example of "doing work" that stated "a psychiatric service dog can help some individuals with dissociative identity disorder to remain grounded in time or place." 73 FR 34466, 34504 (June 17, 2008). Several commenters objected to the use of this example, arguing that grounding was not a "task" and therefore, the example inherently contradicted the basic premise that a service animal must perform a task in order to mitigate a disability. Other commenters stated that "grounding" should not be included as an example of "work" because it could lead to some individuals claiming that they should be able to use emotional support animals in public because the dog makes them feel calm or safe. By contrast, one commenter with experience in training service animals explained that grounding is a trained task based upon very specific behavioral indicators that can be observed and measured. These tasks are based upon input from mental health practitioners, dog trainers, and individuals with a history of working with psychiatric service dogs.

It is the Department's view that an animal that is trained to "ground" a person with a psychiatric disorder does work or performs a task that would qualify it as a service animal as compared to an untrained emotional support animal whose presence affects a person's disability. It is the fact that the animal is trained to respond to the individual's needs that distinguishes an animal as a service animal. The process must have two steps: Recognition and response. For example, if a service animal senses that a person is about to have a psychiatric episode and it is trained to respond for example, by nudging, barking, or removing the individual to a safe location until the episode subsides, then the animal has indeed performed a task or done work on behalf of the individual with the disability, as opposed to merely sensing an event.

One commenter suggested defining the term "task," presumably to improve the understanding of the types of services performed by an animal that would be sufficient to qualify the animal for coverage. The Department believes that the common definition of the word "task" is sufficiently clear and that it is not necessary to add to the definitions section. However, the Department has added examples of other kinds of work or tasks to help illustrate and provide clarity to the definition. After careful evaluation of this issue, the Department has concluded that the phrases "do work" and "perform tasks" have been effective during the past two decades to illustrate the varied services provided by service animals for the benefit of individuals with all types of disabilities. Thus, the Department declines to depart from its longstanding approach at this time.

Species limitations. When the Department originally issued its title III regulation in the early 1990s, the Department did not define the parameters of acceptable animal species. At that time, few anticipated the variety of animals that would be promoted as service animals in the years to come, which ranged from pigs and miniature horses to snakes, iguanas, and parrots. The Department has followed this particular issue closely, keeping current with the many unusual species of animals represented to be service animals. Thus, the Department has decided to refine further this aspect of the service animal definition in the final rule.

The Department received many comments from individuals and organizations recommending species limitations. Several of these commenters asserted that limiting the number of allowable species would help stop erosion of the public's trust, which has resulted in reduced access for many individuals with disabilities who use trained service animals that adhere to high behavioral standards. Several commenters suggested that other species would be acceptable if those animals could meet nationally recognized behavioral standards for trained service dogs. Other commenters asserted that certain species of animals (*e.g.,* reptiles) cannot be trained to do work or perform tasks, so these animals would not be covered.

In the NPRM, the Department used the term "common domestic animal" in the service animal definition and excluded reptiles, rabbits, farm animals (including horses, miniature horses, ponies, pigs, and goats), ferrets, amphibians, and rodents from the service animal definition. 73 FR 34466, 34478 (June 17, 2008). However, the term "common domestic animal" is difficult to define with precision due to the increase in the number of domesticated species. Also, several State and local laws define a "domestic" animal as an animal that is not wild. The Department agrees with commenters' views that limiting the number and types of species recognized as service animals will provide greater predictability for State and local government entities as well as added assurance of access for individuals with disabilities who use dogs as service animals. As a consequence, the Department has decided to limit this rule's coverage of service animals to dogs, which are the most common service animals used by individuals with disabilities.

Wild animals, monkeys, and other nonhuman primates. Numerous business entities endorsed a narrow definition of acceptable service animal species, and asserted that there are certain animals (*e.g.,* reptiles) that cannot be trained to do work or perform tasks. Other commenters suggested that the Department should identify excluded animals, such as birds and llamas, in the final rule. Although one commenter noted that wild animals bred in captivity should be permitted to be service animals, the Department has decided to make clear that all wild animals, whether born or bred in captivity or in the wild, are eliminated from coverage as service animals. The Department believes that this approach reduces risks to health or safety attendant with wild animals. Some animals, such as certain nonhuman primates including certain monkeys, pose a direct threat; their behavior can be unpredictably aggressive and violent without notice or provocation. The American Veterinary Medical Association (AVMA) issued a position statement advising against the use of monkeys as service animals, stating that "[t]he AVMA does not support the use of nonhuman primates as assistance animals because of animal welfare concerns, and the potential for serious injury and zoonotic [animal to human disease transmission] risks." AVMA Position Statement, *Nonhuman Primates as Assistance Animals,* (2005) available at *http://www.avma.org/issues/policy/nonhuman_primates.asp* (last visited June 24, 2010).

An organization that trains capuchin monkeys to provide in-home services to individuals with paraplegia and quadriplegia was in substantial agreement with the AVMA's views but requested a limited recognition in the service animal definition for the capuchin monkeys it trains to provide assistance for persons with disabilities. The organization commented that its trained capuchin monkeys undergo scrupulous veterinary examinations to ensure that the animals pose no health risks, and are used by individuals with disabilities exclusively in their homes. The organization acknowledged that the capuchin monkeys it trains are not necessarily suitable for use in State or local government facilities. The organization noted that several State and local government entities have local zoning, licensing, health,

and safety laws that prohibit nonhuman primates, and that these prohibitions would prevent individuals with disabilities from using these animals even in their homes.

The organization argued that including capuchin monkeys under the service animal umbrella would make it easier for individuals with disabilities to obtain reasonable modifications of State and local licensing, health, and safety laws that would permit the use of these monkeys. The organization argued that this limited modification to the service animal definition was warranted in view of the services these monkeys perform, which enable many individuals with paraplegia and quadriplegia to live and function with increased independence.

The Department has carefully considered the potential risks associated with the use of nonhuman primates as service animals in State and local government facilities, as well as the information provided to the Department about the significant benefits that trained capuchin monkeys provide to certain individuals with disabilities in residential settings. The Department has determined, however, that nonhuman primates, including capuchin monkeys, will not be recognized as service animals for purposes of this rule because of their potential for disease transmission and unpredictable aggressive behavior. The Department believes that these characteristics make nonhuman primates unsuitable for use as service animals in the context of the wide variety of public settings subject to this rule. As the organization advocating the inclusion of capuchin monkeys acknowledges, capuchin monkeys are not suitable for use in public facilities.

The Department emphasizes that it has decided only that capuchin monkeys will not be included in the definition of service animals for purposes of its regulation implementing the ADA. This decision does not have any effect on the extent to which public entities are required to allow the use of such monkeys under other Federal statutes. For example, under the FHAct, an individual with a disability may have the right to have an animal other than a dog in his or her home if the animal qualifies as a "reasonable accommodation" that is necessary to afford the individual equal opportunity to use and enjoy a dwelling, assuming that the use of the animal does not pose a direct threat. In some cases, the right of an individual to have an animal under the FHAct may conflict with State or local laws that prohibit all individuals, with or without disabilities, from owning a particular species. However, in this circumstance, an individual who wishes to request a reasonable modification of the State or local law must do so under the FHAct, not the ADA.

Having considered all of the comments about which species should qualify as service animals under the ADA, the Department has determined the most reasonable approach is to limit acceptable species to dogs.

Size or weight limitations. The vast majority of commenters did not support a size or weight limitation. Commenters were typically opposed to a size or weight limit because many tasks performed by service animals require large, strong dogs. For instance, service animals may perform tasks such as providing balance and support or pulling a wheelchair. Small animals may not be suitable for large adults. The weight of the service animal user is often correlated with the size and weight of the service animal. Others were concerned that adding a size and weight limit would further complicate the difficult process of finding an appropriate service animal. One commenter noted that there is no need for a limit because "if, as a practical matter, the size or weight of an individual's service animal creates a direct threat or fundamental alteration to a particular public entity or accommodation, there are provisions that allow for the animal's exclusion or removal." Some common concerns among commenters in support of a size and weight limit were that a larger animal may be less able to fit in various areas with its handler, such as toilet rooms and public seating areas, and that larger animals are more difficult to control.

Balancing concerns expressed in favor of and against size and weight limitations, the Department has determined that such limitations would not be appropriate. Many individuals of larger stature require larger dogs. The Department believes it would be inappropriate to deprive these individuals of the option of using a service dog of the size required to provide the physical support and stability these individuals may need to function independently. Since large dogs have always served as service animals, continuing their use should not constitute fundamental alterations or impose undue burdens on title II entities.

Breed limitations. A few commenters suggested that certain breeds of dogs should not be allowed to be used as service animals. Some suggested that the Department should defer to local laws restricting the breeds of dogs that individuals who reside in a community may own. Other commenters opposed breed restrictions, stating that the breed of a dog does not determine its propensity for aggression and that aggressive and non-aggressive dogs exist in all breeds.

The Department does not believe that it is either appropriate or consistent with the ADA to defer to local laws that prohibit certain breeds of dogs based on local concerns that these breeds may have a history of unprovoked aggression or attacks. Such deference would have the effect of limiting the rights of persons with disabilities under the ADA who use certain service animals based on where they live rather than on whether the use of a particular animal poses a direct threat to the health and safety of others. Breed restrictions differ significantly from jurisdiction to jurisdiction. Some jurisdictions have no breed restrictions. Others have restrictions that, while well-meaning, have the unintended effect of screening out the very breeds of dogs that have successfully served as service animals for decades without a history of the type of unprovoked aggression or attacks that would pose a direct threat, *e.g.,* German Shepherds. Other jurisdictions prohibit animals over a certain weight, thereby restricting breeds without invoking an express breed ban. In addition, deference to breed restrictions contained in local laws would have the unacceptable consequence of restricting travel by an individual with a disability who uses a breed that is acceptable and poses no safety hazards in the individual's home jurisdiction but is nonetheless banned by other jurisdictions. State and local government entities have the ability to determine, on a case-by-case basis, whether a particular service animal can be excluded based on that particular animal's actual behavior or history—not based on fears or generalizations about how an animal or breed might behave. This ability to exclude an animal whose behavior or history evidences a direct threat is sufficient to protect health and safety.

Recognition of psychiatric service animals but not "emotional support animals." The definition of "service animal" in the NPRM stated the Department's longstanding position that emotional support animals are not included in the definition of "service animal." The proposed text in § 35.104 provided that "[a]nimals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits or to promote emotional well-being are not service animals." 73 FR 34466, 34504 (June 17, 2008).

Many advocacy organizations expressed concern and disagreed with the exclusion of comfort and emotional support animals. Others have been more specific, stating that individuals with disabilities may need their emotional support animals in order to have equal access. Some commenters noted that individuals with disabilities use animals that have not been trained to perform tasks directly related to their disability. These animals do not qualify as service animals under the ADA. These are emotional support or comfort animals.

Commenters asserted that excluding categories such as "comfort" and "emotional support" animals recognized by laws such as the FHAct or the Air Carrier Access Act (ACAA) is confusing and burdensome. Other commenters noted that emotional support and comfort animals perform an important function, asserting that animal companionship helps individuals who experience depression resulting from multiple sclerosis.

Some commenters explained the benefits emotional support animals provide, including emotional support, comfort, therapy, companionship, therapeutic benefits, and the promotion of emotional well-being. They contended that without the presence of an emotional support animal in their lives they would be disadvantaged and unable to participate in society. These commenters were concerned that excluding this category of animals will lead to discrimination against, and the excessive questioning of, individuals with non-visible or non-apparent disabilities. Other commenters expressing opposition to the exclusion of individually trained "comfort" or "emotional support" animals asserted that the ability to soothe or de-escalate and control emotion is "work" that benefits the individual with the disability.

Many commenters requested that the Department carve out an exception that permits current or former members of the

military to use emotional support animals. They asserted that a significant number of service members returning from active combat duty have adjustment difficulties due to combat, sexual assault, or other traumatic experiences while on active duty. Commenters noted that some current or former members of the military service have been prescribed animals for conditions such as PTSD. One commenter stated that service women who were sexually assaulted while in the military use emotional support animals to help them feel safe enough to step outside their homes. The Department recognizes that many current and former members of the military have disabilities as a result of service-related injuries that may require emotional support and that such individuals can benefit from the use of an emotional support animal and could use such animal in their home under the FHAct. However, having carefully weighed the issues, the Department believes that its final rule appropriately addresses the balance of issues and concerns of both the individual with a disability and the public entity. The Department also notes that nothing in this part prohibits a public entity from allowing current or former military members or anyone else with disabilities to utilize emotional support animals if it wants to do so.

Commenters asserted the view that if an animal's "mere presence" legitimately provides such benefits to an individual with a disability and if those benefits are necessary to provide equal opportunity given the facts of the particular disability, then such an animal should qualify as a "service animal." Commenters noted that the focus should be on the nature of a person's disability, the difficulties the disability may impose and whether the requested accommodation would legitimately address those difficulties, not on evaluating the animal involved. The Department understands this approach has benefitted many individuals under the FHAct and analogous State law provisions, where the presence of animals poses fewer health and safety issues, and where emotional support animals provide assistance that is unique to residential settings. The Department believes, however, that the presence of such animals is not required in the context of title II entities such as courthouses, State and local government administrative buildings, and similar title II facilities.

Under the Department's previous regulatory framework, some individuals and entities assumed that the requirement that service animals must be individually trained to do work or perform tasks excluded all individuals with mental disabilities from having service animals. Others assumed that any person with a psychiatric condition whose pet provided comfort to them was covered by the 1991 title II regulation. The Department reiterates that psychiatric service animals that are trained to do work or perform a task for individuals whose disability is covered by the ADA are protected by the Department's present regulatory approach. Psychiatric service animals can be trained to perform a variety of tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and ameliorate their effects. Tasks performed by psychiatric service animals may include reminding the handler to take medicine, providing safety checks or room searches for persons with PTSD, interrupting self-mutilation, and removing disoriented individuals from dangerous situations.

The difference between an emotional support animal and a psychiatric service animal is the work or tasks that the animal performs. Traditionally, service dogs worked as guides for individuals who were blind or had low vision. Since the original regulation was promulgated, service animals have been trained to assist individuals with many different types of disabilities.

In the final rule, the Department has retained its position on the exclusion of emotional support animals from the definition of "service animal." The definition states that "[t]he provision of emotional support, well-being, comfort, or companionship, * * * do[es] not constitute work or tasks for the purposes of this definition." The Department notes, however, that the exclusion of emotional support animals from coverage in the final rule does not mean that individuals with psychiatric or mental disabilities cannot use service animals that meet the regulatory definition. The final rule defines service animal as follows: "[s]ervice animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability." This language simply clarifies the Department's longstanding position.

The Department's position is based on the fact that the title II and title III regulations govern a wider range of public settings than the housing and transportation settings for which the Department of Housing and Urban Development (HUD) and DOT regulations allow emotional support animals or comfort animals. The Department recognizes that there are situations not governed by the title II and title III regulations, particularly in the context of residential settings and transportation, where there may be a legal obligation to permit the use of animals that do not qualify as service animals under the ADA, but whose presence nonetheless provides necessary emotional support to persons with disabilities. Accordingly, other Federal agency regulations, case law, and possibly State or local laws governing those situations may provide appropriately for increased access for animals other than service animals as defined under the ADA. Public officials, housing providers, and others who make decisions relating to animals in residential and transportation settings should consult the Federal, State, and local laws that apply in those areas (*e.g.*, the FHAct regulations of HUD and the ACAA) and not rely on the ADA as a basis for reducing those obligations.

Retain term "service animal." Some commenters asserted that the term "assistance animal" is a term of art and should replace the term "service animal." However, the majority of commenters preferred the term "service animal" because it is more specific. The Department has decided to retain the term "service animal" in the final rule. While some agencies, like HUD, use the term "assistance animal," "assistive animal," or "support animal," these terms are used to denote a broader category of animals than is covered by the ADA. The Department has decided that changing the term used in the final rule would create confusion, particularly in view of the broader parameters for coverage under the FHAct, *cf.*, preamble to HUD's Final Rule for Pet Ownership for the Elderly and Persons with Disabilities, 73 FR 63834–38 (Oct. 27, 2008); HUD Handbook No. 4350.3 Rev–1, Chapter 2, Occupancy Requirements of Subsidized Multifamily Housing Programs (June 2007), available at *http://www.hud.gov/offices/adm/hudclips/handbooks/hsgh/4350.3* (last visited June 24, 2010). Moreover, as discussed above, the Department's definition of "service animal" in the title II final rule does not affect the rights of individuals with disabilities who use assistance animals in their homes under the FHAct or who use "emotional support animals" that are covered under the ACAA and its implementing regulations. *See* 14 CFR 382.7 *et seq.; see also* Department of Transportation, *Guidance Concerning Service Animals in Air Transportation*, 68 FR 24874, 24877 (May 9, 2003) (discussing accommodation of service animals and emotional support animals on aircraft).

"Video Remote Interpreting" (VRI) Services

In the NPRM, the Department proposed adding Video Interpreting Services (VIS) to the list of auxiliary aids available to provide effective communication described in § 35.104. In the preamble to the NPRM, VIS was defined as "a technology composed of a video phone, video monitors, cameras, a high-speed Internet connection, and an interpreter. The video phone provides video transmission to a video monitor that permits the individual who is deaf or hard of hearing to view and sign to a video interpreter (*i.e.*, a live interpreter in another location), who can see and sign to the individual through a camera located on or near the monitor, while others can communicate by speaking. The video monitor can display a split screen of two live images, with the interpreter in one image and the individual who is deaf or hard of hearing in the other image." 73 FR 34446, 34479 (June 17, 2008). Comments from advocacy organizations and individuals unanimously requested that the Department use the term "video remote interpreting (VRI)," instead of VIS, for consistency with Federal Communications Commission (FCC) regulations. *See* FCC Public Notice, DA–0502417 (Sept. 7, 2005), and with common usage by consumers. The Department has made that change throughout the regulation to avoid confusion and to make the regulation more consistent with existing regulations.

Many commenters also requested that the Department distinguish between VRI and "video relay service (VRS)." Both VRI and VRS use a remote interpreter who is able to see and communicate with a deaf person and a hearing person, and all three individuals may be connected by a video link. VRI is a fee-based interpreting service conveyed via videoconferencing where at least one person,

typically the interpreter, is at a separate location. VRI can be provided as an on-demand service or by appointment. VRI normally involves a contract in advance for the interpreter who is usually paid by the covered entity.

VRS is a telephone service that enables persons with disabilities to use the telephone to communicate using video connections and is a more advanced form of relay service than the traditional voice to text telephones (TTY) relay systems that were recognized in the 1991 title II regulation. More specifically, VRS is a video relay service using interpreters connected to callers by video hook-up and is designed to provide telephone services to persons who are deaf and use American Sign Language that are functionally equivalent to those provided to users who are hearing. VRS is funded through the Interstate Telecommunications Relay Services Fund and overseen by the FCC. *See* 47 CFR 64.601(a)(26). There are no fees for callers to use the VRS interpreters and the video connection, although there may be relatively inexpensive initial costs to the title II entities to purchase the videophone or camera for on-line video connection, or other equipment to connect to the VRS service. The FCC has made clear that VRS functions as a telephone service and is not intended to be used for interpreting services where both parties are in the same room; the latter is reserved for VRI. The Department agrees that VRS cannot be used as a substitute for in-person interpreters or for VRI in situations that would not, absent one party's disability, entail use of the telephone.

Many commenters strongly recommended limiting the use of VRI to circumstances where it will provide effective communication. Commenters from advocacy groups and persons with disabilities expressed concern that VRI may not always be appropriate to provide effective communication, especially in hospitals and emergency rooms. Examples were provided of patients who are unable to see the video monitor because they are semi-conscious or unable to focus on the video screen; other examples were given of cases where the video monitor is out of the sightline of the patient or the image is out of focus; still other examples were given of patients who could not see the image because the signal was interrupted, causing unnatural pauses in the communication, or the image was grainy or otherwise unclear. Many commenters requested more explicit guidelines on the use of VRI, and some recommended requirements for equipment maintenance, high-speed, wide-bandwidth video links using dedicated lines or wireless systems, and training of staff using VRI, especially in hospital and health care situations. Several major organizations requested a requirement to include the interpreter's face, head, arms, hands, and eyes in all transmissions. Finally, one State agency asked for additional guidance, outreach, and mandated advertising about the availability of VRI in title II situations so that local government entities would budget for and facilitate the use of VRI in libraries, schools, and other places.

After consideration of the comments and the Department's own research and experience, the Department has determined that VRI can be an effective method of providing interpreting services in certain circumstances, but not in others. For example, VRI should be effective in many situations involving routine medical care, as well as in the emergency room where urgent care is important, but no in-person interpreter is available; however, VRI may not be effective in situations involving surgery or other medical procedures where the patient is limited in his or her ability to see the video screen. Similarly, VRI may not be effective in situations where there are multiple people in a room and the information exchanged is highly complex and fast-paced. The Department recognizes that in these and other situations, such as where communication is needed for persons who are deaf-blind, it may be necessary to summon an in-person interpreter to assist certain individuals. To ensure that VRI is effective in situations where it is appropriate, the Department has established performance standards in § 35.160(d).

Subpart B—General Requirements

Section 35.130(h) Safety.

Section 36.301(b) of the 1991 title III regulation provides that a public accommodation "may impose legitimate safety requirements that are necessary for safe operation. Safety requirements must be based on actual risks, and not on mere speculation, stereotypes, or generalizations about individuals with disabilities." 28 CFR 36.301(b). Although the 1991 title II regulation did not include similar language, the Department's 1993 ADA Title II Technical Assistance Manual at II–3.5200 makes clear the Department's view that public entities also have the right to impose legitimate safety requirements necessary for the safe operation of services, programs, or activities. To ensure consistency between the title II and title III regulations, the Department has added a new § 35.130(h) in the final rule incorporating this longstanding position relating to imposition of legitimate safety requirements.

Section 35.133 Maintenance of accessible features.

Section 35.133 in the 1991 title II regulation provides that a public entity must maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by qualified individuals with disabilities. *See* 28 CFR 35.133(a). In the NPRM, the Department clarified the application of this provision and proposed one change to the section to address the discrete situation in which the scoping requirements provided in the 2010 Standards reduce the number of required elements below the requirements of the 1991 Standards. In that discrete event, a public entity may reduce such accessible features in accordance with the requirements in the 2010 Standards.

The Department received only four comments on this proposed amendment. None of the commenters opposed the change. In the final rule, the Department has revised the section to make it clear that if the 2010 Standards reduce either the technical requirements or the number of required accessible elements below that required by the 1991 Standards, then the public entity may reduce the technical requirements or the number of accessible elements in a covered facility in accordance with the requirements of the 2010 Standards.

One commenter urged the Department to amend § 35.133(b) to expand the language of the section to restocking of shelves as a permissible activity for isolated or temporary interruptions in service or access. It is the Department's position that a temporary interruption that blocks an accessible route, such as restocking of shelves, is already permitted by § 35.133(b), which clarifies that "isolated or temporary interruptions in service or access due to maintenance or repairs" are permitted. Therefore, the Department will not make any additional changes in the final rule to the language of § 35.133(b) other than those discussed in the preceding paragraph.

Section 35.136 Service animals.

The 1991 title II regulation states that "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity." 28 CFR 130(b)(7). Unlike the title III regulation, the 1991 title II regulation did not contain a specific provision addressing service animals.

In the NPRM, the Department stated the intention of providing the broadest feasible access to individuals with disabilities and their service animals, unless a public entity can demonstrate that making the modifications to policies excluding animals would fundamentally alter the nature of the public entity's service, program, or activity. The Department proposed creating a new § 35.136 addressing service animals that was intended to retain the scope of the 1991 title III regulation at § 36.302(c), while clarifying the Department's longstanding policies and interpretations, as outlined in published technical assistance, *Commonly Asked Questions About Service Animals in Places of Business* (1996), available at *http://www.ada.gov/qasrvc.ftm* and *ADA Guide for Small Businesses* (1999), available at *http://www.ada.gov/smbustxt.htm*, and to add that a public entity may exclude a service animal in certain circumstances where the service animal fails to meet certain behavioral standards. The Department received extensive comments in response to proposed § 35.136 from individuals, disability advocacy groups, organizations involved in training service animals, and public entities. Those comments and the Department's response are discussed below.

Exclusion of service animals. In the NPRM, the Department proposed incorporating the title III regulatory language of § 36.302(c) into new § 35.136(a), which states that "[g]enerally, a public entity shall modify its policies, practices, or procedures to permit

the use of a service animal by an individual with a disability, unless the public entity can demonstrate that the use of a service animal would fundamentally alter the public entity's service, program, or activity." The final rule retains this language with some modifications.

In addition, in the NPRM, the Department proposed clarifying those circumstances where otherwise eligible service animals may be excluded by public entities from their programs or facilities. The Department proposed in § 35.136(b)(1) of the NPRM that a public entity may ask an individual with a disability to remove a service animal from a title II service, program, or activity if: "[t]he animal is out of control and the animal's handler does not take effective action to control it." 73 FR 34466, 34504 (June 17, 2008).

The Department has long held that a service animal must be under the control of the handler at all times. Commenters overwhelmingly were in favor of this language, but noted that there are occasions when service animals are provoked to disruptive or aggressive behavior by agitators or troublemakers, as in the case of a blind individual whose service dog is taunted or pinched. While all service animals are trained to ignore and overcome these types of incidents, misbehavior in response to provocation is not always unreasonable. In circumstances where a service animal misbehaves or responds reasonably to a provocation or injury, the public entity must give the handler a reasonable opportunity to gain control of the animal. Further, if the individual with a disability asserts that the animal was provoked or injured, or if the public entity otherwise has reason to suspect that provocation or injury has occurred, the public entity should seek to determine the facts and, if provocation or injury occurred, the public entity should take effective steps to prevent further provocation or injury, which may include asking the provocateur to leave the public entity. This language is unchanged in the final rule.

The NPRM also proposed language at § 35.136(b)(2) to permit a public entity to exclude a service animal if the animal is not housebroken (*i.e.,* trained so that, absent illness or accident, the animal controls its waste elimination) or the animal's presence or behavior fundamentally alters the nature of the service the public entity provides (*e.g.,* repeated barking during a live performance). Several commenters were supportive of this NPRM language, but cautioned against overreaction by the public entity in these instances. One commenter noted that animals get sick, too, and that accidents occasionally happen. In these circumstances, simple clean up typically addresses the incident. Commenters noted that the public entity must be careful when it excludes a service animal on the basis of "fundamental alteration," asserting for example that a public entity should not exclude a service animal for barking in an environment where other types of noise, such as loud cheering or a child crying, is tolerated. The Department maintains that the appropriateness of an exclusion can be assessed by reviewing how a public entity addresses comparable situations that do not involve a service animal. The Department has retained in § 35.136(b) of the final rule the exception requiring animals to be housebroken. The Department has not retained the specific NPRM language stating that animals can be excluded if their presence or behavior fundamentally alters the nature of the service provided by the public entity, because the Department believes that this exception is covered by the general reasonable modification requirement contained in § 35.130(b)(7).

The NPRM also proposed at § 35.136(b)(3) that a service animal can be excluded where "[t]he animal poses a direct threat to the health or safety of others that cannot be eliminated by reasonable modifications." 73 FR 34466, 34504 (June 17, 2008). Commenters were universally supportive of this provision as it makes express the discretion of a public entity to exclude a service animal that poses a direct threat. Several commenters cautioned against the overuse of this provision and suggested that the Department provide an example of the rule's application. The Department has decided not to include regulatory language specifically stating that a service animal can be excluded if it poses a direct threat. The Department believes that the addition of new § 35.139, which incorporates the language of the title III provisions at § 36.302 relating to the general defense of direct threat, is sufficient to establish the availability of this defense to public entities.

Access to a public entity following the proper exclusion of a service animal. The NPRM proposed that in the event a public entity properly excludes a service animal, the public entity must give the individual with a disability the opportunity to access the programs, services, and facilities of the public entity without the service animal. Most commenters welcomed this provision as a common sense approach. These commenters noted that they do not wish to preclude individuals with disabilities from the full and equal enjoyment of the State or local government's programs, services, or facilities, simply because of an isolated problem with a service animal. The Department has elected to retain this provision in § 35.136(a).

Other requirements. The NPRM also proposed that the regulation include the following requirements: that the work or tasks performed by the service animal must be directly related to the handler's disability; that a service animal must be individually trained to do work or perform a task, be housebroken, and be under the control of the handler; and that a service animal must have a harness, leash, or other tether. Most commenters addressed at least one of these issues in their responses. Most agreed that these provisions are important to clarify further the 1991 service animal regulation. The Department has moved the requirement that the work or tasks performed by the service animal must be related directly to the handler's disability to the definition of "service animal" in § 35.104. In addition, the Department has modified the proposed language in § 35.136(d) relating to the handler's control of the animal with a harness, leash, or other tether to state that "[a] service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (*e.g.,* voice control, signals, or other effective means)." The Department has retained the requirement that the service animal must be individually trained (*see* Appendix A discussion of § 35.104, definition of "service animal"), as well as the requirement that the service animal be housebroken.

Responsibility for supervision and care of a service animal. The NPRM proposed language at § 35.136(e) stating that "[a] public entity is not responsible for caring for or supervising a service animal." 73 FR 34466, 34504 (June 17, 2008). Most commenters did not address this particular provision. The Department recognizes that there are occasions when a person with a disability is confined to bed in a hospital for a period of time. In such an instance, the individual may not be able to walk or feed the service animal. In such cases, if the individual has a family member, friend, or other person willing to take on these responsibilities in the place of the individual with disabilities, the individual's obligation to be responsible for the care and supervision of the service animal would be satisfied. The language of this section is retained, with minor modifications, in § 35.136(e) of the final rule.

Inquiries about service animals. The NPRM proposed language at § 35.136(f) setting forth parameters about how a public entity may determine whether an animal qualifies as a service animal. The proposed section stated that a public entity may ask if the animal is required because of a disability and what task or work the animal has been trained to do but may not require proof of service animal certification or licensing. Such inquiries are limited to eliciting the information necessary to make a decision without requiring disclosure of confidential disability-related information that a State or local government entity does not need. This language is consistent with the policy guidance outlined in two Department publications, *Commonly Asked Questions about Service Animals in Places of Business* (1996), available at *http://www.ada.gov/qasrvc.htm,* and *ADA Guide for Small Businesses,* (1999), available at *http://www.ada.gov/smbustxt.htm.*

Although some commenters contended that the NPRM service animal provisions leave unaddressed the issue of how a public entity can distinguish between a psychiatric service animal, which is covered under the final rule, and a comfort animal, which is not, other commenters noted that the Department's published guidance has helped public entities to distinguish between service animals and pets on the basis of an individual's response to these questions. Accordingly, the Department has retained the NPRM language incorporating its guidance concerning the permissible questions into the final rule.

Some commenters suggested that a title II entity be allowed to require current

documentation, no more than one year old, on letterhead from a mental health professional stating the following: (1) That the individual seeking to use the animal has a mental health-related disability; (2) that having the animal accompany the individual is necessary to the individual's mental health or treatment or to assist the person otherwise; and (3) that the person providing the assessment of the individual is a licensed mental health professional and the individual seeking to use the animal is under that individual's professional care. These commenters asserted that this will prevent abuse and ensure that individuals with legitimate needs for psychiatric service animals may use them. The Department believes that this proposal would treat persons with psychiatric, intellectual, and other mental disabilities less favorably than persons with physical or sensory disabilities. The proposal would also require persons with disabilities to obtain medical documentation and carry it with them any time they seek to engage in ordinary activities of daily life in their communities—something individuals without disabilities have not been required to do. Accordingly, the Department has concluded that a documentation requirement of this kind would be unnecessary, burdensome, and contrary to the spirit, intent, and mandates of the ADA.

Areas of a public entity open to the public, participants in services, programs, or activities, or invitees. The NPRM proposed at § 35.136(g) that an individual with a disability who uses a service animal has the same right of access to areas of a title II entity as members of the public, participants in services, programs, or activities, or invitees. Commenters indicated that allowing individuals with disabilities to go with their service animals into the same areas as members of the public, participants in programs, services, or activities, or invitees is accepted practice by most State and local government entities. The Department has included a slightly modified version of this provision in § 35.136(g) of the final rule.

The Department notes that under the final rule, a healthcare facility must also permit a person with a disability to be accompanied by a service animal in all areas of the facility in which that person would otherwise be allowed. There are some exceptions, however. The Department follows the guidance of the Centers for Disease Control and Prevention (CDC) on the use of service animals in a hospital setting. Zoonotic diseases can be transmitted to humans through bites, scratches, direct contact, arthropod vectors, or aerosols.

Consistent with CDC guidance, it is generally appropriate to exclude a service animal from limited-access areas that employ general infection-control measures, such as operating rooms and burn units. *See* Centers for Disease Control and Prevention, *Guidelines for Environmental Infection Control in Health-Care Facilities: Recommendations of CDC and the Healthcare Infection Control Practices Advisory Committee* (June 2003), available at *http://www.cdc.gov/hicpac/pdf/guidelines/eic_in_HCF_03.pdf* (last visited June 24, 2010). A service animal may accompany its handler to such areas as admissions and discharge offices, the emergency room, inpatient and outpatient rooms, examining and diagnostic rooms, clinics, rehabilitation therapy areas, the cafeteria and vending areas, the pharmacy, restrooms, and all other areas of the facility where healthcare personnel, patients, and visitors are permitted without added precaution.

Prohibition against surcharges for use of a service animal. In the NPRM, the Department proposed to incorporate the previously mentioned policy guidance, which prohibits the assessment of a surcharge for the use of a service animal, into proposed § 35.136(h). Several commenters agreed that this provision makes clear the obligation of a public entity to admit an individual with a service animal without surcharges, and that any additional costs imposed should be factored into the overall cost of administering a program, service, or activity, and passed on as a charge to all participants, rather than an individualized surcharge to the service animal user. Commenters also noted that service animal users cannot be required to comply with other requirements that are not generally applicable to other persons. If a public entity normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal. The Department has retained this language, with minor modifications, in the final rule at § 35.136(h).

Training requirement. Certain commenters recommended the adoption of formal training requirements for service animals. The Department has rejected this approach and will not impose any type of formal training requirements or certification process, but will continue to require that service animals be individually trained to do work or perform tasks for the benefit of an individual with a disability. While some groups have urged the Department to modify this position, the Department has determined that such a modification would not serve the full array of individuals with disabilities who use service animals, since individuals with disabilities may be capable of training, and some have trained, their service animal to perform tasks or do work to accommodate their disability. A training and certification requirement would increase the expense of acquiring a service animal and might limit access to service animals for individuals with limited financial resources.

Some commenters proposed specific behavior or training standards for service animals, arguing that without such standards, the public has no way to differentiate between untrained pets and service animals. Many of the suggested behavior or training standards were lengthy and detailed. The Department believes that this rule addresses service animal behavior sufficiently by including provisions that address the obligations of the service animal user and the circumstances under which a service animal may be excluded, such as the requirements that an animal be housebroken and under the control of its handler.

Miniature horses. The Department has been persuaded by commenters and the available research to include a provision that would require public entities to make reasonable modifications to policies, practices, or procedures to permit the use of a miniature horse by a person with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability. The traditional service animal is a dog, which has a long history of guiding individuals who are blind or have low vision, and over time dogs have been trained to perform an even wider variety of services for individuals with all types of disabilities. However, an organization that developed a program to train miniature horses, modeled on the program used for guide dogs, began training miniature horses in 1991.

Although commenters generally supported the species limitations proposed in the NPRM, some were opposed to the exclusion of miniature horses from the definition of a service animal. These commenters noted that these animals have been providing assistance to persons with disabilities for many years. Miniature horses were suggested by some commenters as viable alternatives to dogs for individuals with allergies, or for those whose religious beliefs preclude the use of dogs. Another consideration mentioned in favor of the use of miniature horses is the longer life span and strength of miniature horses in comparison to dogs. Specifically, miniature horses can provide service for more than 25 years while dogs can provide service for approximately 7 years, and, because of their strength, miniature horses can provide services that dogs cannot provide. Accordingly, use of miniature horses reduces the cost involved to retire, replace, and train replacement service animals.

The miniature horse is not one specific breed, but may be one of several breeds, with distinct characteristics that produce animals suited to service animal work. The animals generally range in height from 24 inches to 34 inches measured to the withers, or shoulders, and generally weigh between 70 and 100 pounds. These characteristics are similar to those of large breed dogs such as Labrador Retrievers, Great Danes, and Mastiffs. Similar to dogs, miniature horses can be trained through behavioral reinforcement to be "housebroken." Most miniature service horse handlers and organizations recommend that when the animals are not doing work or performing tasks, the miniature horses should be kept outside in a designated area, instead of indoors in a house.

According to information provided by an organization that trains service horses, these miniature horses are trained to provide a wide array of services to their handlers, primarily guiding individuals who are blind or have low vision, pulling wheelchairs, providing stability and balance for individuals with disabilities that impair the ability to walk, and supplying leverage that enables a person with a mobility disability to get up after a fall. According to the commenter, miniature horses are particularly effective for large stature individuals. The animals can be trained to stand (and in some cases, lie down) at the handler's feet in venues where space is at a premium, such as

assembly areas or inside some vehicles that provide public transportation. Some individuals with disabilities have traveled by train and have flown commercially with their miniature horses.

The miniature horse is not included in the definition of service animal, which is limited to dogs. However, the Department has added a specific provision at § 35.136(i) of the final rule covering miniature horses. Under this provision, a public entity must make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability. The public entity may take into account a series of assessment factors in determining whether to allow a miniature horse into a specific facility. These include the type, size, and weight of the miniature horse; whether the handler has sufficient control of the miniature horse; whether the miniature horse is housebroken; and whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation. In addition, paragraphs (c)–(h) of this section, which are applicable to dogs, also apply to miniature horses.

Ponies and full-size horses are not covered by § 35.136(i). Also, because miniature horses can vary in size and can be larger and less flexible than dogs, covered entities may exclude this type of service animal if the presence of the miniature horse, because of its larger size and lower level of flexibility, results in a fundamental alteration to the nature of the programs activities, or services provided.

Section 35.137 Mobility devices.

Section 35.137 of the NPRM clarified the scope and circumstances under which covered entities are legally obligated to accommodate various "mobility devices." Section 35.137 set forth specific requirements for the accommodation of "mobility devices," including wheelchairs, manually-powered mobility aids, and other power-driven mobility devices.

In both the NPRM and the final rule, § 35.137(a) states the general rule that in any areas open to pedestrians, public entities shall permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids, including walkers, crutches, canes, braces, or similar devices. Because mobility scooters satisfy the definition of "wheelchair" (*i.e.,* "manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor, or of both indoor and outdoor locomotion"), the reference to them in § 35.137(a) of the final rule has been omitted to avoid redundancy.

Some commenters expressed concern that permitting the use of other power-driven mobility devices by individuals with mobility disabilities would make such devices akin to wheelchairs and would require them to make physical changes to their facilities to accommodate their use. This concern is misplaced. If a facility complies with the applicable design requirements in the 1991 Standards or the 2010 Standards, the public entity will not be required to exceed those standards to accommodate the use of wheelchairs or other power-driven mobility devices that exceed those requirements.

Legal standard for other power-driven mobility devices. The NPRM version of § 35.137(b) provided that "[a] public entity shall make reasonable modifications in its policies, practices, and procedures to permit the use of other power-driven mobility devices by individuals with disabilities, unless the public entity can demonstrate that the use of the device is not reasonable or that its use will result in a fundamental alteration in the public entity's service, program, or activity." 73 FR 34466, 34505 (June 17, 2008). In other words, public entities are by default required to permit the use of other power-driven mobility devices; the burden is on them to prove the existence of a valid exception.

Most commenters supported the notion of assessing whether the use of a particular device is reasonable in the context of a particular venue. Commenters, however, disagreed about the meaning of the word "reasonable" as it is used in § 35.137(b) of the NPRM. Advocacy and nonprofit groups almost universally objected to the use of a general reasonableness standard with regard to the assessment of whether a particular device should be allowed at a particular venue. They argued that the assessment should be based on whether reasonable modifications could be made to allow a particular device at a particular venue, and that the only factors that should be part of the calculus that results in the exclusion of a particular device are undue burden, direct threat, and fundamental alteration.

A few commenters opposed the proposed provision requiring public entities to assess whether reasonable modifications can be made to allow other power-driven mobility devices, preferring instead that the Department issue guidance materials so that public entities would not have to incur the cost of such analyses. Another commenter noted a "fox guarding the hen house"-type of concern with regard to public entities developing and enforcing their own modification policy.

In response to comments received, the Department has revised § 35.137(b) to provide greater clarity regarding the development of legitimate safety requirements regarding other power-driven mobility devices and has added a new § 35.130(h) (Safety) to the title II regulation which specifically permits public entities to impose legitimate safety requirements necessary for the safe operation of their services, programs, and activities. (*See* discussion below.) The Department has not retained the proposed NPRM language stating that an other power-driven mobility device can be excluded if a public entity can demonstrate that its use is unreasonable or will result in a fundamental alteration of the entity's service, program, or activity, because the Department believes that this exception is covered by the general reasonable modification requirement contained in § 35.130(b)(7).

Assessment factors. Section 35.137(c) of the NPRM required public entities to "establish policies to permit the use of other power-driven mobility devices" and articulated four factors upon which public entities must base decisions as to whether a modification is reasonable to allow the use of a class of other power-driven mobility devices by individuals with disabilities in specific venues (e.g., parks, courthouses, office buildings, etc.). 73 FR 34466, 34504 (June 17, 2008).

The Department has relocated and modified the NPRM text that appeared in § 35.137(c) to new paragraph § 35.137(b)(2) to clarify what factors the public entity shall use in determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification. Section 35.137(b)(2) now states that "[i]n determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification under (b)(1), a public entity shall consider" certain enumerated factors. The assessment factors are designed to assist public entities in determining whether allowing the use of a particular other power-driven mobility device in a specific facility is reasonable. Thus, the focus of the analysis must be on the appropriateness of the use of the device at a specific facility, rather than whether it is necessary for an individual to use a particular device.

The NPRM proposed the following specific assessment factors: (1) The dimensions, weight, and operating speed of the mobility device in relation to a wheelchair; (2) the potential risk of harm to others by the operation of the mobility device; (3) the risk of harm to the environment or natural or cultural resources or conflict with Federal land management laws and regulations; and (4) the ability of the public entity to stow the mobility device when not in use, if requested by the user.

Factor 1 was designed to help public entities assess whether a particular device was appropriate, given its particular physical features, for a particular location. Virtually all commenters said the physical features of the device affected their view of whether a particular device was appropriate for a particular location. For example, while many commenters supported the use of another power-driven mobility device if the device were a Segway® PT, because of environmental and health concerns they did not offer the same level of support if the device were an off-highway vehicle, all-terrain vehicle (ATV), golf car, or other device with a fuel-powered or combustion engine. Most commenters noted that indicators such as speed, weight, and dimension really were an assessment of the appropriateness of a particular device in specific venues and suggested that factor 1 say this more specifically.

The term "in relation to a wheelchair" in the NPRM's factor 1 apparently created some concern that the same legal standards that apply to wheelchairs would be applied to other power-driven mobility devices. The Department has omitted the term "in relation to a wheelchair" from § 35.137(b)(2)(i) to clarify that if a facility that is in compliance

with the applicable provisions of the 1991 Standards or the 2010 Standards grants permission for an other power-driven mobility device to go on-site, it is not required to exceed those standards to accommodate the use of other power-driven mobility devices.

In response to requests that NPRM factor 1 state more specifically that it requires an assessment of an other power-driven mobility device's appropriateness under particular circumstances or in particular venues, the Department has added several factors and more specific language. In addition, although the NPRM made reference to the operation of other power-driven mobility devices in "specific venues," the Department's intent is captured more clearly by referencing "specific facility" in paragraph (b)(2). The Department also notes that while speed is included in factor 1, public entities should not rely solely on a device's top speed when assessing whether the device can be accommodated; instead, public entities should also consider the minimum speeds at which a device can be operated and whether the development of speed limit policies can be established to address concerns regarding the speed of the device. Finally, since the ability of the public entity to stow the mobility device when not in use is an aspect of its design and operational characteristics, the text proposed as factor 4 in the NPRM has been incorporated in paragraph (b)(2)(iii).

The NPRM's version of factor 2 provided that the "risk of potential harm to others by the operation of the mobility device" is one of the determinants in the assessment of whether other power-driven mobility devices should be excluded from a site. The Department intended this requirement to be consistent with the Department's longstanding interpretation, expressed in § II–3.5200 (Safety) of the 1993 Title II Technical Assistance Manual, which provides that public entities may "impose legitimate safety requirements that are necessary for safe operation." (This language parallels the provision in the title III regulation at § 36.301(b).) However, several commenters indicated that they read this language, particularly the phrase "risk of potential harm," to mean that the Department had adopted a concept of risk analysis different from that which is in the existing standards. The Department did not intend to create a new standard and has changed the language in paragraphs (b)(1) and (b)(2) to clarify the applicable standards, thereby avoiding the introduction of new assessments of risk beyond those necessary for the safe operation of the public entity. In addition, the Department has added a new section, 35.130(h), which incorporates the existing safety standard into the title II regulation.

While all applicable affirmative defenses are available to public entities in the establishment and execution of their policies regarding other power-driven mobility devices, the Department did not explicitly incorporate the direct threat defense into the assessment factors because § 35.130(h) provides public entities the appropriate framework with which to assess whether legitimate safety requirements that may preclude the use of certain other power-driven mobility devices are necessary for the safe operation of the public entities. In order to be legitimate, the safety requirement must be based on actual risks and not mere speculation regarding the device or how it will be operated. Of course, public entities may enforce legitimate safety rules established by the public entity for the operation of other power-driven mobility devices (*e.g.,* reasonable speed restrictions). Finally, NPRM factor 3 concerning environmental resources and conflicts of law has been relocated to § 35.137(b)(2)(v).

As a result of these comments and requests, NPRM factors 1, 2, 3, and 4 have been revised and renumbered within paragraph (b)(2) in the final rule.

Several commenters requested that the Department provide guidance materials or more explicit concepts of which considerations might be appropriate for inclusion in a policy that allows the use of other power-driven mobility devices. A public entity that has determined that reasonable modifications can be made in its policies, practices, or procedures to allow the use of other power-driven mobility devices should develop a policy that clearly states the circumstances under which the use of other power-driven mobility devices by individuals with a mobility disability will be permitted. It also should include clear, concise statements of specific rules governing the operation of such devices. Finally, the public entity should endeavor to provide individuals with disabilities who use other power-driven mobility devices with advanced notice of its policy regarding the use of such devices and what rules apply to the operation of these devices.

For example, the U.S. General Services Administration (GSA) has developed a policy allowing the use of the Segway® PT and other EPAMDs in all Federal buildings under GSA's jurisdiction. *See* General Services Administration, *Interim Segway® Personal Transporter Policy* (Dec. 3, 2007), available at *http://www.gsa.gov/graphics/pbs/Interim_Segway_Policy_121007.pdf* (last visited June 24, 2010). The GSA policy defines the policy's scope of coverage by setting out what devices are and are not covered by the policy. The policy also sets out requirements for safe operation, such as a speed limit, prohibits the use of EPAMDs on escalators, and provides guidance regarding security screening of these devices and their operators.

A public entity that determines that it can make reasonable modifications to permit the use of an other power-driven mobility device by an individual with a mobility disability might include in its policy the procedure by which claims that the other power-driven mobility device is being used for a mobility disability will be assessed for legitimacy (*i.e.,* a credible assurance that the device is being used for a mobility disability, including a verbal representation by the person with a disability that is not contradicted by observable fact, or the presentation of a disability parking space placard or card, or State-issued proof of disability); the type or classes of other power-driven mobility devices are permitted to be used by individuals with mobility disabilities; the size, weight, and dimensions of the other power-driven mobility devices that are permitted to be used by individuals with mobility disabilities; the speed limit for the other power-driven mobility devices that are permitted to be used by individuals with mobility disabilities; the places, times, or circumstances under which the use of the other power-driven mobility device is or will be restricted or prohibited; safety, pedestrian, and other rules concerning the use of the other power-driven mobility device; whether, and under which circumstances, storage for the other power-driven mobility device will be made available; and how and where individuals with a mobility disability can obtain a copy of the other power-driven mobility device policy.

Public entities also might consider grouping other power-driven mobility devices by type (*e.g.,* EPAMDs, golf cars, gasoline-powered vehicles, and other devices). For example, an amusement park may determine that it is reasonable to allow individuals with disabilities to use EPAMDs in a variety of outdoor programs and activities, but that it would not be reasonable to allow the use of golf cars as mobility devices in similar circumstances. At the same time, the entity may address its concerns about factors such as space limitations by disallowing use of EPAMDs by members of the general public who do not have mobility disabilities.

The Department anticipates that, in many circumstances, public entities will be able to develop policies that will allow the use of other power-driven mobility devices by individuals with mobility disabilities. Consider the following example:

A county courthouse has developed a policy whereby EPAMDs may be operated in the pedestrian areas of the courthouse if the operator of the device agrees not to operate the device faster than pedestrians are walking; to yield to pedestrians; to provide a rack or stand so that the device can stand upright; and to use the device only in courtrooms that are large enough to accommodate such devices. If the individual is selected for jury duty in one of the smaller courtrooms, the county's policy indicates that if it is not possible for the individual with the disability to park the device and walk into the courtroom, the location of the trial will be moved to a larger courtroom.

Inquiry into the use of other power-driven mobility device. The NPRM version of § 35.137(d) provided that "[a] public entity may ask a person using a power-driven mobility device if the mobility device is needed due to the person's disability. A public entity shall not ask a person using a mobility device questions about the nature and extent of the person's disability." 73 FR 34466, 34504 (June 17, 2008).

Many environmental, transit system, and government commenters expressed concern about people feigning mobility disabilities to be able to use other power-driven mobility devices in public entities in which their use is otherwise restricted. These commenters felt that a mere inquiry into whether the device is being used for a mobility disability was an insufficient mechanism by which to detect fraud by other power-driven mobility

device users who do not have mobility disabilities. These commenters believed they should be given more latitude to make inquiries of other power-driven mobility device users claiming a mobility disability than they would be given for wheelchair users. They sought the ability to establish a policy or method by which public entities may assess the legitimacy of the mobility disability. They suggested some form of certification, sticker, or other designation. One commenter suggested a requirement that a sticker bearing the international symbol for accessibility be placed on the device or that some other identification be required to signal that the use of the device is for a mobility disability. Other suggestions included displaying a disability parking placard on the device or issuing EPAMDs, like the Segway® PT, a permit that would be similar to permits associated with parking spaces reserved for those with disabilities.

Advocacy, nonprofit, and several individual commenters balked at the notion of allowing any inquiry beyond whether the device is necessary for a mobility disability and encouraged the Department to retain the NPRM's language on this topic. Other commenters, however, were empathetic with commenters who had concerns about fraud. At least one Segway® PT advocate suggested it would be permissible to seek documentation of the mobility disability in the form of a simple sign or permit.

The Department has sought to find common ground by balancing the needs of public entities and individuals with mobility disabilities wishing to use other power-driven mobility devices with the Department's longstanding, well-established policy of not allowing public entities or establishments to require proof of a mobility disability. There is no question that public entities have a legitimate interest in ferreting out fraudulent representations of mobility disabilities, especially given the recreational use of other power-driven mobility devices and the potential safety concerns created by having too many such devices in a specific facility at one time. However, the privacy of individuals with mobility disabilities and respect for those individuals, is also vitally important.

Neither § 35.137(d) of the NPRM nor § 35.137(c) of the final rule permits inquiries into the nature of a person's mobility disability. However, the Department does not believe it is unreasonable or overly intrusive for an individual with a mobility disability seeking to use an other power-driven mobility device to provide a credible assurance to verify that the use of the other power-driven mobility device is for a mobility disability. The Department sought to minimize the amount of discretion and subjectivity exercised by public entities in assessing whether an individual has a mobility disability and to allow public entities to verify the existence of a mobility disability. The solution was derived from comments made by several individuals who said they have been admitted with their Segway® PTs into public entities and public accommodations that ordinarily do not allow these devices on-site when they have presented or displayed State-issued disability parking placards. In the examples provided by commenters, the parking placards were accepted as verification that the Segway® PTs were being used as mobility devices.

Because many individuals with mobility disabilities avail themselves of State programs that issue disability parking placards or cards and because these programs have penalties for fraudulent representations of identity and disability, utilizing the parking placard system as a means to establish the existence of a mobility disability strikes a balance between the need for privacy of the individual and fraud protection for the public entity. Consequently, the Department has decided to include regulatory text in § 35.137(c)(2) of the final rule that requires public entities to accept the presentation of a valid, State-issued disability parking placard or card, or State-issued proof of disability, as verification that an individual uses the other power-driven mobility device for his or her mobility disability. A "valid" disability placard or card is one that is presented by the individual to whom it was issued and is otherwise in compliance with the State of issuance's requirements for disability placards or cards. Public entities are required to accept a valid, State-issued disability parking placard or card, or State-issued proof of disability as a credible assurance, but they cannot demand or require the presentation of a valid disability placard or card, or State-issued proof of disability, as a prerequisite for use of an other power-driven mobility device, because not all persons with mobility disabilities have such means of proof. If an individual with a mobility disability does not have such a placard or card, or State-issued proof of disability, he or she may present other information that would serve as a credible assurance of the existence of a mobility disability.

In lieu of a valid, State-issued disability parking placard or card, or State-issued proof of disability, a verbal representation, not contradicted by observable fact, shall be accepted as a credible assurance that the other power-driven mobility device is being used because of a mobility disability. This does not mean, however, that a mobility disability must be observable as a condition for allowing the use of an other power-driven mobility device by an individual with a mobility disability, but rather that if an individual represents that a device is being used for a mobility disability and that individual is observed thereafter engaging in a physical activity that is contrary to the nature of the represented disability, the assurance given is no longer credible and the individual may be prevented from using the device.

Possession of a valid, State-issued disability parking placard or card or a verbal assurance does not trump a public entity's valid restrictions on the use of other power-driven mobility devices. Accordingly, a credible assurance that the other power-driven mobility device is being used because of a mobility disability is not a guarantee of entry to a public entity because, notwithstanding such credible assurance, use of the device in a particular venue may be at odds with the legal standard in § 35.137(b)(1) or with one or more of the § 35.137(b)(2) factors. Only after an individual with a disability has satisfied all of the public entity's policies regarding the use of other power-driven mobility devices does a credible assurance become a factor in allowing the use of the device. For example, if an individual seeking to use an other power-driven mobility device fails to satisfy any of the public entity's stated policies regarding the use of other power-driven mobility devices, the fact that the individual legitimately possesses and presents a valid, State-issued disability parking placard or card, or State-issued proof of disability, does not trump the policy and require the public entity to allow the use of the device. In fact, in some instances, the presentation of a legitimately held placard or card, or State-issued proof of disability, will have no relevance or bearing at all on whether the other power-driven mobility device may be used, because the public entity's policy does not permit the device in question on-site under any circumstances (*e.g.,* because its use would create a substantial risk of serious harm to the immediate environment or natural or cultural resources). Thus, an individual with a mobility disability who presents a valid disability placard or card, or State-issued proof of disability, will not be able to use an ATV as an other power-driven mobility device in a State park if the State park has adopted a policy banning their use for any or all of the above-mentioned reasons. However, if a public entity permits the use of a particular other power-driven mobility device, it cannot refuse to admit an individual with a disability who uses that device if the individual has provided a credible assurance that the use of the device is for a mobility disability.

Section 35.138 Ticketing

The 1991 title II regulation did not contain specific regulatory language on ticketing. The ticketing policies and practices of public entities, however, are subject to title II's nondiscrimination provisions. Through the investigation of complaints, enforcement actions, and public comments related to ticketing, the Department became aware that some venue operators, ticket sellers, and distributors were violating title II's nondiscrimination mandate by not providing individuals with disabilities the same opportunities to purchase tickets for accessible seating as they provided to spectators purchasing conventional seats. In the NPRM, the Department proposed § 35.138 to provide explicit direction and guidance on discriminatory practices for entities involved in the sale or distribution of tickets.

The Department received comments from advocacy groups, assembly area trade associations, public entities, and individuals. Many commenters supported the addition of regulatory language pertaining to ticketing and urged the Department to retain it in the final rule. Several commenters, however, questioned why there were inconsistencies between the title II and title III provisions and suggested that the same language be used for both titles. The Department has decided to retain ticketing regulatory language and to ensure consistency between the ticketing provisions in title II and title III.

Because many in the ticketing industry view season tickets and other multi-event packages differently from individual tickets, the Department bifurcated some season ticket provisions from those concerning single-event tickets in the NPRM. This structure, however, resulted in some provisions being repeated for both types of tickets but not for others even though they were intended to apply to both types of tickets. The result was that it was not entirely clear that some of the provisions that were not repeated also were intended to apply to season tickets. The Department is addressing the issues raised by these commenters using a different approach. For the purposes of this section, a *single event* refers to an individual performance for which tickets may be purchased. In contrast, a *series of events* includes, but is not limited to, subscription events, event packages, season tickets, or any other tickets that may be purchased for multiple events of the same type over the course of a specified period of time whose ownership right reverts to the public entity at the end of each season or time period. Series-of-events tickets that give their holders an enhanced ability to purchase such tickets from the public entity in seasons or periods of time that follow, such as a right of first refusal or higher ranking on waiting lists for more desirable seats, are subject to the provisions in this section. In addition, the final rule merges together some NPRM paragraphs that dealt with related topics and has reordered and renamed some of the paragraphs that were in the NPRM.

Ticket sales. In the NPRM, the Department proposed, in § 35.138(a), a general rule that a public entity shall modify its policies, practices, or procedures to ensure that individuals with disabilities can purchase tickets for accessible seating for an event or series of events in the same way as others (i.e., during the same hours and through the same distribution methods as other seating is sold). 73 FR 34466, 34504 (June 17, 2008). "Accessible seating" is defined in § 35.138(a)(1) of the final rule to mean "wheelchair spaces and companion seats that comply with sections 221 and 802 of the 2010 Standards along with any other seats required to be offered for sale to the individual with a disability pursuant to paragraph (d) of this section." The defined term does not include designated aisle seats. A "wheelchair space" refers to a space for a single wheelchair and its occupant.

The NPRM proposed requiring that accessible seats be sold through the "same methods of distribution" as non-accessible seats. Comments from venue managers and others in the business community, in general, noted that multiple parties are involved in ticketing, and because accessible seats may not be allotted to all parties involved at each stage, such parties should be protected from liability. For example, one commenter noted that a third-party ticket vendor, like Ticketmaster, can only sell the tickets it receives from its client. Because § 35.138(a)(2)(iii) of the final rule requires venue operators to make available accessible seating through the same methods of distribution they use for their regular tickets, venue operators that provide tickets to third-party ticket vendors are required to provide accessible seating to the third-party ticket vendor. This provision will enhance third-party ticket vendors' ability to acquire and sell accessible seating for sale in the future. The Department notes that once third-party ticket vendors acquire accessible tickets, they are obligated to sell them in accordance with these rules.

The Department also has received frequent complaints that individuals with disabilities have not been able to purchase accessible seating over the Internet, and instead have had to engage in a laborious process of calling a customer service line, or sending an e-mail to a customer service representative and waiting for a response. Not only is such a process burdensome, but it puts individuals with disabilities at a disadvantage in purchasing tickets for events that are popular and may sell out in minutes. Because § 35.138(e) of the final rule authorizes venues to release accessible seating in case of a sell-out, individuals with disabilities effectively could be cut off from buying tickets unless they also have the ability to purchase tickets in real time over the Internet. The Department's new regulatory language is designed to address this problem.

Several commenters representing assembly areas raised concerns about offering accessible seating for sale over the Internet. They contended that this approach would increase the incidence of fraud since anyone easily could purchase accessible seating over the Internet. They also asserted that it would be difficult technologically to provide accessible seating for sale in real time over the Internet, or that to do so would require simplifying the rules concerning the purchase of multiple additional accompanying seats. Moreover, these commenters argued that requiring an individual purchasing accessible seating to speak with a customer service representative would allow the venue to meet the patron's needs most appropriately and ensure that wheelchair spaces are reserved for individuals with disabilities who require wheelchair spaces. Finally, these commenters argued that individuals who can transfer effectively and conveniently from a wheelchair to a seat with a movable armrest seat could instead purchase designated aisle seats.

The Department considered these concerns carefully and has decided to continue with the general approach proposed in the NPRM. Although fraud is an important concern, the Department believes that it is best combated by other means that would not have the effect of limiting the ability of individuals with disabilities to purchase tickets, particularly since restricting the purchase of accessible seating over the Internet will, of itself, not curb fraud. In addition, the Department has identified permissible means for covered entities to reduce the incidence of fraudulent accessible seating ticket purchases in § 35.138(h) of the final rule.

Several commenters questioned whether ticket websites themselves must be accessible to individuals who are blind or have low vision, and if so, what that requires. The Department has consistently interpreted the ADA to cover websites that are operated by public entities and stated that such sites must provide their services in an accessible manner or provide an accessible alternative to the website that is available 24 hours a day, seven days a week. The final rule, therefore, does not impose any new obligation in this area. The accessibility of websites is discussed in more detail in the section of Appendix A entitled "Other Issues."

In § 35.138(b) of the NPRM, the Department also proposed requiring public entities to make accessible seating available during all stages of tickets sales including, but not limited to, presales, promotions, lotteries, waitlists, and general sales. For example, if tickets will be presold for an event that is open only to members of a fan club, or to holders of a particular credit card, then tickets for accessible seating must be made available for purchase through those means. This requirement does not mean that any individual with a disability would be able to purchase those seats. Rather, it means that an individual with a disability who meets the requirement for such a sale (*e.g.,* who is a member of the fan club or holds that credit card) will be able to participate in the special promotion and purchase accessible seating. The Department has maintained the substantive provisions of the NPRM's § 35.138(a) and (b) but has combined them in a single paragraph at § 35.138(a)(2) of the final rule so that all of the provisions having to do with the manner in which tickets are sold are located in a single paragraph.

Identification of available accessible seating. In the NPRM, the Department proposed § 35.138(c), which, as modified and renumbered as paragraph (b)(3) in the final rule, requires a facility to identify available accessible seating through seating maps, brochures, or other methods if that information is made available about other seats sold to the general public. This rule requires public entities to provide information about accessible seating to the same degree of specificity that it provides information about general seating. For example, if a seating map displays color-coded blocks pegged to prices for general seating, then accessible seating must be similarly color-coded. Likewise, if covered entities provide detailed maps that show exact seating and pricing for general seating, they must provide the same for accessible seating.

The NPRM did not specify a requirement to identify prices for accessible seating. The final rule requires that if such information is provided for general seating, it must be provided for accessible seating as well.

In the NPRM, the Department proposed in § 35.138(d) that a public entity, upon being asked, must inform persons with disabilities and their companions of the locations of all unsold or otherwise available seating. This provision is intended to prevent the practice of "steering" individuals with disabilities to certain accessible seating so that the facility can maximize potential ticket sales by releasing unsold accessible seating, especially in preferred or desirable locations, for sale to the general public. The Department received no significant comment on this proposal. The Department has retained this provision in the final rule but

has added it, with minor modifications, to § 35.138(b) as paragraph (1).

Ticket prices. In the NPRM, the Department proposed § 35.138(e) requiring that ticket prices for accessible seating be set no higher than the prices for other seats in that seating section for that event. The NPRM's provision also required that accessible seating be made available at every price range, and if an existing facility has barriers to accessible seating within a particular price range, a proportionate amount of seating (determined by the ratio of the total number of seats at that price level to the total number of seats in the assembly area) must be offered in an accessible location at that same price. Under this rule, for example, if a public entity has a 20,000-seat facility built in 1980 with inaccessible seating in the $20-price category, which is on the upper deck, and it chooses not to put accessible seating in that section, then it must place a proportionate number of seats in an accessible location for $20. If the upper deck has 2,000 seats, then the facility must place 10 percent of its accessible seating in an accessible location for $20 provided that it is part of a seating section where ticket prices are equal to or more than $20—a facility may not place the $20-accessible seating in a $10-seating section. The Department received no significant comment on this rule, and it has been retained, as amended, in the final rule in § 35.138(c).

Purchase of multiple tickets. In the NPRM, the Department proposed § 35.138(i) to address one of the most common ticketing complaints raised with the Department: That individuals with disabilities are not able to purchase more than two tickets. The Department proposed this provision to facilitate the ability of individuals with disabilities to attend events with friends, companions, or associates who may or may not have a disability by enabling individuals with disabilities to purchase the maximum number of tickets allowed per transaction to other spectators; by requiring venues to place accompanying individuals in general seating as close as possible to accessible seating (in the event that a group must be divided because of the large size of the group); and by allowing an individual with a disability to purchase up to three additional contiguous seats per wheelchair space if they are available at the time of sale. Section 35.138(i)(2) of the NPRM required that a group containing one or more wheelchair users must be placed together, if possible, and that in the event that the group could not be placed together, the individuals with disabilities may not be isolated from the rest of the group.

The Department asked in the NPRM whether this rule was sufficient to effectuate the integration of individuals with disabilities. Many advocates and individuals praised it as a welcome and much-needed change, stating that the trade-off of being able to sit with their family or friends was worth reducing the number of seats available for individuals with disabilities. Some commenters went one step further and suggested that the number of additional accompanying seats should not be restricted to three.

Although most of the substance of the proposed provision on the purchase of multiple tickets has been maintained in the final rule, it has been renumbered as § 35.138(d), reorganized, and supplemented. To preserve the availability of accessible seating for other individuals with disabilities, the Department has not expanded the rule beyond three additional contiguous seats. Section 35.138(d)(1) of the final rule requires public entities to make available for purchase three additional tickets for seats in the same row that are contiguous with the wheelchair space provided that at the time of the purchase there are three such seats available. The requirement that the additional seats be "contiguous with the wheelchair space" does not mean that each of the additional seats must be in actual contact or have a border in common with the wheelchair space; however, at least one of the additional seats should be immediately adjacent to the wheelchair space. The Department recognizes that it will often be necessary to use vacant wheelchair spaces to provide for contiguous seating.

The Department has added paragraphs (d)(2) and (d)(3) to clarify that in situations where there are insufficient unsold seats to provide three additional contiguous seats per wheelchair space or a ticket office restricts sales of tickets to a particular event to less than four tickets per customer, the obligation to make available three additional contiguous seats per wheelchair space would be affected. For example, if at the time of purchase, there are only two additional contiguous seats available for purchase because the third has been sold already, then the ticket purchaser would be entitled to two such seats. In this situation, the public entity would be required to make up the difference by offering one additional ticket for sale that is as close as possible to the accessible seats. Likewise, if ticket purchases for an event are limited to two per customer, a person who uses a wheelchair who seeks to purchase tickets would be entitled to purchase only one additional contiguous seat for the event.

The Department also has added paragraph (d)(4) to clarify that the requirement for three additional contiguous seats is not intended to serve as a cap if the maximum number of tickets that may be purchased by members of the general public exceeds the four tickets an individual with a disability ordinarily would be allowed to purchase (*i.e.,* a wheelchair space and three additional contiguous seats). If the maximum number of tickets that may be purchased by members of the general public exceeds four, an individual with a disability is to be allowed to purchase the maximum number of tickets; however, additional tickets purchased by an individual with a disability beyond the wheelchair space and the three additional contiguous seats provided in § 35.138(d)(1) do not have to be contiguous with the wheelchair space.

The NPRM proposed at § 35.138(i)(2) that for group sales, if a group includes one or more individuals who use a wheelchair, then the group shall be placed in a seating area with accessible seating so that, if possible, the group can sit together. If it is necessary to divide the group, it should be divided so that the individuals in the group who use wheelchairs are not isolated from the rest of the members of their group. The final rule retains the NPRM language in paragraph (d)(5).

Hold-and-release of unsold accessible seating. The Department recognizes that not all accessible seating will be sold in all assembly areas for every event to individuals with disabilities who need such seating and that public entities may have opportunities to sell such seating to the general public. The Department proposed in the NPRM a provision aimed at striking a balance between affording individuals with disabilities adequate time to purchase accessible seating and the entity's desire to maximize ticket sales. In the NPRM, the Department proposed § 35.138(f), which allowed for the release of accessible seating under the following circumstances: (i) When all seating in the facility has been sold, excluding luxury boxes, club boxes, or suites; (ii) when all seating in a designated area has been sold and the accessible seating being released is in the same area; or (iii) when all seating in a designated price range has been sold and the accessible seating being released is within the same price range.

The Department's NPRM asked "whether additional regulatory guidance is required or appropriate in terms of a more detailed or set schedule for the release of tickets in conjunction with the three approaches described above. For example, does the proposed regulation address the variable needs of assembly areas covered by the ADA? Is additional regulatory guidance required to eliminate discriminatory policies, practices and procedures related to the sale, hold, and release of accessible seating? What considerations should appropriately inform the determination of when unsold accessible seating can be released to the general public?" 73 FR 34466, 34484 (June 17, 2008).

The Department received comments both supporting and opposing the inclusion of a hold-and-release provision. One side proposed loosening the restrictions on the release of unsold accessible seating. One commenter from a trade association suggested that tickets should be released regardless of whether there is a sell-out, and that these tickets should be released according to a set schedule. Conversely, numerous individuals, advocacy groups, and at least one public entity urged the Department to tighten the conditions under which unsold tickets for accessible seating may be released. These commenters suggested that venues should not be permitted to release tickets during the first two weeks of sale, or alternatively, that they should not be permitted to be released earlier than 48 hours before a sold-out event. Many of these commenters criticized the release of accessible seating under the second and third prongs of § 35.138(f) in the NPRM (when there is a sell-out in general seating in a designated seating area or in a price range), arguing that it would create situations where general seating would be available for purchase while accessible seating would not be.

Numerous commenters—both from the industry and from advocacy groups—asked for clarification of the term "sell-out."

Business groups commented that industry practice is to declare a sell-out when there are only "scattered singles" available—isolated seats that cannot be purchased as a set of adjacent pairs. Many of those same commenters also requested that "sell-out" be qualified with the phrase "of all seating available for sale" since it is industry practice to hold back from release tickets to be used for groups connected with that event (*e.g.,* the promoter, home team, or sports league). They argued that those tickets are not available for sale and any return of these tickets to the general inventory happens close to the event date. Noting the practice of holding back tickets, one advocacy group suggested that covered entities be required to hold back accessible seating in proportion to the number of tickets that are held back for later release.

The Department has concluded that it would be inappropriate to interfere with industry practice by defining what constitutes a "sell-out" and that a public entity should continue to use its own approach to defining a "sell-out." If, however, a public entity declares a sell-out by reference to those seats that are available for sale, but it holds back tickets that it reasonably anticipates will be released later, it must hold back a proportional percentage of accessible seating to be released as well.

Adopting any of the alternatives proposed in the comments summarized above would have upset the balance between protecting the rights of individuals with disabilities and meeting venues' concerns about lost revenue from unsold accessible seating. As a result, the Department has retained § 35.138(f) (renumbered as § 35.138(e)) in the final rule.

The Department has, however, modified the regulation text to specify that accessible seating may be released only when "all non-accessible tickets in a designated seating area have been sold and the tickets for accessible seating are being released in the same designated area." As stated in the NPRM, the Department intended for this provision to allow, for example, the release of accessible seating at the orchestra level when all other seating at the orchestra level is sold. The Department has added this language to the final rule at § 35.138(e)(1)(ii) to clarify that venues cannot designate or redesignate seating areas for the purpose of maximizing the release of unsold accessible seating. So, for example, a venue may not determine on an *ad hoc* basis that a group of seats at the orchestra level is a designated seating area in order to release unsold accessible seating in that area.

The Department also has maintained the hold-and-release provisions that appeared in the NPRM but has added a provision to address the release of accessible seating for series-of-events tickets on a series-of-events basis. Many commenters asked the Department whether unsold accessible seating may be converted to general seating and released to the general public on a season-ticket basis or longer when tickets typically are sold as a season-ticket package or other long-term basis. Several disability rights organizations and individual commenters argued that such a practice should not be permitted, and, if it were, that conditions should be imposed to ensure that individuals with disabilities have future access to those seats.

The Department interprets the fundamental principle of the ADA as a requirement to give individuals with disabilities equal, not better, access to those opportunities available to the general public. Thus, for example, a public entity that sells out its facility on a season-ticket only basis is not required to leave unsold its accessible seating if no persons with disabilities purchase those season-ticket seats. Of course, public entities may choose to go beyond what is required by reserving accessible seating for individuals with disabilities (or releasing such seats for sale to the general public) on an individual-game basis.

If a covered entity chooses to release unsold accessible seating for sale on a season-ticket or other long-term basis, it must meet at least two conditions. Under § 35.138(g) of the final rule, public entities must leave flexibility for game-day change-outs to accommodate ticket transfers on the secondary market. And public entities must modify their ticketing policies so that, in future years, individuals with disabilities will have the ability to purchase accessible seating on the same basis as other patrons (e.g., as season tickets). Put differently, releasing accessible seating to the general public on a season-ticket or other long-term basis cannot result in that seating being lost to individuals with disabilities in perpetuity. If, in future years, season tickets become available and persons with disabilities have reached the top of the waiting list or have met any other eligibility criteria for season-ticket purchases, public entities must ensure that accessible seating will be made available to the eligible individuals. In order to accomplish this, the Department has added § 35.138(e)(3)(i) to require public entities that release accessible season tickets to individuals who do not have disabilities that require the features of accessible seating to establish a process to prevent the automatic reassignment of such ticket holders to accessible seating. For example, a public entity could have in place a system whereby accessible seating that was released because it was not purchased by individuals with disabilities is not in the pool of tickets available for purchase for the following season unless and until the conditions for ticket release have been satisfied in the following season. Alternatively, a public entity might release tickets for accessible seating only when a purchaser who does not need its features agrees that he or she has no guarantee of or right to the same seats in the following season, or that if season tickets are guaranteed for the following season, the purchaser agrees that the offer to purchase tickets is limited to non-accessible seats having to the extent practicable, comparable price, view, and amenities to the accessible seats such individuals held in the prior year. The Department is aware that this rule may require some administrative changes but believes that this process will not create undue financial and administrative burdens. The Department believes that this approach is balanced and beneficial. It will allow public entities to sell all of their seats and will leave open the possibility, in future seasons or series of events, that persons who need accessible seating may have access to it.

The Department also has added § 35.138(e)(3)(ii) to address how season tickets or series-of-events tickets that have attached ownership rights should be handled if the ownership right returns to the public entity (e.g., when holders forfeit their ownership right by failing to purchase season tickets or sell their ownership right back to a public entity). If the ownership right is for accessible seating, the public entity is required to adopt a process that allows an eligible individual with a disability who requires the features of such seating to purchase the rights and tickets for such seating.

Nothing in the regulatory text prevents a public entity from establishing a process whereby such ticket holders agree to be voluntarily reassigned from accessible seating to another seating area so that individuals with mobility disabilities or disabilities that require the features of accessible seating and who become newly eligible to purchase season tickets have an opportunity to do so. For example, a public entity might seek volunteers to relocate to another location that is at least as good in terms of its location, price, and amenities, or a public entity might use a seat with forfeited ownership rights as an inducement to get a ticket holder to give up accessible seating he or she does not need.

Ticket transfer. The Department received many comments asking whether accessible seating has the same transfer rights as general seats. The proposed regulation at § 35.138(e) required that individuals with disabilities must be allowed to purchase season tickets for accessible seating on the same terms and conditions as individuals purchasing season tickets for general seating, including the right—if it exists for other ticket-holders—to transfer individual tickets to friends or associates. Some commenters pointed out that the NPRM proposed explicitly allowing individuals with disabilities holding season tickets to transfer tickets but did not address the transfer of tickets purchased for individual events. Several commenters representing assembly areas argued that persons with disabilities holding tickets for an individual event should not be allowed to sell or transfer them to third parties because such ticket transfers would increase the risk of fraud or would make unclear the obligation of the entity to accommodate secondary ticket transfers. They argued that individuals holding accessible seating should either be required to transfer their tickets to another individual with a disability or return them to the facility for a refund.

Although the Department is sympathetic to concerns about administrative burden, curtailing transfer rights for accessible seating when other ticket holders are permitted to transfer tickets would be inconsistent with the ADA's guiding principle that individuals with disabilities must have rights equal to others. Thus, the Department has added language in the final rule in § 35.138(f) that requires that individuals with disabilities holding accessible seating for any event have the

same transfer rights accorded other ticket holders for that event. Section 35.138(f) also preserves the rights of individuals with disabilities who hold tickets to accessible seats for a series of events to transfer individual tickets to others, regardless of whether the transferee needs accessible seating. This approach recognizes the common practice of individuals splitting season tickets or other multi-event ticket packages with friends, colleagues, or other spectators to make the purchase of season tickets affordable; individuals with disabilities should not be placed in the burdensome position of having to find another individual with a disability with whom to share the package.

This provision, however, does not require public entities to seat an individual who holds a ticket to an accessible seat in such seating if the individual does not need the accessible features of the seat. A public entity may reserve the right to switch these individuals to different seats if they are available, but a public entity is not required to remove a person without a disability who is using accessible seating from that seating, even if a person who uses a wheelchair shows up with a ticket from the secondary market for a non-accessible seat and wants accessible seating.

Secondary ticket market. Section 35.138(g) is a new provision in the final rule that requires a public entity to modify its policies, practices, or procedures to ensure that an individual with a disability, who acquires a ticket in the secondary ticket market, may use that ticket under the same terms and conditions as other ticket holders who acquire a ticket in the secondary market for an event or series of events. This principle was discussed in the NPRM in connection with § 35.138(e), pertaining to season-ticket sales. There, the Department asked for public comment regarding a public entity's proposed obligation to accommodate the transfer of accessible seating tickets on the secondary ticket market to those who do not need accessible seating and vice versa.

The secondary ticket market, for the purposes of this rule, broadly means any transfer of tickets after the public entity's initial sale of tickets to individuals or entities. It thus encompasses a wide variety of transactions, from ticket transfers between friends to transfers using commercial exchange systems. Many commenters noted that the distinction between the primary and secondary ticket market has become blurred as a result of agreements between teams, leagues, and secondary market sellers. These commenters noted that the secondary market may operate independently of the public entity, and parts of the secondary market, such as ticket transfers between friends, undoubtedly are outside the direct jurisdiction of the public entity.

To the extent that venues seat persons who have purchased tickets on the secondary market, they must similarly seat persons with disabilities who have purchased tickets on the secondary market. In addition, some public entities may acquire ADA obligations directly by formally entering the secondary ticket market.

The Department's enforcement experience with assembly areas also has revealed that venues regularly provide for and make last-minute seat transfers. As long as there are vacant wheelchair spaces, requiring venues to provide wheelchair spaces for patrons who acquired inaccessible seats and need wheelchair spaces is an example of a reasonable modification of a policy under title II of the ADA. Similarly, a person who has a ticket for a wheelchair space but who does not require its accessible features could be offered non-accessible seating if such seating is available.

The Department's longstanding position that title II of the ADA requires venues to make reasonable modifications in their policies to allow individuals with disabilities who acquired non-accessible tickets on the secondary ticket market to be seated in accessible seating, where such seating is vacant, is supported by the only Federal court to address this issue. *See Independent Living Resources* v. *Oregon Arena Corp.,* 1 F. Supp. 2d 1159, 1171 (D. Or. 1998). The Department has incorporated this position into the final rule at § 35.138(g)(2).

The NPRM contained two questions aimed at gauging concern with the Department's consideration of secondary ticket market sales. The first question asked whether a secondary purchaser who does not have a disability and who buys an accessible seat should be required to move if the space is needed for someone with a disability.

Many disability rights advocates answered that the individual should move provided that there is a seat of comparable or better quality available for him and his companion. Some venues, however, expressed concerns about this provision, and asked how they are to identify who should be moved and what obligations apply if there are no seats available that are equivalent or better in quality.

The Department's second question asked whether there are particular concerns about the obligation to provide accessible seating, including a wheelchair space, to an individual with a disability who purchases an inaccessible seat through the secondary market.

Industry commenters contended that this requirement would create a "logistical nightmare," with venues scrambling to reseat patrons in the short time between the opening of the venues' doors and the commencement of the event. Furthermore, they argued that they might not be able to reseat all individuals and that even if they were able to do so, patrons might be moved to inferior seats (whether in accessible or non-accessible seating). These commenters also were concerned that they would be sued by patrons moved under such circumstances.

These commenters seem to have misconstrued the rule. Covered entities are not required to seat every person who acquires a ticket for inaccessible seating but needs accessible seating, and are not required to move any individual who acquires a ticket for accessible seating but does not need it. Covered entities that allow patrons to buy and sell tickets on the secondary market must make reasonable modifications to their policies to allow persons with disabilities to participate in secondary ticket transfers. The Department believes that there is no one-size-fits-all rule that will suit all assembly areas. In those circumstances where a venue has accessible seating vacant at the time an individual with a disability who needs accessible seating presents his ticket for inaccessible seating at the box office, the venue must allow the individual to exchange his ticket for an accessible seat in a comparable location if such an accessible seat is vacant. Where, however, a venue has sold all of its accessible seating, the venue has no obligation to provide accessible seating to the person with a disability who purchased an inaccessible seat on the secondary market. Venues may encourage individuals with disabilities who hold tickets for inaccessible seating to contact the box office before the event to notify them of their need for accessible seating, even though they may not require ticketholders to provide such notice.

The Department notes that public entities are permitted, though not required, to adopt policies regarding moving patrons who do not need the features of an accessible seat. If a public entity chooses to do so, it might mitigate administrative concerns by marking tickets for accessible seating as such, and printing on the ticket that individuals who purchase such seats but who do not need accessible seating are subject to being moved to other seats in the facility if the accessible seating is required for an individual with a disability. Such a venue might also develop and publish a ticketing policy to provide transparency to the general public and to put holders of tickets for accessible seating who do not require it on notice that they may be moved.

Prevention of fraud in purchase of accessible seating. Assembly area managers and advocacy groups have informed the Department that the fraudulent purchase of accessible seating is a pressing concern. Curbing fraud is a goal that public entities and individuals with disabilities share. Steps taken to prevent fraud, however, must be balanced carefully against the privacy rights of individuals with disabilities. Such measures also must not impose burdensome requirements upon, nor restrict the rights of, individuals with disabilities.

In the NPRM, the Department struck a balance between these competing concerns by proposing § 35.138(h), which prohibited public entities from asking for proof of disability before the purchase of accessible seating but provided guidance in two paragraphs on appropriate measures for curbing fraud. Paragraph (1) proposed allowing a public entity to ask individuals purchasing single-event tickets for accessible seating whether they are wheelchair users. Paragraph (2) proposed allowing a public entity to require the individuals purchasing accessible seating for season tickets or other multi-event ticket packages to attest in writing that the accessible seating is for a wheelchair user. Additionally, the NPRM proposed to permit venues, when they have good cause to believe that an individual has fraudulently purchased accessible seating, to investigate that individual.

Several commenters objected to this rule on the ground that it would require a wheelchair user to be the purchaser of

tickets. The Department has reworded this paragraph to reflect that the individual with a disability does not have to be the ticket purchaser. The final rule allows third parties to purchase accessible tickets at the request of an individual with a disability.

Commenters also argued that other individuals with disabilities who do not use wheelchairs should be permitted to purchase accessible seating. Some individuals with disabilities who do not use wheelchairs urged the Department to change the rule, asserting that they, too, need accessible seating. The Department agrees that such seating, although designed for use by a wheelchair user, may be used by non-wheelchair users, if those persons are persons with a disability who need to use accessible seating because of a mobility disability or because their disability requires the use of the features that accessible seating provides (*e.g.,* individuals who cannot bend their legs because of braces, or individuals who, because of their disability, cannot sit in a straight-back chair).

Some commenters raised concerns that allowing venues to ask questions to determine whether individuals purchasing accessible seating are doing so legitimately would burden individuals with disabilities in the purchase of accessible seating. The Department has retained the substance of this provision in § 35.138(h) of the final rule, but emphasizes that such questions should be asked at the initial time of purchase. For example, if the method of purchase is via the Internet, then the question(s) should be answered by clicking a yes or no box during the transaction. The public entity may warn purchasers that accessible seating is for individuals with disabilities and that individuals purchasing such tickets fraudulently are subject to relocation.

One commenter argued that face-to-face contact between the venue and the ticket holder should be required in order to prevent fraud and suggested that individuals who purchase accessible seating should be required to pick up their tickets at the box office and then enter the venue immediately. The Department has declined to adopt that suggestion. It would be discriminatory to require individuals with disabilities to pick up tickets at the box office when other spectators are not required to do so. If the assembly area wishes to make face-to-face contact with accessible seating ticket holders to curb fraud, it may do so through its ushers and other customer service personnel located within the seating area.

Some commenters asked whether it is permissible for assembly areas to have voluntary clubs where individuals with disabilities self-identify to the public entity in order to become a member of a club that entitles them to purchase accessible seating reserved for club members or otherwise receive priority in purchasing accessible seating. The Department agrees that such clubs are permissible, provided that a reasonable amount of accessible seating remains available at all prices and dispersed at all locations for individuals with disabilities who are non-members.

§ 35.139 Direct threat

In Appendix A of the Department's 1991 title II regulation, the Department included a detailed discussion of "direct threat" that, among other things, explained that "the principles established in § 36.208 of the Department's [title III] regulation" were "applicable" as well to title II, insofar as "questions of safety are involved." 28 CFR part 35, app. A at 565 (2009). In the final rule, the Department has included specific requirements related to "direct threat" that parallel those in the title III rule. These requirements are found in new § 35.139.

Subpart D—Program Accessibility

Section 35.150(b)(2) Safe harbor

The "program accessibility" requirement in regulations implementing title II of the Americans with Disabilities Act requires that each service, program, or activity, *when viewed in its entirety,* be readily accessible to and usable by individuals with disabilities. 28 CFR 35.150(a). Because title II evaluates a public entity's programs, services, and activities in their entirety, public entities have flexibility in addressing accessibility issues. Program access does not necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities, and public entities are not required to make structural changes to existing facilities where other methods are effective in achieving program access. *See id.*[3] Public entities do, however, have program access considerations that are independent of, but may coexist with, requirements imposed by new construction or alteration requirements in those same facilities.

Where a public entity opts to alter existing facilities to comply with its program access requirements, the entity must meet the accessibility requirements for alterations set out in § 35.151. Under the final rule, these alterations will be subject to the 2010 Standards. The 2010 Standards introduce technical and scoping specifications for many elements not covered by the 1991 Standards. In existing facilities, these supplemental requirements need to be taken into account by a public entity in ensuring program access. Also included in the 2010 Standards are revised technical and scoping requirements for a number of elements that were addressed in the 1991 Standards. These revised requirements reflect incremental changes that were added either because of additional study by the Access Board or in order to harmonize requirements with the model codes.

Although the program accessibility standard offers public entities a level of discretion in determining how to achieve program access, in the NPRM, the Department proposed an addition to § 35.150 at § 35.150(b)(2), denominated "Safe Harbor," to clarify that "[i]f a public entity has constructed or altered elements * * * in accordance with the specifications in either the 1991 Standards or the Uniform Federal Accessibility Standard, such public entity is not, solely because of the Department's adoption of the [2010] Standards, required to retrofit such elements to reflect incremental changes in the proposed standards." 73 FR 34466, 34505 (June 17, 2008). In these circumstances, the public entity would be entitled to a safe harbor for the already compliant elements until those elements are altered. The safe harbor does not negate a public entity's new construction or alteration obligations. A public entity must comply with the new construction or alteration requirements in effect at the time of the construction or alteration. With respect to existing facilities designed and constructed after January 26, 1992, but before the public entities are required to comply with the 2010 Standards, the rule is that any elements in these facilities that were not constructed in conformance with UFAS or the 1991 Standards are in violation of the ADA and must be brought into compliance. If elements in existing facilities were altered after January 26, 1992, and those alterations were not made in conformance with the alteration requirements in effect at the time, then those alteration violations must be corrected. Section 35.150(b)(2) of the final rule specifies that until the compliance date for the Standards (18 months from the date of publication of the rule), facilities or elements covered by § 35.151(a) or (b) that are noncompliant with either the 1991 Standards or UFAS shall be made accessible in accordance with the 1991 Standards, UFAS, or the 2010 Standards. Once the compliance date is reached, such noncompliant facilities or elements must be made accessible in accordance with the 2010 Standards.

The Department received many comments on the safe harbor during the 60-day public comment period. Advocacy groups were opposed to the safe harbor for compliant elements in existing facilities. These commenters objected to the Department's characterization of revisions between the 1991 and 2010 Standards as incremental changes and assert that these revisions represent important advances in accessibility for individuals with disabilities. Commenters saw no basis for "grandfathering" outdated accessibility standards given the flexibility inherent in the program access standard. Others noted that title II's "undue financial and administrative burdens" and "fundamental alteration" defenses eliminate any need for further exemptions from compliance. Some commenters suggested that entities' past efforts to comply with the program access standard of 28 CFR 35.150(a) might appropriately be a factor in determining what is required in the future.

Many public entities welcomed the Department's proposed safe harbor. These commenters contend that the safe harbor allows public entities needed time to evaluate program access in light of the 2010 Standards, and incorporate structural changes in a careful and thoughtful way toward increasing accessibility entity-wide. Many felt that it would be an ineffective use of public funds to update buildings to retrofit elements that had already been constructed or modified to Department-issued and sanctioned specifications. One entity pointed to the "possibly budget-breaking" nature of

[3] The term "existing facility" is defined in § 35.104 as amended by this rule.

forcing compliance with incremental changes.

The Department has reviewed and considered all information received during the 60-day public comment period. Upon review, the Department has decided to retain the title II safe harbor with minor revisions. The Department believes that the safe harbor provides an important measure of clarity and certainty for public entities as to the effect of the final rule with respect to existing facilities. Additionally, by providing a safe harbor for elements already in compliance with the technical and scoping specifications in the 1991 Standards or UFAS, funding that would otherwise be spent on incremental changes and repeated retrofitting is freed up to be used toward increased entity-wide program access. Public entities may thereby make more efficient use of the resources available to them to ensure equal access to their services, programs, or activities for all individuals with disabilities.

The safe harbor adopted with this final rule is a narrow one, as the Department recognizes that this approach may delay, in some cases, the increased accessibility that the revised requirements would provide, and that for some individuals with disabilities the impact may be significant. This safe harbor operates only with respect to elements that are in compliance with the scoping and technical specifications in either the 1991 Standards or UFAS; it does not apply to supplemental requirements, those elements for which scoping and technical specifications are first provided in the 2010 Standards.

Existing Facilities

Existing play areas. The 1991 Standards do not include specific requirements for the design and construction of play areas. To meet program accessibility requirements where structural changes are necessary, public entities have been required to apply the general new construction and alteration standards to the greatest extent possible, including with respect to accessible parking, routes to the playground, playground equipment, and playground amenities (e.g., picnic tables and restrooms). The Access Board published final guidelines for play areas in October 2000. The guidelines extended beyond general playground access to establish specific scoping and technical requirements for ground-level and elevated play components, accessible routes connecting the components, accessible ground surfaces, and maintenance of those surfaces. These guidelines filled a void left by the 1991 Standards. They have been referenced in Federal playground construction and safety guidelines and have been used voluntarily when many play areas across the country have been altered or constructed.

In adopting the 2004 ADAAG (which includes the 2000 play area guidelines), the Department acknowledges both the importance of integrated, full access to play areas for children and parents with disabilities, as well as the need to avoid placing an untenable fiscal burden on public entities. In the NPRM, the Department stated it was proposing two specific provisions to reduce the impact on existing facilities that undertake structural modifications pursuant to the program accessibility requirement. First, the Department proposed in § 35.150(b)(4) that existing play areas that are not being altered would be permitted to meet a reduced scoping requirement with respect to their elevated play components. Elevated play components, which are found on most playgrounds, are the individual components that are linked together to form large-scale composite playground equipment (*e.g.,* the monkey bars attached to the suspension bridge attached to the tube slide, etc.) The 2010 Standards provide that a play area that includes both ground level and elevated play components must ensure that a specified number of the ground-level play components and at least 50 percent of the elevated play components are accessible.

In the NPRM, the Department asked for specific public comment with regard to whether existing play areas should be permitted to substitute additional ground-level play components for the elevated play components they would otherwise have been required to make accessible. The Department also queried if there were other requirements applicable to play areas in the 2004 ADAAG for which the Department should consider exemptions or reduced scoping. Many commenters opposed permitting existing play areas to make such substitutions. Several commenters stated that the Access Board already completed significant negotiation and cost balancing in its rulemaking, so no additional exemptions should be added in either meeting program access requirements or in alterations. Others noted that elevated components are generally viewed as the more challenging and exciting by children, so making more ground than elevated play components accessible would result in discrimination against children with disabilities in general and older children with disabilities in particular. They argued that the ground components would be seen as equipment for younger children and children with disabilities, while elevated components would serve only older children without disabilities. In addition, commenters advised that including additional ground-level play components would require more accessible route and use zone surfacing, which would result in a higher cost burden than making elevated components accessible.

The Department also asked for public comment on whether it would be appropriate for the Access Board to consider issuing guidelines for alterations to play and recreational facilities that would permit reduced scoping of accessible components or substitution of ground-level play components in lieu of elevated play components. Most commenters opposed any additional reductions in scoping and substitutions. These commenters uniformly stated that the Access Board completed sufficient negotiation during its rulemaking on its play area guidelines published in 2000 and that those guidelines consequently should stand as is. One commenter advocated reduced scoping and substitution of ground play components during alterations only for those play areas built prior to the finalization of the guidelines.

The Department has considered the comments it has received and has determined that it is not necessary to provide a specific exemption to the scoping for components for existing play areas or to recommend reduced scoping or additional exemptions for alteration, and has deleted the reduced scoping proposed in NPRM § 35.150(b)(4)(i) from the final rule. The Department believes that it is preferable for public entities to try to achieve compliance with the design standards established in the 2010 Standards. If this is not possible to achieve in an existing setting, the requirements for program accessibility provide enough flexibility to permit the covered entity to pursue alternative approaches to provide accessibility.

Second, in § 35.150(b)(5)(i) of the NPRM, the Department proposed language stating that existing play areas that are less than 1,000 square feet in size and are not otherwise being altered, need not comply with the scoping and technical requirements for play areas in section 240 of the 2004 ADAAG. The Department stated it selected this size based on the provision in section 1008.2.4.1 of the 2004 ADAAG, Exception 1, which permits play areas less than 1,000 square feet in size to provide accessible routes with a reduced clear width (44 inches instead of 60 inches). In its 2000 regulatory assessment for the play area guidelines, the Access Board assumed that such "small" play areas represented only about 20 percent of the play areas located in public schools, and none of the play areas located in city and State parks (which the Board assumed were typically larger than 1,000 square feet).

In the NPRM, the Department asked if existing play areas less than 1,000 square feet should be exempt from the requirements applicable to play areas. The vast majority of commenters objected to such an exemption. One commenter stated that many localities that have parks this size are already making them accessible; many cited concerns that this would leave all or most public playgrounds in small towns inaccessible; and two commenters stated that, since many of New York City's parks are smaller than 1,000 square feet, only scattered larger parks in the various boroughs would be obliged to become accessible. Residents with disabilities would then have to travel substantial distances outside their own neighborhoods to find accessible playgrounds. Some commenters responded that this exemption should not apply in instances where the play area is the only one in the program, while others said that if a play area is exempt for reasons of size, but is the only one in the area, then it should have at least an accessible route and 50 percent of its ground-level play components accessible. One commenter supported the exemption as presented in the question.

The Department is persuaded by these comments that it is inappropriate to exempt public play areas that are less than 1,000 square feet in size. The Department believes that the factors used to determine program accessibility, including the limits established by the undue financial and administrative burdens defense, provide sufficient flexibility to public entities in determining how to make their existing play areas accessible. In those cases where a title II entity believes

that present economic concerns make it an undue financial and administrative burden to immediately make its existing playgrounds accessible in order to comply with program accessibility requirements, then it may be reasonable for the entity to develop a multi-year plan to bring its facilities into compliance.

In addition to requesting public comment about the specific sections in the NPRM, the Department also asked for public comment about the appropriateness of a general safe harbor for existing play areas and a safe harbor for public entities that have complied with State or local standards specific to play areas. In the almost 200 comments received on title II play areas, the vast majority of commenters strongly opposed all safe harbors, exemptions, and reductions in scoping. By contrast, one commenter advocated a safe harbor from compliance with the 2004 ADAAG play area requirements along with reduced scoping and exemptions for both program accessibility and alterations; a second commenter advocated only the general safe harbor from compliance with the supplemental requirements.

In response to the question of whether the Department should exempt public entities from specific compliance with the supplemental requirements for play areas, commenters stated that since no specific standards previously existed, play areas are more than a decade behind in providing full access for individuals with disabilities. When accessible play areas were created, public entities, acting in good faith, built them according to the 2004 ADAAG requirements; many equipment manufacturers also developed equipment to meet those guidelines. If existing playgrounds were exempted from compliance with the supplemental guidelines, commenters said, those entities would be held to a lesser standard and left with confusion, a sense of wasted resources, and federally condoned discrimination and segregation. Commenters also cited Federal agency settlement agreements on play areas that required compliance with the guidelines. Finally, several commenters observed that the provision of a safe harbor in this instance was invalid for two reasons: (1) The rationale for other safe harbors—that entities took action to comply with the 1991 Standards and should not be further required to comply with new standards—does not exist; and (2) concerns about financial and administrative burdens are adequately addressed by program access requirements.

The question of whether accessibility of play areas should continue to be assessed on the basis of case-by-case evaluations elicited conflicting responses. One commenter asserted that there is no evidence that the case-by-case approach is not working and so it should continue until found to be inconsistent with the ADA's goals. Another commenter argued that case-by-case evaluations result in unpredictable outcomes which result in costly and long court actions. A third commenter, advocating against case-by-case evaluations, requested instead increased direction and scoping to define what constitutes an accessible play area program.

The Department has considered all of the comments it received in response to its questions and has concluded that there is insufficient basis to establish a safe harbor from compliance with the supplemental guidelines. Thus, the Department has eliminated the proposed exemption contained in § 35.150(b)(5)(i) of the NPRM for existing play areas that are less than 1,000 square feet. The Department believes that the factors used to determine program accessibility, including the limits established by the undue financial and administrative burdens defense, provide sufficient flexibility to public entities in determining how to make their existing play areas accessible.

In the NPRM, the Department also asked whether there are State and local standards addressing play and recreation area accessibility and, to the extent that there are such standards, whether facilities currently governed by, and in compliance with, such State and local standards or codes should be subject to a safe harbor from compliance with applicable requirements in the 2004 ADAAG. The Department also asked whether it would be appropriate for the Access Board to consider the implementation of guidelines that would permit such a safe harbor with respect to play and recreation areas undertaking alterations. In response, commenters stated that few State or local governments have standards that address issues of accessibility in play areas, and one commenter organization said that it was unaware of any State or local standards written specifically for accessible play areas. One commenter observed from experience that most State and local governments were waiting for the Access Board guidelines to become enforceable standards as they had no standards themselves to follow. Another commenter offered that public entities across the United States already include in their playground construction bid specifications language that requires compliance with the Access Board's guidelines. A number of commenters advocated for the Access Board's guidelines to become comprehensive Federal standards that would complement any abbreviated State and local standards. One commenter, however, supported a safe harbor for play areas undergoing alterations if the areas currently comply with State or local standards.

The Department is persuaded by these comments that there is insufficient basis to establish a safe harbor for program access or alterations for play areas built in compliance with State or local laws.

In the NPRM, the Department asked whether "a reasonable number, but at least one" is a workable standard to determine the appropriate number of existing play areas that a public entity must make accessible. Many commenters objected to this standard, expressing concern that the phrase "at least one" would be interpreted as a maximum rather than a minimum requirement. Such commenters feared that this language would allow local governments to claim compliance by making just one public park accessible, regardless of the locality's size, budget, or other factors, and would support segregation, forcing children with disabilities to leave their neighborhoods to enjoy an accessible play area. While some commenters criticized what they viewed as a new analysis of program accessibility, others asserted that the requirements of program accessibility should be changed to address issues related to play areas that are not the main program in a facility but are essential components of a larger program (*e.g.,* drop-in child care for a courthouse).

The Department believes that those commenters who opposed the Department's "reasonable number, but at least one" standard for program accessibility misunderstood the Department's proposal. The Department did not intend any change in its longstanding interpretation of the program accessibility requirement. Program accessibility requires that each service, program, or activity be operated "so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities," 28 CFR 35.150(a), subject to the undue financial and administrative burdens and fundamental alterations defenses provided in 28 CFR 35.150. In determining how many facilities of a multi-site program must be made accessible in order to make the overall program accessible, the standard has always been an assessment of what is reasonable under the circumstances to make the program readily accessible to and usable by individuals with disabilities, taking into account such factors as the size of the public entity, the particular program features offered at each site, the geographical distance between sites, the travel times to the sites, the number of sites, and availability of public transportation to the sites. In choosing among available methods for meeting this requirement, public entities are required to give priority "to those methods that offer services, programs, and activities * * * in the most integrated setting appropriate." 28 CFR 35.150(b)(1). As a result, in cases where the sites are widely dispersed with difficult travel access and where the program features offered vary widely between sites, program accessibility will require a larger number of facilities to be accessible in order to ensure program accessibility than where multiple sites are located in a concentrated area with easy travel access and uniformity in program offerings.

Commenters responded positively to the Department's question in the NPRM whether the final rule should provide a list of factors that a public entity should use to determine how many of its existing play areas should be made accessible. Commenters also asserted strongly that the number of existing parks in the locality should not be the main factor. In addition to the Department's initial list—including number of play areas in an area, travel times or geographic distances between play areas, and the size of the public entity—commenters recommended such factors as availability of accessible pedestrian routes to the playgrounds, ready availability of accessible transportation, comparable amenities and services in and surrounding the play areas, size of the playgrounds, and sufficient variety in accessible play components within the playgrounds. The Department agrees that these factors should be considered, where appropriate, in any

determination of whether program accessibility has been achieved. However, the Department has decided that it need not address these factors in the final rule itself because the range of factors that might need to be considered would vary depending upon the circumstances of particular public entities. The Department does not believe any list would be sufficiently comprehensive to cover every situation.

The Department also requested public comment about whether there was a "tipping point" at which the costs of compliance with the new requirements for existing play areas would be so burdensome that the entity would simply shut down the playground. Commenters generally questioned the feasibility of determining a "tipping point." No commenters offered a recommended "tipping point." Moreover, most commenters stated that a "tipping point" is not a valid consideration for various reasons, including that "tipping points" will vary based upon each entity's budget and other mandates, and costs that are too high will be addressed by the limitations of the undue financial and administrative burdens defense in the program accessibility requirement and that a "tipping point" must be weighed against quality of life issues, which are difficult to quantify. The Department has decided that comments did not establish any clear "tipping point" and therefore provides no regulatory requirement in this area.

Swimming pools. The 1991 Standards do not contain specific scoping or technical requirements for swimming pools. As a result, under the 1991 title II regulation, title II entities that operate programs or activities that include swimming pools have not been required to provide an accessible route into those pools via a ramp or pool lift, although they are required to provide an accessible route to such pools. In addition, these entities continue to be subject to the general title II obligation to make their programs usable and accessible to persons with disabilities.

The 2004 ADAAG includes specific technical and scoping requirements for new and altered swimming pools at sections 242 and 1009. In the NPRM, the Department sought to address the impact of these requirements on existing swimming pools. Section 242.2 of the 2004 ADAAG states that swimming pools must provide two accessible means of entry, except that swimming pools with less than 300 linear feet of swimming pool wall are only required to provide one accessible means of entry, provided that the accessible means of entry is either a swimming pool lift complying with section 1009.2 or a sloped entry complying with section 1009.3.

In the NPRM, the Department proposed, in § 35.150(b)(4)(ii), that for measures taken to comply with title II's program accessibility requirements, existing swimming pools with at least 300 linear feet of swimming pool wall would be required to provide only one accessible means of access that complied with section 1009.2 or section 1009.3 of the 2004 ADAAG.

The Department specifically sought comment from public entities and individuals with disabilities on the question whether the Department should "allow existing public entities to provide only one accessible means of access to swimming pools more than 300 linear feet long?" The Department received significant public comment on this proposal.

Most commenters opposed any reduction in the scoping required in the 2004 ADAAG, citing the fact that swimming is a common therapeutic form of exercise for many individuals with disabilities. Many commenters also stated that the cost of a swimming pool lift, approximately $5,000, or other nonstructural options for pool access such as transfer steps, transfer walls, and transfer platforms, would not be an undue financial and administrative burden for most title II entities. Other commenters pointed out that the undue financial and administrative burdens defense already provided public entities with a means to reduce their scoping requirements. A few commenters cited safety concerns resulting from having just one accessible means of access, and stated that because pools typically have one ladder for every 75 linear feet of pool wall, they should have more than one accessible means of access. One commenter stated that construction costs for a public pool are approximately $4,000–4,500 per linear foot, making the cost of a pool with 300 linear feet of swimming pool wall approximately $1.2 million, compared to $5,000 for a pool lift. Some commenters did not oppose the one accessible means of access for larger pools so long as a lift was used. A few commenters approved of the one accessible means of access for larger pools. The Department also considered the American National Standard for Public Swimming Pools, ANSI/NSPI–1 2003, section 23 of which states that all pools should have at least two means of egress.

In the NPRM, the Department also proposed at § 35.150(b)(5)(ii) that existing swimming pools with less than 300 linear feet of swimming pool wall be exempted from having to comply with the provisions of section 242.2. The Department's NPRM requested public comment about the potential effect of this approach, asking whether existing swimming pools with less than 300 linear feet of pool wall should be exempt from the requirements applicable to swimming pools.

Most commenters were opposed to this proposal. A number of commenters stated, based on the Access Board estimates that 90 percent of public high school pools, 40 percent of public park and community center pools, and 30 percent of public college and university pools have less than 300 linear feet of pool wall, that a large number of public swimming pools would fall under this exemption. Other commenters pointed to the existing undue financial and administrative burdens defenses as providing public entities with sufficient protection from excessive compliance costs. Few commenters supported this exemption.

The Department also considered the fact that many existing swimming pools owned or operated by public entities are recipients of Federal financial assistance and therefore, are also subject to the program accessibility requirements of section 504 of the Rehabilitation Act.

The Department has carefully considered all the information available to it including the comments submitted on these two proposed exemptions for swimming pools owned or operated by title II entities. The Department acknowledges that swimming provides important therapeutic, exercise, and social benefits for many individuals with disabilities and is persuaded that exemption of many publicly owned or operated pools from the 2010 Standards is neither appropriate nor necessary. The Department agrees with the commenters that title II already contains sufficient limitations on public entities' obligations to make their programs accessible. In particular, the Department agrees that those public entities that can demonstrate that making particular existing swimming pools accessible in accordance with the 2010 Standards would be an undue financial and administrative burden are sufficiently protected from excessive compliance costs. Thus, the Department has eliminated proposed §§ 35.150(b)(4)(ii) and (b)(5)(ii) from the final rule.

In addition, although the NPRM contained no specific proposed regulatory language on this issue, the NPRM sought comment on what would be a workable standard for determining the appropriate number of existing swimming pools that a public entity must make accessible for its program to be accessible. The Department asked whether a "reasonable number, but at least one" would be a workable standard and, if not, whether there was a more appropriate specific standard. The Department also asked if, in the alternative, the Department should provide "a list of factors that a public entity could use to determine how many of its existing swimming pools to make accessible, e.g., number of swimming pools, travel times or geographic distances between swimming pools, and the size of the public entity?"

A number of commenters expressed concern over the "reasonable number, but at least one" standard and contended that, in reality, public entities would never provide more than one accessible existing pool, thus segregating individuals with disabilities. Other commenters felt that the existing program accessibility standard was sufficient. Still others suggested that one in every three existing pools should be made accessible. One commenter suggested that all public pools should be accessible. Some commenters proposed a list of factors to determine how many existing pools should be accessible. Those factors include the total number of pools, the location, size, and type of pools provided, transportation availability, and lessons and activities available. A number of commenters suggested that the standard should be based on geographic areas, since pools serve specific neighborhoods. One commenter argued that each pool should be examined individually to determine what can be done to improve its accessibility.

The Department did not include any language in the final rule that specifies the "reasonable number, but at least one" standard for program access. However, the Department believes that its proposal was misunderstood by many commenters. Each

service, program, or activity conducted by a public entity, when viewed in its entirety, must still be readily accessible to and usable by individuals with disabilities unless doing so would result in a fundamental alteration in the nature of the program or activity or in undue financial and administrative burdens. Determining which pool(s) to make accessible and whether more than one accessible pool is necessary to provide program access requires analysis of a number of factors, including, but not limited to, the size of the public entity, geographical distance between pool sites, whether more than one community is served by particular pools, travel times to the pools, the total number of pools, the availability of lessons and other programs and amenities at each pool, and the availability of public transportation to the pools. In many instances, making one existing swimming pool accessible will not be sufficient to ensure program accessibility. There may, however, be some circumstances where a small public entity can demonstrate that modifying one pool is sufficient to provide access to the public entity's program of providing public swimming pools. In all cases, a public entity must still demonstrate that its programs, including the program of providing public swimming pools, when viewed in their entirety, are accessible.

Wading pools. The 1991 Standards do not address wading pools. Section 242.3 of the 2004 ADAAG requires newly constructed or altered wading pools to provide at least one sloped means of entry to the deepest part of the pool. The Department was concerned about the potential impact of this new requirement on existing wading pools. Therefore, in the NPRM, the Department sought comments on whether existing wading pools that are not being altered should be exempt from this requirement, asking, "[w]hat site constraints exist in existing facilities that could make it difficult or infeasible to install a sloped entry in an existing wading pool? Should existing wading pools that are not being altered be exempt from the requirement to provide a sloped entry?" 73 FR 34466, 34487–88 (June 17, 2008). Most commenters agreed that existing wading pools that are not being altered should be exempt from this requirement. Almost all commenters felt that during alterations a sloped entry should be provided unless it was technically infeasible to do so. Several commenters felt that the required clear deck space surrounding a pool provided sufficient space for a sloped entry during alterations.

The Department also solicited comments on the possibility of exempting existing wading pools from the obligation to provide program accessibility. Most commenters argued that installing a sloped entry in an existing wading pool is not very feasible. Because covered entities are not required to undertake modifications that would be technically infeasible, the Department believes that the rule as drafted provides sufficient protection from unwarranted expense to the operators of small existing wading pools. Other existing wading pools, particularly those larger pools associated with facilities such as aquatic centers or water parks, must be assessed on a case-by-case basis. Therefore, the Department has not included such an exemption for wading pools in its final rule.

Saunas and steam rooms. The 1991 Standards do not address saunas and steam rooms. Section 35.150(b)(5)(iii) of the NPRM exempted existing saunas and steam rooms that seat only two individuals and were not being altered from section 241 of the 2004 ADAAG, which requires an accessible turning space. Two commenters objected to this exemption as unnecessary, and argued that the cost of accessible saunas is not high and public entities still have an undue financial and administrative burdens defense.

The Department considered these comments and has decided to eliminate the exemption for existing saunas and steam rooms that seat only two people. Such an exemption is unnecessary because covered entities will not be subject to program accessibility requirements to make existing saunas and steam rooms accessible if doing so constitutes an undue financial and administrative burden. The Department believes it is likely that because of their pre-fabricated forms, which include built-in seats, it would be either technically infeasible or an undue financial and administrative burden to modify such saunas and steams rooms. Consequently, a separate exemption for saunas and steam rooms would have been superfluous. Finally, employing the program accessibility standard for small saunas and steam rooms is consistent with the Department's decisions regarding the proposed exemptions for play areas and swimming pools.

Several commenters also argued in favor of a specific exemption for existing spas. The Department notes that the technical infeasibility and program accessibility defenses are applicable equally to existing spas and declines to adopt such an exemption.

Other recreational facilities. In the NPRM, the Department asked about a number of issues relating to recreation facilities such as team or player seating areas, areas of sport activity, exercise machines, boating facilities, fishing piers and platforms, and miniature golf courses. The Department's questions addressed the costs and benefits of applying the 2004 ADAAG to these spaces and facilities and the application of the specific technical requirements in the 2004 ADAAG for these spaces and facilities. The discussion of the comments received by the Department on these issues and the Department's response to those comments can be found in either the section of Appendix A to this rule entitled "Other Issues," or in Appendix B to the final title III rule, which will be published today elsewhere in this volume.

Section 35.151 New construction and alterations

Section 35.151(a), which provided that those facilities that are constructed or altered by, on behalf of, or for the use of a public entity shall be designed, constructed, or altered to be readily accessible to and usable by individuals with disabilities, is unchanged in the final rule, but has been redesignated as § 35.151(a)(1). The Department has added a new section, designated as § 35.151(a)(2), to provide that full compliance with the requirements of this section is not required where an entity can demonstrate that it is structurally impracticable to meet the requirements. Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features. This exception was contained in the title III regulation and in the 1991 Standards (applicable to both public accommodations and facilities used by public entities), so it has applied to any covered facility that was constructed under the 1991 Standards since the effective date of the ADA. The Department added it to the text of § 35.151 to maintain consistency between the design requirements that apply under title II and those that apply under title III. The Department received no significant comments about this section.

Section 35.151(b) Alterations

The 1991 title II regulation does not contain any specific regulatory language comparable to the 1991 title III regulation relating to alterations and path of travel for covered entities, although the 1991 Standards describe standards for path of travel during alterations to a primary function. *See* 28 CFR part 36, app A., section 4.1.6(a) (2009).

The path of travel requirements contained in the title III regulation are based on section 303(a)(2) of the ADA, 42 U.S.C. 12183(a)(2), which provides that when an entity undertakes an alteration to a place of public accommodation or commercial facility that affects or could affect the usability of or access to an area that contains a primary function, the entity shall ensure that, to the maximum extent feasible, the path of travel to the altered area—and the restrooms, telephones, and drinking fountains serving it—is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

The NPRM proposed amending § 35.151 to add both the path of travel requirements and the exemption relating to barrier removal (as modified to apply to the program accessibility standard in title II) that are contained in the title III regulation to the title II regulation. Proposed § 35.151(b)(4) contained the requirements for path of travel. Proposed § 35.151(b)(2) stated that the path of travel requirements of § 35.151(b)(4) shall not apply to measures taken solely to comply with program accessibility requirements.

Where the specific requirements for path of travel apply under title III, they are limited to the extent that the cost and scope of alterations to the path of travel are disproportionate to the cost of the overall alteration, as determined under criteria established by the Attorney General.

The Access Board included the path of travel requirement for alterations to facilities covered by the standards (other than those subject to the residential facilities standards) in section 202.4 of 2004 ADAAG. Section 35.151(b)(4)(iii) of the final rule establishes the criteria for determining when the cost of

alterations to the path of travel is "disproportionate" to the cost of the overall alteration.

The NPRM also provided that areas such as supply storage rooms, employee lounges and locker rooms, janitorial closets, entrances, and corridors are not areas containing a primary function. Nor are restroom areas considered to contain a primary function unless the provision of restrooms is a primary purpose of the facility, such as at a highway rest stop. In that situation, a restroom would be considered to be an "area containing a primary function" of the facility.

The Department is not changing the requirements for program accessibility. As provided in § 35.151(b)(2) of the regulation, the path of travel requirements of § 35.151(b)(4) only apply to alterations undertaken solely for purposes other than to meet the program accessibility requirements. The exemption for the specific path of travel requirement was included in the regulation to ensure that the specific requirements and disproportionality exceptions for path of travel are not applied when areas are being altered to meet the title II program accessibility requirements in § 35.150. In contrast, when areas are being altered to meet program accessibility requirements, they must comply with all of the applicable requirements referenced in section 202 of the 2010 Standards. A covered title II entity must provide accessibility to meet the requirements of § 35.150 unless doing so is an undue financial and administrative burden in accordance with § 35.150(a)(3). A covered title II entity may not use the disproportionality exception contained in the path of travel provisions as a defense to providing an accessible route as part of its obligation to provide program accessibility. The undue financial and administrative burden standard does *not* contain any bright line financial tests.

The Department's proposed § 35.151(b)(4) adopted the language now contained in § 36.403 of the title III regulation, including the disproportionality limitation (*i.e.,* alterations made to provide an accessible path of travel to the altered area would be deemed disproportionate to the overall alteration when the cost exceeds 20 percent of the cost of the alteration to the primary function area). Proposed § 35.151(b)(2) provided that the path of travel requirements do not apply to alterations undertaken solely to comply with program accessibility requirements.

The Department received a substantial number of comments objecting to the Department's adoption of the exemption for the path of travel requirements when alterations are undertaken solely to meet program accessibility requirements. These commenters argued that the Department had no statutory basis for providing this exemption nor does it serve any purpose. In addition, these commenters argued that the path of travel exemption has the effect of placing new limitations on the obligations to provide program access. A number of commenters argued that doing away with the path of travel requirement would render meaningless the concept of program access. They argued that just as the requirement to provide an accessible path of travel to an altered area (regardless of the reason for the alteration), including making the restrooms, telephones, and drinking fountains that serve the altered area accessible, is a necessary requirement in other alterations, it is equally necessary for alterations made to provide program access. Several commenters expressed concern that a readily accessible path of travel be available to ensure that persons with disabilities can get to the physical location in which programs are held. Otherwise, they will not be able to access the public entity's service, program, or activity. Such access is a cornerstone of the protections provided by the ADA. Another commenter argued that it would be a waste of money to create an accessible facility without having a way to get to the primary area. This commenter also stated that the International Building Code (IBC) requires the path of travel to a primary function area, up to 20 percent of the cost of the project. Another commenter opposed the exemption, stating that the trigger of an alteration is frequently the only time that a facility must update its facilities to comply with evolving accessibility standards.

In the Department's view, the commenters objecting to the path of travel exemption contained in § 35.151(b)(2) did not understand the intention behind the exemption. The exemption was not intended to eliminate any existing requirements related to accessibility for alterations undertaken in order to meet program access obligations under § 35.149 and § 35.150. Rather, it was intended to ensure that covered entities did not apply the path of travel requirements in lieu of the overarching requirements in this Subpart that apply when making a facility accessible in order to comply with program accessibility. The exemption was also intended to make it clear that the disproportionality test contained in the path of travel standards is not applicable in determining whether providing program access results in an undue financial and administration burden within the meaning of § 35.150(a)(3). The exemption was also provided to maintain consistency with the title III path of travel exemption for barrier removal, *see* § 36.304(d), in keeping with the Department's regulatory authority under title II of the ADA. *See* 42 U.S.C. 12134(b); *see also* H. R Rep. No. 101B485, pt. 2, at 84 (1990) ("The committee intends, however, that the forms of discrimination prohibited by section 202 be identical to those set out in the applicable provisions of titles I and III of this legislation.").

For title II entities, the path of travel requirements are of significance in those cases where an alteration is being made solely for reasons other than program accessibility. For example, a public entity might have six courtrooms in two existing buildings and might determine that only three of those courtrooms and the public use and common use areas serving those courtrooms in one building are needed to be made accessible in order to satisfy its program access obligations. When the public entity makes those courtrooms and the public use and common use areas serving them accessible in order to meet its program access obligations, it will have to comply with the 2010 Standards unless the public entity can demonstrate that full compliance would result in undue financial and administrative burdens as described in § 35.150(a)(3). If such action would result in an undue financial or administrative burden, the public entity would nevertheless be required to take some other action that would not result in such an alteration or such burdens but would ensure that the benefits and services provided by the public entity are readily accessible to persons with disabilities. When the public entity is making modifications to meet its program access obligation, it may not rely on the path of travel exception under § 35.151(b)(4), which limits the requirement to those alterations where the cost and scope of the alterations are not disproportionate to the cost and scope of the overall alterations. If the public entity later decides to alter courtrooms in the other building, for purposes of updating the facility (and, as previously stated, has met its program access obligations) then in that case, the public entity would have to comply with the path of travel requirements in the 2010 Standards subject to the disproportionality exception set forth in § 35.151(b)(4).

The Department has slightly revised proposed § 35.151(b)(2) to make it clearer that the path of travel requirements only apply when alterations are undertaken solely for purposes other than program accessibility.

Section 35.151(b)(4)(ii)(C) Path of travel—safe harbor

In § 35.151(b)(4)(ii)(C) of the NPRM, the Department included a provision that stated that public entities that have brought required elements of path of travel into compliance with the 1991 Standards are not required to retrofit those elements in order to reflect incremental changes in the 2010 Standards solely because of an alteration to a primary function area that is served by that path of travel. In these circumstances, the public entity is entitled to a safe harbor and is only required to modify elements to comply with the 2010 Standards if the public entity is planning an alteration to the element.

A substantial number of commenters objected to the Department's imposition of a safe harbor for alterations to facilities of public entities that comply with the 1991 Standards. These commenters argued that if a public entity is already in the process of altering its facility, there should be a legal requirement that individuals with disabilities be entitled to increased accessibility by using the 2010 Standards for path of travel work. They also stated that they did not believe there was a statutory basis for "grandfathering" facilities that comply with the 1991 Standards.

The ADA is silent on the issue of "grandfathering" or establishing a safe harbor for measuring compliance in situations where the covered entity is not undertaking a planned alteration to specific building elements. The ADA delegates to the Attorney General the responsibility for issuing regulations that define the parameters of

covered entities' obligations when the statute does not directly address an issue. This regulation implements that delegation of authority.

One commenter proposed that a previous record of barrier removal be one of the factors in determining, prospectively, what renders a facility, when viewed in its entirety, usable and accessible to persons with disabilities. Another commenter asked the Department to clarify, at a minimum, that to the extent compliance with the 1991 Standards does not provide program access, particularly with regard to areas not specifically addressed in the 1991 Standards, the safe harbor will not operate to relieve an entity of its obligations to provide program access.

One commenter supported the proposal to add a safe harbor for path of travel.

The final rule retains the safe harbor for required elements of a path of travel to altered primary function areas for public entities that have already complied with the 1991 Standards with respect to those required elements. The Department believes that this safe harbor strikes an appropriate balance between ensuring that individuals with disabilities are provided access to buildings and facilities and potential financial burdens on existing public entities that are undertaking alterations subject to the 2010 Standards. This safe harbor is not a blanket exemption for facilities. If a public entity undertakes an alteration to a primary function area, only the required elements of a path of travel to that area that already comply with the 1991 Standards are subject to the safe harbor. If a public entity undertakes an alteration to a primary function area and the required elements of a path of travel to the altered area do not comply with the 1991 Standards, then the public entity must bring those elements into compliance with the 2010 Standards.

Section 35.151(b)(3) Alterations to historic facilities

The final rule renumbers the requirements for alterations to historic facilities enumerated in current § 35.151(d)(1) and (2) as § 35.151(b)(3)(i) and (ii). Currently, the regulation provides that alterations to historic facilities shall comply to the maximum extent feasible with section 4.1.7 of UFAS or section 4.1.7 of the 1991 Standards. *See* 28 CFR 35.151(d)(1). Section 35.151(b)(3)(i) of the final rule eliminates the option of using UFAS for alterations that commence on or after March 15, 2012. The substantive requirement in current § 35.151(d)(2)—that alternative methods of access shall be provided pursuant to the requirements of § 35.150 if it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the building or facility—is contained in § 35.151(b)(3)(ii).

Section 35.151(c) Accessibility standards for new construction and alterations

Section 35.151(c) of the NPRM proposed to adopt ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the Americans with Disabilities Act and Architectural Barriers Act Guidelines (2004 ADAAG) into the ADA Standards for Accessible Design (2010 Standards). As the Department has noted, the development of these standards represents the culmination of a lengthy effort by the Access Board to update its guidelines, to make the Federal guidelines consistent to the extent permitted by law, and to harmonize the Federal requirements with the private sector model codes that form the basis of many State and local building code requirements. The full text of the 2010 Standards is available for public review on the ADA Home Page (*http://www.ada.gov*) and on the Access Board's Web site (*http://www.access-board.gov/gs.htm*) (last visited June 24, 2010). The Access Board site also includes an extensive discussion of the development of the 2004 ADA/ABA Guidelines, and a detailed comparison of the 1991 Standards, the 2004 ADA/ABA Guidelines, and the 2003 International Building Code.

Section 204 of the ADA, 42 U.S.C. 12134, directs the Attorney General to issue regulations to implement title II that are consistent with the minimum guidelines published by the Access Board. The Attorney General (or his designee) is a statutory member of the Access Board (*see* 29 U.S.C. 792(a)(1)(B(vii)) and was involved in the development of the 2004 ADAAG. Nevertheless, during the process of drafting the NPRM, the Department reviewed the 2004 ADAAG to determine if additional regulatory provisions were necessary. As a result of this review, the Department decided to propose new sections, which were contained in § 35.151(e)–(h) of the NPRM, to clarify how the Department will apply the proposed standards to social service center establishments, housing at places of education, assembly areas, and medical care facilities. Each of these provisions is discussed below.

Congress anticipated that there would be a need for close coordination of the ADA building requirements with State and local building code requirements. Therefore, the ADA authorized the Attorney General to establish an ADA code certification process under title III of the ADA. That process is addressed in 28 CFR part 36, subpart F. Revisions to that process are addressed in the regulation amending the title III regulation published elsewhere in the **Federal Register** today. In addition, the Department operates an extensive technical assistance program. The Department anticipates that once this rule is final, revised technical assistance material will be issued to provide guidance about its implementation.

Section 35.151(c) of the 1991 title II regulation establishes two standards for accessible new construction and alteration. Under paragraph (c), design, construction, or alteration of facilities in conformance with UFAS or with the 1991 Standards (which, at the time of the publication of the rule were also referred to as the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (1991 ADAAG)) is deemed to comply with the requirements of this section with respect to those facilities (except that if the 1991 Standards are chosen, the elevator exemption does not apply). The 1991 Standards were based on the 1991 ADAAG, which was initially developed by the Access Board as guidelines for the accessibility of buildings and facilities that are subject to title III. The Department adopted the 1991 ADAAG as the standards for places of public accommodation and commercial facilities under title III of the ADA and it was published as Appendix A to the Department's regulation implementing title III, 56 FR 35592 (July 26, 1991) as amended, 58 FR 17522 (April 5, 1993), and as further amended, 59 FR 2675 (Jan. 18, 1994), codified at 28 CFR part 36 (2009).

Section 35.151(c) of the final rule adopts the 2010 Standards and establishes the compliance date and triggering events for the application of those standards to both new construction and alterations. Appendix B of the final title III rule (Analysis and Commentary on the 2010 ADA Standards for Accessible Design) (which will be published today elsewhere in this volume and codified as Appendix B to 28 CFR part 36) provides a description of the major changes in the 2010 Standards (as compared to the 1991 ADAAG) and a discussion of the public comments that the Department received on specific sections of the 2004 ADAAG. A number of commenters asked the Department to revise certain provisions in the 2004 ADAAG in a manner that would reduce either the required scoping or specific technical accessibility requirements. As previously stated, although the ADA requires the enforceable standards issued by the Department under title II and title III to be consistent with the minimum guidelines published by the Access Board, it is the sole responsibility of the Attorney General to promulgate standards and to interpret and enforce those standards. The guidelines adopted by the Access Board are "minimum guidelines." 42 U.S.C. 12186(c).

Compliance date. When the ADA was enacted, the effective dates for various provisions were delayed in order to provide time for covered entities to become familiar with their new obligations. Titles II and III of the ADA generally became effective on January 26, 1992, six months after the regulations were published. *See* 42 U.S.C. 12131 note; 42 U.S.C. 12181 note. New construction under title II and alterations under either title II or title III had to comply with the design standards on that date. *See* 42 U.S.C. 12183(a)(1). For new construction under title III, the requirements applied to facilities designed and constructed for first occupancy after January 26, 1993—18 months after the 1991 Standards were published by the Department. In the NPRM, the Department proposed to amend § 35.151(c)(1) by revising the current language to limit the application of the 1991 standards to facilities on which construction commences within six months of the final rule adopting revised standards. The NPRM also proposed adding paragraph (c)(2) to § 35.151, which states that facilities on which construction commences on or after the date six months following the effective date of the final rule shall comply with the proposed standards adopted by that rule.

As a result, under the NPRM, for the first six months after the effective date, public entities would have the option to use either

UFAS or the 1991 Standards and be in compliance with title II. Six months after the effective date of the rule, the new standards would take effect. At that time, construction in accordance with UFAS would no longer satisfy ADA requirements. The Department stated that in order to avoid placing the burden of complying with both standards on public entities, the Department would coordinate a government-wide effort to revise Federal agencies' section 504 regulations to adopt the 2004 ADAAG as the standard for new construction and alterations.

The purpose of the proposed six-month delay in requiring compliance with the 2010 Standards was to allow covered entities a reasonable grace period to transition between the existing and the proposed standards. For that reason, if a title II entity preferred to use the 2010 Standards as the standard for new construction or alterations commenced within the six-month period after the effective date of the final rule, such entity would be considered in compliance with title II of the ADA.

The Department received a number of comments about the proposed six-month effective date for the title II regulation that were similar in content to those received on this issue for the proposed title III regulation. Several commenters supported the six-month effective date. One commenter stated that any revisions to its State building code becomes effective six months after adoption and that this has worked well. In addition, this commenter stated that since 2004 ADAAG is similar to IBC 2006 and ICC/ANSI A117.1–2003, the transition should be easy. By contrast, another commenter advocated for a minimum 12-month effective date, arguing that a shorter effective date could cause substantial economic hardships to many cities and towns because of the lengthy lead time necessary for construction projects. This commenter was concerned that a six-month effective date could lead to projects having to be completely redrawn, rebid, and rescheduled to ensure compliance with the new standards. Other commenters advocated that the effective date be extended to at least 18 months after the publication of the rule. One of these commenters expressed concern that the kinds of bureaucratic organizations subject to the title II regulations lack the internal resources to quickly evaluate the regulatory changes, determine whether they are currently compliant with the 1991 standards, and determine what they have to do to comply with the new standards. The other commenter argued that 18 months is the minimum amount of time necessary to ensure that projects that have already been designed and approved do not have to undergo costly design revisions at taxpayer expense.

The Department is persuaded by the concerns raised by commenters for both the title II and III regulations that the six-month compliance date proposed in the NPRM for application of the 2010 Standards may be too short for certain projects that are already in the midst of the design and permitting process. The Department has determined that for new construction and alterations, compliance with the 2010 Standards will not be required until 18 months from the date the final rule is published. Until the time compliance with the 2010 Standards is required, public entities will have the option of complying with the 2010 Standards, the UFAS, or the 1991 Standards. However, public entities that choose to comply with the 2010 Standards in lieu of the 1991 Standards or UFAS prior to the compliance date described in this rule must choose one of the three standards, and may not rely on some of the requirements contained in one standard and some of the requirements contained in the other standards.

Triggering event. In § 35.151(c)(2) of the NPRM, the Department proposed that the commencement of construction serve as the triggering event for applying the proposed standards to new construction and alterations under title II. This language is consistent with the triggering event set forth in § 35.151(a) of the 1991 title II regulation. The Department received only four comments on this section of the title II rule. Three commenters supported the use of "start of construction" as the triggering event. One commenter argued that the Department should use the "last building permit or start of physical construction, whichever comes first," stating that "altering a design after a building permit has been issued can be an undue burden."

After considering these comments, the Department has decided to continue to use the commencement of physical construction as the triggering event for application of the 2010 Standards for entities covered by title II. The Department has also added clarifying language at § 35.151(c)(4) to the regulation to make it clear that the date of ceremonial groundbreaking or the date a structure is razed to make it possible for construction of a facility to take place does not qualify as the commencement of physical construction.

Section 234 of the 2010 Standards provides accessibility guidelines for newly designed and constructed amusement rides. The amusement ride provisions do not provide a "triggering event" for new construction or alteration of an amusement ride. An industry commenter requested that the triggering event of "first use," as noted in the Advisory note to section 234.1 of the 2004 ADAAG, be included in the final rule. The Advisory note provides that "[a] custom designed and constructed ride is new upon its first use, which is the first time amusement park patrons take the ride." The Department declines to treat amusement rides differently than other types of new construction and alterations. Under the final rule, they are subject to § 35.151(c). Thus, newly constructed and altered amusement rides shall comply with the 2010 Standards if the start of physical construction or the alteration is on or after 18 months from the publication date of this rule. The Department also notes that section 234.4.2 of the 2010 Standards only applies where the structural or operational characteristics of an amusement ride are altered. It does not apply in cases where the only change to a ride is the theme.

Noncomplying new construction and alterations. The element-by-element safe harbor referenced in § 35.150(b)(2) has no effect on new or altered elements in existing facilities that were subject to the 1991 Standards or UFAS on the date that they were constructed or altered, but do not comply with the technical and scoping specifications for those elements in the 1991 Standards or UFAS. Section 35.151(c)(5) of the final rule sets forth the rules for noncompliant new construction or alterations in facilities that were subject to the requirements of this part. Under those provisions, noncomplying new construction and alterations constructed or altered after the effective date of the applicable ADA requirements and before March 15, 2012 shall, before March 15, 2012, be made accessible in accordance with either the 1991 Standards, UFAS, or the 2010 Standards. Noncomplying new construction and alterations constructed or altered after the effective date of the applicable ADA requirements and before March 15, 2012, shall, on or after March 15, 2012 be made accessible in accordance with the 2010 Standards.

Section 35.151(d) Scope of coverage

In the NPRM, the Department proposed a new provision, § 35.151(d), to clarify that the requirements established by § 35.151, including those contained in the 2004 ADAAG, prescribe what is necessary to ensure that buildings and facilities, including fixed or built-in elements in new or altered facilities, are accessible to individuals with disabilities. Once the construction or alteration of a facility has been completed, all other aspects of programs, services, and activities conducted in that facility are subject to the operational requirements established in this final rule. Although the Department may use the requirements of the 2010 Standards as a guide to determining when and how to make equipment and furnishings accessible, those determinations fall within the discretionary authority of the Department.

The Department also wishes to clarify that the advisory notes, appendix notes, and figures that accompany the 1991 and 2010 Standards do not establish separately enforceable requirements unless specifically stated otherwise in the text of the standards. This clarification has been made to address concerns expressed by ANPRM commenters who mistakenly believed that the advisory notes in the 2004 ADAAG established requirements beyond those established in the text of the guidelines (e.g., Advisory 504.4 suggests, but does not require, that covered entities provide visual contrast on stair tread nosing to make them more visible to individuals with low vision). The Department received no significant comments on this section and it is unchanged in the final rule.

Definitions of residential facilities and transient lodging. The 2010 Standards add a definition of "residential dwelling unit" and modify the current definition of "transient lodging." Under section 106.5 of the 2010 Standards, "residential dwelling unit" is defined as "[a] unit intended to be used as a residence, that is primarily long-term in nature" and does not include transient lodging, inpatient medical care, licensed long-term care, and detention or correctional facilities. Additionally, section 106.5 of the

2010 Standards changes the definition of "transient lodging" to a building or facility "containing one or more guest room(s) for sleeping that provides accommodations that are primarily short-term in nature." "Transient lodging" does not include residential dwelling units intended to be used as a residence. The references to "dwelling units" and "dormitories" that are in the definition of the 1991 Standards are omitted from the 2010 Standards.

The comments about the application of transient lodging or residential standards to social service center establishments, and housing at a place of education are addressed separately below. The Department received one additional comment on this issue from an organization representing emergency response personnel seeking an exemption from the transient lodging accessibility requirements for crew quarters and common use areas serving those crew quarters (*e.g.,* locker rooms, exercise rooms, day room) that are used exclusively by on-duty emergency response personnel and that are not used for any public purpose. The commenter argued that since emergency response personnel must meet certain physical qualifications that have the effect of exempting persons with mobility disabilities, there is no need to build crew quarters and common use areas serving those crew quarters to meet the 2004 ADAAG. In addition, the commenter argued that applying the transient lodging standards would impose significant costs and create living space that is less usable for most emergency response personnel.

The ADA does not exempt spaces because of a belief or policy that excludes persons with disabilities from certain work. However, the Department believes that crew quarters that are used exclusively as a residence by emergency response personnel and the kitchens and bathrooms exclusively serving those quarters are more like residential dwelling units and are therefore covered by the residential dwelling standards in the 2010 Standards, not the transient lodging standards. The residential dwelling standards address most of the concerns of the commenter. For example, the commenter was concerned that sinks in kitchens and lavatories in bathrooms that are accessible under the transient lodging standards would be too low to be comfortably used by emergency response personnel. The residential dwelling standards allow such features to be adaptable so that they would not have to be lowered until accessibility was needed. Similarly, grab bars and shower seats would not have to be installed at the time of construction provided that reinforcement has been installed in walls and located so as to permit their installation at a later date.

Section 35.151(e) Social service center establishments

In the NPRM, the Department proposed a new § 35.151(e) requiring group homes, halfway houses, shelters, or similar social service center establishments that provide temporary sleeping accommodations or residential dwelling units to comply with the provisions of the 2004 ADAAG that apply to residential facilities, including, but not limited to, the provisions in sections 233 and 809.

The NPRM explained that this proposal was based on two important changes in the 2004 ADAAG. First, for the first time, residential dwelling units are explicitly covered in the 2004 ADAAG in section 233. Second, the 2004 ADAAG eliminates the language contained in the 1991 Standards addressing scoping and technical requirements for homeless shelters, group homes, and similar social service center establishments. Currently, such establishments are covered in section 9.5 of the transient lodging section of the 1991 Standards. The deletion of section 9.5 creates an ambiguity of coverage that must be addressed.

The NPRM explained the Department's belief that transferring coverage of social service center establishments from the transient lodging standards to the residential facilities standards would alleviate conflicting requirements for social service center providers. The Department believes that a substantial percentage of social service center establishments are recipients of Federal financial assistance from the Department of Housing and Urban Development (HUD). The Department of Health and Human Services (HHS) also provides financial assistance for the operation of shelters through the Administration for Children and Families programs. As such, these establishments are covered both by the ADA and section 504 of the Rehabilitation Act. UFAS is currently the design standard for new construction and alterations for entities subject to section 504. The two design standards for accessibility—the 1991 Standards and UFAS—have confronted many social service providers with separate, and sometimes conflicting, requirements for design and construction of facilities. To resolve these conflicts, the residential facilities standards in the 2004 ADAAG have been coordinated with the section 504 requirements. The transient lodging standards, however, are not similarly coordinated. The deletion of section 9.5 of the 1991 Standards from the 2004 ADAAG presented two options: (1) Require coverage under the transient lodging standards, and subject such facilities to separate, conflicting requirements for design and construction; or (2) require coverage under the residential facilities standards, which would harmonize the regulatory requirements under the ADA and section 504. The Department chose the option that harmonizes the regulatory requirements: coverage under the residential facilities standards.

In the NPRM, the Department expressed concern that the residential facilities standards do not include a requirement for clear floor space next to beds similar to the requirement in the transient lodging standards and as a result, the Department proposed adding a provision that would require certain social service center establishments that provide sleeping rooms with more than 25 beds to ensure that a minimum of 5 percent of the beds have clear floor space in accordance with section 806.2.3 or 3004 ADAAG.

In the NPRM, the Department requested information from providers who operate homeless shelters, transient group homes, halfway houses, and other social service center establishments, and from the clients of these facilities who would be affected by this proposed change, asking, "[t]o what extent have conflicts between the ADA and section 504 affected these facilities? What would be the effect of applying the residential dwelling unit requirements to these facilities, rather than the requirements for transient lodging guest rooms?" 73 FR 34466, 34491 (June 17, 2008).

Many of the commenters supported applying the residential facilities requirements to social service center establishments, stating that even though the residential facilities requirements are less demanding in some instances, the existence of one clear standard will result in an overall increased level of accessibility by eliminating the confusion and inaction that are sometimes caused by the current existence of multiple requirements. One commenter also stated that "it makes sense to treat social service center establishments like residential facilities because this is how these establishments function in practice."

Two commenters agreed with applying the residential facilities requirements to social service center establishments but recommended adding a requirement for various bathing options, such as a roll-in shower (which is not required under the residential standards).

One commenter objected to the change and asked the Department to require that social service center establishments continue to comply with the transient lodging standards. One commenter stated that it did not agree that the standards for residential coverage would serve persons with disabilities as well as the 1991 transient lodging standards. This commenter expressed concern that the Department had eliminated guidance for social service agencies and that the rule should be put on hold until those safeguards are restored. Another commenter argued that the rule that would provide the greatest access for persons with disabilities should prevail.

Several commenters argued for the application of the transient lodging standards to all social service center establishments except those that were "intended as a person's place of abode," referencing the Department's question related to the definition of "place of lodging" in the title III NPRM. One commenter stated that the International Building Code requires accessible units in all transient facilities. The commenter expressed concern that group homes should be built to be accessible, rather than adaptable.

The Department continues to be concerned about alleviating the challenges for social service providers that are also subject to section 504 and would likely be subject to conflicting requirements if the transient lodging standards were applied. Thus, the Department has retained the requirement that social service center establishments comply with the residential dwelling standards. The Department believes, however, that social service center establishments that provide emergency shelter to large transient populations should be able to provide bathing facilities that are accessible to

persons with mobility disabilities who need roll-in showers. Because of the transient nature of the population of these large shelters, it will not be feasible to modify bathing facilities in a timely manner when faced with a need to provide a roll-in shower with a seat when requested by an overnight visitor. As a result, the Department has added a requirement that social service center establishments with sleeping accommodations for more than 50 individuals must provide at least one roll-in shower with a seat that complies with the relevant provisions of section 608 of the 2010 Standards. Transfer-type showers are not permitted in lieu of a roll-in shower with a seat and the exceptions in sections 608.3 and 608.4 for residential dwelling units are not permitted. When separate shower facilities are provided for men and for women, at least one roll-in shower shall be provided for each group. This supplemental requirement to the residential facilities standards is in addition to the supplemental requirement that was proposed in the NPRM for clear floor space in sleeping rooms with more than 25 beds.

The Department also notes that while dwelling units at some social service center establishments are also subject to the Fair Housing Act (FHAct) design and construction requirements that require certain features of adaptable and accessible design, FHAct units do not provide the same level of accessibility that is required for residential facilities under the 2010 Standards. The FHAct requirements, where also applicable, should not be considered a substitute for the 2010 Standards. Rather, the 2010 Standards must be followed in addition to the FHAct requirements.

The Department also notes that whereas the NPRM used the term "social service establishment," the final rule uses the term "social service center establishment." The Department has made this editorial change so that the final rule is consistent with the terminology used in the ADA. *See* 42 U.S.C. 12181(7)(k).

Section 35.151(f) Housing at a place of education

The Department of Justice and the Department of Education share responsibility for regulation and enforcement of the ADA in postsecondary educational settings, including its requirements for architectural features. In addition, the Department of Housing and Urban Development (HUD) has enforcement responsibility for housing subject to title II of the ADA. Housing facilities in educational settings range from traditional residence halls and dormitories to apartment or townhouse-style residences. In addition to title II of the ADA, public universities and schools that receive Federal financial assistance are also subject to section 504, which contains its own accessibility requirements through the application of UFAS. Residential housing in an educational setting is also covered by the FHAct, which requires newly constructed multifamily housing to include certain features of accessible and adaptable design. Covered entities subject to the ADA must always be aware of, and comply with, any other Federal statutes or regulations that govern the operation of residential properties.

Although the 1991 Standards mention dormitories as a form of transient lodging, they do not specifically address how the ADA applies to dormitories or other types of residential housing provided in an educational setting. The 1991 Standards also do not contain any specific provisions for residential facilities, allowing covered entities to elect to follow the residential standards contained in UFAS. Although the 2004 ADAAG contains provisions for both residential facilities and transient lodging, the guidelines do not indicate which requirements apply to housing provided in an educational setting, leaving it to the adopting agencies to make that choice. After evaluating both sets of standards, the Department concluded that the benefits of applying the transient lodging standards outweighed the benefits of applying the residential facilities standards. Consequently, in the NPRM, the Department proposed a new § 35.151(f) that provided that residence halls or dormitories operated by or on behalf of places of education shall comply with the provisions of the proposed standards for transient lodging, including, but not limited to, the provisions in sections 224 and 806 of the 2004 ADAAG.

Both public and private school housing facilities have varied characteristics. College and university housing facilities typically provide housing for up to one academic year, but may be closed during school vacation periods. In the summer, they are often used for short-term stays of one to three days, a week, or several months. Graduate and faculty housing is often provided year-round in the form of apartments, which may serve individuals or families with children. These housing facilities are diverse in their layout. Some are double-occupancy rooms with a shared toilet and bathing room, which may be inside or outside the unit. Others may contain cluster, suite, or group arrangements where several rooms are located inside a defined unit with bathing, kitchen, and similar common facilities. In some cases, these suites are indistinguishable in features from traditional apartments. Universities may build their own housing facilities or enter into agreements with private developers to build, own, or lease housing to the educational institution or to its students. Academic housing may be located on the campus of the university or may be located in nearby neighborhoods.

Throughout the school year and the summer, academic housing can become program areas in which small groups meet, receptions and educational sessions are held, and social activities occur. The ability to move between rooms—both accessible rooms and standard rooms—in order to socialize, to study, and to use all public use and common use areas is an essential part of having access to these educational programs and activities. Academic housing is also used for short-term transient educational programs during the time students are not in regular residence and may be rented out to transient visitors in a manner similar to a hotel for special university functions.

The Department was concerned that applying the new construction requirements for residential facilities to educational housing facilities could hinder access to educational programs for students with disabilities. Elevators are not generally required under the 2004 ADAAG residential facilities standards unless they are needed to provide an accessible route from accessible units to public use and common use areas, while under the 2004 ADAAG as it applies to other types of facilities, multistory public facilities must have elevators unless they meet very specific exceptions. In addition, the residential facilities standards do not require accessible roll-in showers in bathrooms, while the transient lodging requirements require some of the accessible units to be served by bathrooms with roll-in showers. The transient lodging standards also require that a greater number of units have accessible features for persons with communication disabilities. The transient lodging standards provide for installation of the required accessible features so that they are available immediately, but the residential facilities standards allow for certain features of the unit to be adaptable. For example, only reinforcements for grab bars need to be provided in residential dwellings, but the actual grab bars must be installed under the transient lodging standards. By contrast, the residential facilities standards do require certain features that provide greater accessibility within units, such as more usable kitchens, and an accessible route throughout the dwelling. The residential facilities standards also require 5 percent of the units to be accessible to persons with mobility disabilities, which is a continuation of the same scoping that is currently required under UFAS, and is therefore applicable to any educational institution that is covered by section 504. The transient lodging standards require a lower percentage of accessible sleeping rooms for facilities with large numbers of rooms than is required by UFAS. For example, if a dormitory had 150 rooms, the transient lodging standards would require seven accessible rooms while the residential standards would require eight. In a large dormitory with 500 rooms, the transient lodging standards would require 13 accessible rooms and the residential facilities standards would require 25. There are other differences between the two sets of standards as well with respect to requirements for accessible windows, alterations, kitchens, accessible route throughout a unit, and clear floor space in bathrooms allowing for a side transfer.

In the NPRM, the Department requested public comment on how to scope educational housing facilities, asking, "[w]ould the residential facility requirements or the transient lodging requirements in the 2004 ADAAG be more appropriate for housing at places of education? How would the different requirements affect the cost when building new dormitories and other student housing?" 73 FR 34466, 34492 (June 17, 2008).

The vast majority of the comments received by the Department advocated using the residential facilities standards for housing at a place of education instead of the transient lodging standards, arguing that housing at places of public education are in fact homes for the students who live in them. These commenters argued, however, that the

Department should impose a requirement for a variety of options for accessible bathing and should ensure that all floors of dormitories be accessible so that students with disabilities have the same opportunities to participate in the life of the dormitory community that are provided to students without disabilities. Commenters representing persons with disabilities and several individuals argued that, although the transient lodging standards may provide a few more accessible features (such as roll-in showers), the residential facilities standards would ensure that students with disabilities have access to all rooms in their assigned unit, not just to the sleeping room, kitchenette, and wet bar. One commenter stated that, in its view, the residential facilities standards were congruent with overlapping requirements from HUD, and that access provided by the residential facilities requirements within alterations would ensure dispersion of accessible features more effectively. This commenter also argued that while the increased number of required accessible units for residential facilities as compared to transient lodging may increase the cost of construction or alteration, this cost would be offset by a reduced need to adapt rooms later if the demand for accessible rooms exceeds the supply. The commenter also encouraged the Department to impose a visitability (accessible doorways and necessary clear floor space for turning radius) requirement for both the residential facilities and transient lodging requirements to allow students with mobility impairments to interact and socialize in a fully integrated fashion.

Two commenters supported the Department's proposed approach. One commenter argued that the transient lodging requirements in the 2004 ADAAG would provide greater accessibility and increase the opportunity of students with disabilities to participate fully in campus life. A second commenter generally supported the provision of accessible dwelling units at places of education, and pointed out that the relevant scoping in the International Building Code requires accessible units "consistent with hotel accommodations."

The Department has considered the comments recommending the use of the residential facilities standards and acknowledges that they require certain features that are not included in the transient lodging standards and that should be required for housing provided at a place of education. In addition, the Department notes that since educational institutions often use their academic housing facilities as short-term transient lodging in the summers, it is important that accessible features be installed at the outset. It is not realistic to expect that the educational institution will be able to adapt a unit in a timely manner in order to provide accessible accommodations to someone attending a one-week program during the summer.

The Department has determined that the best approach to this type of housing is to continue to require the application of transient lodging standards, but at the same time to add several requirements drawn from the residential facilities standards related to accessible turning spaces and work surfaces in kitchens, and the accessible route throughout the unit. This will ensure the maintenance of the transient lodging standard requirements related to access to all floors of the facility, roll-in showers in facilities with more than 50 sleeping rooms, and other important accessibility features not found in the residential facilities standards, but will also ensure usable kitchens and access to all the rooms in a suite or apartment.

The Department has added a new definition to § 35.104, "Housing at a Place of Education," and has revised § 35.151(f) to reflect the accessible features that now will be required in addition to the requirements set forth under the transient lodging standards. The Department also recognizes that some educational institutions provide some residential housing on a year-round basis to graduate students and staff which is comparable to private rental housing, and which contains no facilities for educational programming. Section 35.151(f)(3) exempts from the transient lodging standards apartments or townhouse facilities provided by or on behalf of a place of education that are leased on a year-round basis exclusively to graduate students or faculty, and do not contain any public use or common use areas available for educational programming; instead, such housing shall comply with the requirements for residential facilities in sections 233 and 809 of the 2010 Standards.

Section 35.151(f) uses the term "sleeping room" in lieu of the term "guest room," which is the term used in the transient lodging standards. The Department is using this term because it believes that, for the most part, it provides a better description of the sleeping facilities used in a place of education than "guest room." The final rule states that the Department intends the terms to be used interchangeably in the application of the transient lodging standards to housing at a place of education.

Section 35.151(g) Assembly areas

In the NPRM, the Department proposed § 35.151(g) to supplement the assembly area requirements of the 2004 ADAAG, which the Department is adopting as part of the 2010 Standards. The NPRM proposed at § 35.151(g)(1) to require wheelchair spaces and companion seating locations to be dispersed to all levels of the facility and are served by an accessible route. The Department received no significant comments on this paragraph and has decided to adopt the proposed language with minor modifications. The Department has retained the substance of this section in the final rule but has clarified that the requirement applies to stadiums, arenas, and grandstands. In addition, the Department has revised the phrase "wheelchair and companion seating locations" to "wheelchair spaces and companion seats."

Section 35.151(g)(1) ensures that there is greater dispersion of wheelchair spaces and companion seats throughout stadiums, arenas, and grandstands than would otherwise be required by sections 221 and 802 of the 2004 ADAAG. In some cases, the accessible route may not be the same route that other individuals use to reach their seats. For example, if other patrons reach their seats on the field by an inaccessible route (*e.g.,* by stairs), but there is an accessible route that complies with section 206.3 of the 2010 Standards that could be connected to seats on the field, wheelchair spaces and companion seats must be placed on the field even if that route is not generally available to the public.

Regulatory language that was included in the 2004 ADAAG advisory, but that did not appear in the NPRM, has been added by the Department in § 35.151(g)(2). Section 35.151(g)(2) now requires an assembly area that has seating encircling, in whole or in part, a field of play or performance area such as an arena or stadium, to place wheelchair spaces and companion seats around the entire facility. This rule, which is designed to prevent a public entity from placing wheelchair spaces and companion seats on one side of the facility only, is consistent with the Department's enforcement practices and reflects its interpretation of section 4.33.3 of the 1991 Standards.

In the NPRM, the Department proposed § 35.151(g)(2) which prohibits wheelchair spaces and companion seating locations from being "located on, (or obstructed by) temporary platforms or other moveable structures." Through its enforcement actions, the Department discovered that some venues place wheelchair spaces and companion seats on temporary platforms that, when removed, reveal conventional seating underneath, or cover the wheelchair spaces and companion seats with temporary platforms on top of which they place risers of conventional seating. These platforms cover groups of conventional seats and are used to provide groups of wheelchair seats and companion seats.

Several commenters requested an exception to the prohibition of the use of temporary platforms for public entities that sell most of their tickets on a season-ticket or other multi-event basis. Such commenters argued that they should be able to use temporary platforms because they know, in advance, that the patrons sitting in certain areas for the whole season do not need wheelchair spaces and companion seats. The Department declines to adopt such an exception. As it explained in detail in the NPRM, the Department believes that permitting the use of movable platforms that seat four or more wheelchair users and their companions have the potential to reduce the number of available wheelchair seating spaces below the level required, thus reducing the opportunities for persons who need accessible seating to have the same choice of ticket prices and amenities that are available to other patrons in the facility. In addition, use of removable platforms may result in instances where last minute requests for wheelchair and companion seating cannot be met because entire sections of accessible seating will be lost when a platform is removed. *See* 73 FR 34466, 34493 (June 17, 2008). Further, use of temporary platforms allows facilities to limit persons who need accessible seating to certain seating areas, and to relegate accessible seating to less desirable locations. The use of temporary

platforms has the effect of neutralizing dispersion and other seating requirements (*e.g.,* line of sight) for wheelchair spaces and companion seats. *Cf. Independent Living Resources* v. *Oregon Arena Corp.,* 1 F. Supp. 2d 1159, 1171 (D. Or. 1998) (holding that while a public accommodation may "infill" wheelchair spaces with removable seats when the wheelchair spaces are not needed to accommodate individuals with disabilities, under certain circumstances "[s]uch a practice might well violate the rule that wheelchair spaces must be dispersed throughout the arena in a manner that is roughly proportionate to the overall distribution of seating"). In addition, using temporary platforms to convert unsold wheelchair spaces to conventional seating undermines the flexibility facilities need to accommodate secondary ticket markets exchanges as required by § 35.138(g) of the final rule.

As the Department explained in the NPRM, however, this provision was not designed to prohibit temporary seating that increases seating for events (*e.g.,* placing temporary seating on the floor of a basketball court for a concert). Consequently, the final rule, at § 35.151(g)(3), has been amended to clarify that if an entire seating section is on a temporary platform for a particular event, then wheelchair spaces and companion seats may be in that seating section. However, adding a temporary platform to create wheelchair spaces and companion seats that are otherwise dissimilar from nearby fixed seating and then simply adding a small number of additional seats to the platform would not qualify as an "entire seating section" on the platform. In addition, § 35.151(g)(3) clarifies that facilities may fill in wheelchair spaces with removable seats when the wheelchair spaces are not needed by persons who use wheelchairs.

The Department has been responsive to assembly areas' concerns about reduced revenues due to unused accessible seating. Accordingly, the Department has reduced scoping requirements significantly—by almost half in large assembly areas—and determined that allowing assembly areas to infill unsold wheelchair spaces with readily removable temporary individual seats appropriately balances their economic concerns with the rights of individuals with disabilities. *See* section 221.2 of the 2010 Standards.

For stadium-style movie theaters, in § 35.151(g)(4) of the NPRM the Department proposed requiring placement of wheelchair seating spaces and companion seats on a riser or cross-aisle in the stadium section of the theater and placement of such seating so that it satisfies at least one of the following criteria: (1) It is located within the rear 60 percent of the seats provided in the auditorium; or (2) it is located within the area of the auditorium where the vertical viewing angles are between the 40th to 100th percentile of vertical viewing angles for all seats in that theater as ranked from the first row (1st percentile) to the back row (100th percentile). The vertical viewing angle is the angle between a horizontal line perpendicular to the seated viewer's eye to the screen and a line from the seated viewer's eye to the top of the screen.

The Department proposed this bright-line rule for two reasons: (1) The movie theater industry petitioned for such a rule; and (2) the Department has acquired expertise on the design of stadium style theaters from litigation against several major movie theater chains. *See U.S.* v. *AMC Entertainment,* 232 F. Supp. 2d 1092 (C.D. Ca. 2002), *rev'd in part,* 549 F. 3d 760 (9th Cir. 2008); *U.S.* v. *Cinemark USA, Inc.,* 348 F. 3d 569 (6th Cir. 2003), *cert. denied,* 542 U.S. 937 (2004). Two industry commenters—at least one of whom otherwise supported this rule—requested that the Department explicitly state that this rule does not apply retroactively to existing theaters. Although this rule on its face applies to new construction and alterations, these commenters were concerned that the rule could be interpreted to apply retroactively because of the Department's statement in the ANPRM that this bright-line rule, although newly-articulated, does not represent a "substantive change from the existing line-of-sight requirements" of section 4.33.3 of the 1991 Standards. *See* 69 FR 58768, 58776 (Sept. 30, 2004).

Although the Department intends for § 35.151(g)(4) of this rule to apply prospectively to new construction and alterations, this rule is not a departure from, and is consistent with, the line-of-sight requirements in the 1991 Standards. The Department has always interpreted the line-of-sight requirements in the 1991 Standards to require viewing angles provided to patrons who use wheelchairs to be comparable to those afforded to other spectators. Section 35.151(g)(4) merely represents the application of these requirements to stadium-style movie theaters.

One commenter from a trade association sought clarification whether § 35.151(g)(4) applies to stadium-style theaters with more than 300 seats, and argued that it should not since dispersion requirements apply in those theaters. The Department declines to limit this rule to stadium-style theaters with 300 or fewer seats; stadium-style theaters of all sizes must comply with this rule. So, for example, stadium-style theaters that must vertically disperse wheelchair and companion seats must do so within the parameters of this rule.

The NPRM included a provision that required assembly areas with more than 5,000 seats to provide at least five wheelchair spaces with at least three companion seats for each of those five wheelchair spaces. The Department agrees with commenters who asserted that group seating is better addressed through ticketing policies rather than design and has deleted that provision from this section of the final rule.

Section 35.151(h) Medical care facilities

In the 1991 title II regulation, there was no provision addressing the dispersion of accessible sleeping rooms in medical care facilities. The Department is aware, however, of problems that individuals with disabilities face in receiving full and equal medical care when accessible sleeping rooms are not adequately dispersed. When accessible rooms are not fully dispersed, a person with a disability is often placed in an accessible room in an area that is not medically appropriate for his or her condition, and is thus denied quick access to staff with expertise in that medical specialty and specialized equipment. While the Access Board did not establish specific design requirements for dispersion in the 2004 ADAAG, in response to extensive comments in support of dispersion it added an advisory note, Advisory 223.1 General, encouraging dispersion of accessible rooms within the facility so that accessible rooms are more likely to be proximate to appropriate qualified staff and resources.

In the NPRM, the Department sought additional comment on the issue, asking whether it should require medical care facilities, such as hospitals, to disperse their accessible sleeping rooms, and if so, by what method (by specialty area, floor, or other criteria). All of the comments the Department received on this issue supported dispersing accessible sleeping rooms proportionally by specialty area. These comments, from individuals, organizations, and a building code association, argued that it would not be difficult for hospitals to disperse rooms by specialty area, given the high level of regulation to which hospitals are subject and the planning that hospitals do based on utilization trends. Further, commenters suggested that without a requirement, it is unlikely that hospitals would disperse the rooms. In addition, concentrating accessible rooms in one area perpetuates segregation of individuals with disabilities, which is counter to the purpose of the ADA.

The Department has decided to require medical care facilities to disperse their accessible sleeping rooms in a manner that is proportionate by type of medical specialty. This does not require exact mathematical proportionality, which at times would be impossible. However, it does require that medical care facilities disperse their accessible rooms by medical specialty so that persons with disabilities can, to the extent practical, stay in an accessible room within the wing or ward that is appropriate for their medical needs. The language used in this rule ("in a manner that is proportionate by type of medical specialty") is more specific than that used in the NPRM ("in a manner that enables patients with disabilities to have access to appropriate specialty services") and adopts the concept of proportionality proposed by the commenters. Accessible rooms should be dispersed throughout all medical specialties, such as obstetrics, orthopedics, pediatrics, and cardiac care.

Section 35.151(i) Curb ramps

Section 35.151(e) on curb ramps in the 1991 rule has been redesignated as § 35.151(i). In the NPRM, the Department proposed making a minor editorial change to this section, deleting the phrase "other sloped areas" from the two places in which it appears in the 1991 title II regulation. In the NPRM, the Department stated that the phrase "other sloped areas" lacks technical precision. The Department received no significant public comments on this proposal. Upon further consideration, however, the Department has concluded that the regulation should acknowledge that there are times when there are transitions from

sidewalk to road surface that do not technically qualify as "curb ramps" (sloped surfaces that have a running slope that exceed 5 percent). Therefore, the Department has decided not to delete the phrase "other sloped areas."

Section 35.151(j) Residential housing for sale to individual owners

Although public entities that operate residential housing programs are subject to title II of the ADA, and therefore must provide accessible residential housing, the 1991 Standards did not contain scoping or technical standards that specifically applied to residential housing units. As a result, under the Department's title II regulation, these agencies had the choice of complying with UFAS, which contains specific scoping and technical standards for residential housing units, or applying the ADAAG transient lodging standards to their housing. Neither UFAS nor the 1991 Standards distinguish between residential housing provided for rent and those provided for sale to individual owners. Thus, under the 1991 title II regulation, public entities that construct residential housing units to be sold to individual owners must ensure that some of those units are accessible. This requirement is in addition to any accessibility requirements imposed on housing programs operated by public entities that receive Federal financial assistance from Federal agencies such as HUD.

The 2010 Standards contain scoping and technical standards for residential dwelling units. However, section 233.3.2 of the 2010 Standards specifically defers to the Department and to HUD, the standard-setting agency under the ABA, to decide the appropriate scoping for those residential dwelling units built by or on behalf of public entities with the intent that the finished units will be sold to individual owners. These programs include, for example, HUD's public housing and HOME programs as well as State-funded programs to construct units for sale to individuals. In the NPRM, the Department did not make a specific proposal for this scoping. Instead, the Department stated that after consultation and coordination with HUD, the Department would make a determination in the final rule. The Department also sought public comment on this issue stating that "[t]he Department would welcome recommendations from individuals with disabilities, public housing authorities, and other interested parties that have experience with these programs. Please comment on the appropriate scoping for residential dwelling units built by or on behalf of public entities with the intent that the finished units will be sold to individual owners." 73 FR 34466, 34492 (June 17, 2008).

All of the public comments received by the Department in response to this question were supportive of the Department's ensuring that the residential standards apply to housing built on behalf of public entities with the intent that the finished units would be sold to individual owners. The vast majority of commenters recommended that the Department require that projects consisting of five or more units, whether or not the units are located on one or multiple locations, comply with the 2004 ADAAG requirements for scoping of residential units, which require that 5 percent, and no fewer than one, of the dwelling units provide mobility features, and that 2 percent, and no fewer than one, of the dwelling units provide communication features. *See* 2004 ADAAG Section 233.3. These commenters argued that the Department should not defer to HUD because HUD has not yet adopted the 2004 ADAAG and there is ambiguity on the scope of coverage of pre-built for sale units under HUD's current section 504 regulations. In addition, these commenters expressed concern that HUD's current regulation, 24 CFR 8.29, presumes that a prospective buyer is identified before design and construction begins so that disability features can be incorporated prior to construction. These commenters stated that State and Federally funded homeownership programs typically do not identify prospective buyers before construction has commenced. One commenter stated that, in its experience, when public entities build accessible for-sale units, they often sell these units through a lottery system that does not make any effort to match persons who need the accessible features with the units that have those features. Thus, accessible units are often sold to persons without disabilities. This commenter encouraged the Department to make sure that accessible for-sale units built or funded by public entities are placed in a separate lottery restricted to income-eligible persons with disabilities.

Two commenters recommended that the Department develop rules for four types of for-sale projects: single family pre-built (where buyer selects the unit after construction), single family post-built (where the buyer chooses the model prior to its construction), multi-family pre-built, and multi-family post-built. These commenters recommended that the Department require pre-built units to comply with the 2004 ADAAG 233.1 scoping requirements. For post-built units, the commenters recommended that the Department require all models to have an alternate design with mobility features and an alternate design with communications features in compliance with 2004 ADAAG. Accessible models should be available at no extra cost to the buyer. One commenter recommended that, in addition to required fully accessible units, all ground floor units should be readily convertible for accessibility or for sensory impairments technology enhancements.

The Department believes that consistent with existing requirements under title II, housing programs operated by public entities that design and construct or alter residential units for sale to individual owners should comply with the 2010 Standards, including the requirements for residential facilities in sections 233 and 809. These requirements will ensure that a minimum of 5 percent of the units, but no fewer than one unit, of the total number of residential dwelling units will be designed and constructed to be accessible for persons with mobility disabilities. At least 2 percent, but no fewer than one unit, of the total number of residential dwelling units shall provide communication features.

The Department recognizes that there are some programs (such as the one identified by the commenter), in which units are not designed and constructed until an individual buyer is identified. In such cases, the public entity is still obligated to comply with the 2010 Standards. In addition, the public entity must ensure that pre-identified buyers with mobility disabilities and visual and hearing disabilities are afforded the opportunity to buy the accessible units. Once the program has identified buyers who need the number of accessible units mandated by the 2010 Standards, it may have to make reasonable modifications to its policies, practices, and procedures in order to provide accessible units to other buyers with disabilities who request such units.

The Department notes that the residential facilities standards allow for construction of units with certain features of adaptability. Public entities that are concerned that fully accessible units are less marketable may choose to build these units to include the allowable adaptable features, and then adapt them at their own expense for buyers with mobility disabilities who need accessible units. For example, features such as grab bars are not required but may be added by the public entity if needed by the buyer at the time of purchase and cabinets under sinks may be designed to be removable to allow access to the required knee space for a forward approach.

The Department agrees with the commenters that covered entities may have to make reasonable modifications to their policies, practices, and procedures in order to ensure that when they offer pre-built accessible residential units for sale, the units are offered in a manner that gives access to those units to persons with disabilities who need the features of the units and who are otherwise eligible for the housing program. This may be accomplished, for example, by adopting preferences for accessible units for persons who need the features of the units, holding separate lotteries for accessible units, or other suitable methods that result in the sale of accessible units to persons who need the features of such units. In addition, the Department believes that units designed and constructed or altered that comply with the requirements for residential facilities and are offered for sale to individuals must be provided at the same price as units without such features.

Section 35.151(k) Detention and correctional facilities

The 1991 Standards did not contain specific accessibility standards applicable to cells in correctional facilities. However, correctional and detention facilities operated by or on behalf of public entities have always been subject to the nondiscrimination and program accessibility requirements of title II of the ADA. The 2004 ADAAG established specific requirements for the design and construction and alterations of cells in correctional facilities for the first time.

Based on complaints received by the Department, investigations, and compliance reviews of jails, prisons, and other detention and correctional facilities, the Department has determined that many detention and

correctional facilities do not have enough accessible cells, toilets, and shower facilities to meet the needs of their inmates with mobility disabilities and some do not have any at all. Inmates are sometimes housed in medical units or infirmaries separate from the general population simply because there are no accessible cells. In addition, some inmates have alleged that they are housed at a more restrictive classification level simply because no accessible housing exists at the appropriate classification level. The Department's compliance reviews and investigations have substantiated certain of these allegations.

The Department believes that the insufficient number of accessible cells is, in part, due to the fact that most jails and prisons were built long before the ADA became law and, since then, have undergone few alterations that would trigger the obligation to provide accessible features in accordance with UFAS or the 1991 Standards. In addition, the Department has found that even some new correctional facilities lack accessible features. The Department believes that the unmet demand for accessible cells is also due to the changing demographics of the inmate population. With thousands of prisoners serving life sentences without eligibility for parole, prisoners are aging, and the prison population of individuals with disabilities and elderly individuals is growing. A Bureau of Justice Statistics study of State and Federal sentenced inmates (those sentenced to more than one year) shows the total estimated count of State and Federal prisoners aged 55 and older grew by 36,000 inmates from 2000 (44,200) to 2006 (80,200). William J. Sabol *et al., Prisoners in 2006,* Bureau of Justice Statistics Bulletin, Dec. 2007, at 23 (app. table 7), available at *http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=908* (last visited July 16, 2008); Allen J. Beck et al., *Prisoners in 2000,* Bureau of Justice Statistics Bulletin, Aug. 2001, at 10 (Aug. 2001) (Table 14), available at *bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=927* (last visited July 16, 2008). This jump constitutes an increase of 81 percent in prisoners aged 55 and older during this period.

In the NPRM, the Department proposed a new section, § 35.152, which combined a range of provisions relating to both program accessibility and application of the proposed standards to detention and correctional facilities. In the final rule, the Department is placing those provisions that refer to design, construction, and alteration of detention and correction facilities in a new paragraph (k) of § 35.151, the section of the rule that addresses new construction and alterations for covered entities. Those portions of the final rule that address other issues, such as placement policies and program accessibility, are placed in the new § 35.152.

In the NPRM, the Department also sought input on how best to meet the needs of inmates with mobility disabilities in the design, construction, and alteration of detention and correctional facilities. The Department received a number of comments in response to this question.

New Construction. The NPRM did not expressly propose that new construction of correctional and detention facilities shall comply with the proposed standards because the Department assumed it would be clear that the requirements of § 35.151 would apply to new construction of correctional and detention facilities in the same manner that they apply to other facilities constructed by covered entities. The Department has decided to create a new section, § 35.151(k)(1), which clarifies that new construction of jails, prisons, and other detention facilities shall comply with the requirements of 2010 Standards. Section 35.151(k)(1) also increases the scoping for accessible cells from the 2 percent specified in the 2004 ADAAG to 3 percent.

Alterations. Although the 2010 Standards contain specifications for alterations in existing detention and correctional facilities, section 232.2 defers to the Attorney General the decision as to the extent these requirements will apply to alterations of cells. The NPRM proposed at § 35.152(c) that "[a]lterations to jails, prisons, and other detention and correctional facilities will comply with the requirements of § 35.151(b)." 73 FR 34466, 34507 (June 17, 2008). The final rule retains that requirement at § 35.151(k)(2), but increases the scoping for accessible cells from the 2 percent specified in the 2004 ADAAG to 3 percent.

Substitute cells. In the ANPRM, the Department sought public comment about the most effective means to ensure that existing correctional facilities are made accessible to prisoners with disabilities and presented three options: (1) Require all altered elements to be accessible, which would maintain the current policy that applies to other ADA alteration requirements; (2) permit substitute cells to be made accessible within the same facility, which would permit correctional authorities to meet their obligation by providing the required accessible features in cells within the same facility, other than those specific cells in which alterations are planned; or (3) permit substitute cells to be made accessible within a prison system, which would focus on ensuring that prisoners with disabilities are housed in facilities that best meet their needs, as alterations within a prison environment often result in piecemeal accessibility.

In § 35.152(c) of the NPRM, the Department proposed language based on Option 2, providing that when cells are altered, a covered entity may satisfy its obligation to provide the required number of cells with mobility features by providing the required mobility features in substitute cells (i.e., cells other than those where alterations are originally planned), provided that each substitute cell is located within the same facility, is integrated with other cells to the maximum extent feasible, and has, at a minimum, physical access equal to that of the original cells to areas used by inmates or detainees for visitation, dining, recreation, educational programs, medical services, work programs, religious services, and participation in other programs that the facility offers to inmates or detainees.

The Department received few comments on this proposal. The majority who chose to comment supported an approach that allowed substitute cells to be made accessible within the same facility. In their view, such an approach balanced administrators' needs, cost considerations, and the needs of inmates with disabilities. One commenter noted, however, that with older facilities, required modifications may be inordinately costly and technically infeasible. A large county jail system supported the proposed approach as the most viable option allowing modification or alteration of existing cells based on need and providing a flexible approach to provide program and mobility accessibility. It noted, as an alternative, that permitting substitute cells to be made accessible within a prison system would also be a viable option since such an approach could create a centralized location for accessibility needs and, because that jail system's facilities were in close proximity, it would have little impact on families for visitation or on accessible programming.

A large State department of corrections objected to the Department's proposal. The commenter stated that some very old prison buildings have thick walls of concrete and reinforced steel that are difficult, if not impossible to retrofit, and to do so would be very expensive. This State system approaches accessibility by looking at its system as a whole and providing access to programs for inmates with disabilities at selected prisons. This commenter explained that not all of its facilities offer the same programs or the same levels of medical or mental health services. An inmate, for example, who needs education, substance abuse treatment, and sex offender counseling may be transferred between facilities in order to meet his needs. The inmate population is always in flux and there are not always beds or program availability for every inmate at his security level. This commenter stated that the Department's proposed language would put the State in the position of choosing between adding accessible cells and modifying paths of travel to programs and services at great expense or not altering old facilities, causing them to become in states of disrepair and obsolescent, which would be fiscally irresponsible.

The Department is persuaded by these comments and has modified the alterations requirement in § 35.151(k)(2)(iv) in the final rule to allow that if it is technically infeasible to provide substitute cells in the same facility, cells can be provided elsewhere within the corrections system.

Number of accessible cells. Section 232.2.1 of the 2004 ADAAG requires at least 2 percent, but no fewer than one, of the cells in newly constructed detention and correctional facilities to have accessibility features for individuals with mobility disabilities. Section 232.3 provides that, where special holding cells or special housing cells are provided, at least one cell serving each purpose shall have mobility features. The Department sought input on whether these 2004 ADAAG requirements are sufficient to meet the needs of inmates with mobility disabilities. A major association representing county jails throughout the country stated that the 2004 ADAAG 2 percent requirement for accessible cells is sufficient to meet the needs of county jails.

Similarly, a large county sheriff's department advised that the 2 percent requirement far exceeds the need at its detention facility, where the average age of the population is 32. This commenter stressed that the regulations need to address the differences between a local detention facility with low average lengths of stay as opposed to a State prison housing inmates for lengthy periods. This commenter asserted that more stringent requirements will raise construction costs by requiring modifications that are not needed. If more stringent requirements are adopted, the commenter suggested that they apply only to State and Federal prisons that house prisoners sentenced to long terms. The Department notes that a prisoner with a mobility disability needs a cell with mobility features regardless of the length of incarceration. However, the length of incarceration is most relevant in addressing the needs of an aging population.

The overwhelming majority of commenters responded that the 2 percent ADAAG requirement is inadequate to meet the needs of the incarcerated. Many commenters suggested that the requirement be expanded to apply to each area, type, use, and class of cells in a facility. They asserted that if a facility has separate areas for specific programs, such as a dog training program or a substance abuse unit, each of these areas should also have 2 percent accessible cells but not less than one. These same commenters suggested that 5–7 percent of cells should be accessible to meet the needs of both an aging population and the larger number of inmates with mobility disabilities. One organization recommended that the requirement be increased to 5 percent overall, and that at least 2 percent of each type and use of cell be accessible. Another commenter recommended that 10 percent of cells be accessible. An organization with extensive corrections experience noted that the integration mandate requires a sufficient number and distribution of accessible cells so as to provide distribution of locations relevant to programs to ensure that persons with disabilities have access to the programs.

Through its investigations and compliance reviews, the Department has found that in most detention and correctional facilities, a 2 percent accessible cell requirement is inadequate to meet the needs of the inmate population with disabilities. That finding is supported by the majority of the commenters that recommended a 5–7 percent requirement. Indeed, the Department itself requires more than 2 percent of the cells to be accessible at its own corrections facilities. The Federal Bureau of Prisons is subject to the requirements of the 2004 ADAAG through the General Services Administration's adoption of the 2004 ADAAG as the enforceable accessibility standard for Federal facilities under the Architectural Barriers Act of 1968. 70 FR 67786, 67846–47 (Nov. 8, 2005). However, in order to meet the needs of inmates with mobility disabilities, the Bureau of Prisons has elected to increase that percentage and require that 3 percent of inmate housing at its facilities be accessible. Bureau of Prisons, Design Construction Branch, Design Guidelines, Attachment A: Accessibility Guidelines for Design, Construction, and Alteration of Federal Bureau of Prisons (Oct. 31, 2006).

The Department believes that a 3 percent accessible requirement is reasonable. Moreover, it does not believe it should impose a higher percentage on detention and corrections facilities than it utilizes for its own facilities. Thus, the Department has adopted a 3 percent requirement in § 35.151(k) for both new construction and alterations. The Department notes that the 3 percent requirement is a minimum. As corrections systems plan for new facilities or alterations, the Department urges planners to include numbers of inmates with disabilities in their population projections in order to take the necessary steps to provide a sufficient number of accessible cells to meet inmate needs.

Dispersion of Cells. The NPRM did not contain express language addressing dispersion of cells in a facility. However, Advisory 232.2 of the 2004 ADAAG recommends that "[a]ccessible cells or rooms should be dispersed among different levels of security, housing categories, and holding classifications (*e.g.,* male/female and adult/juvenile) to facilitate access." In explaining the basis for recommending, but not requiring, this type of dispersal, the Access Board stated that "[m]any detention and correctional facilities are designed so that certain areas (*e.g.,* 'shift' areas) can be adapted to serve as different types of housing according to need" and that "[p]lacement of accessible cells or rooms in shift areas may allow additional flexibility in meeting requirements for dispersion of accessible cells or rooms."

The Department notes that inmates are typically housed in separate areas of detention and correctional facilities based on a number of factors, including their classification level. In many instances, detention and correctional facilities have housed inmates in inaccessible cells, even though accessible cells were available elsewhere in the facility, because there were no cells in the areas where they needed to be housed, such as in administrative or disciplinary segregation, the women's section of the facility, or in a particular security classification area.

The Department received a number of comments stating that dispersal of accessible cells together with an adequate number of accessible cells is necessary to prevent inmates with disabilities from placement in improper security classification and to ensure integration. Commenters recommended modification of the scoping requirements to require a percentage of accessible cells in each program, classification, use or service area. The Department is persuaded by these comments. Accordingly, § 35.151(k)(1) and (k)(2) of the final rule require accessible cells in each classification area.

Medical facilities. The NPRM also did not propose language addressing the application of the 2004 ADAAG to medical and long-term care facilities in correctional and detention facilities. The provisions of the 2004 ADAAG contain requirements for licensed medical and long-term care facilities, but not those that are unlicensed. A disability advocacy group and a number of other commenters recommended that the Department expand the application of section 232.4 to apply to all such facilities in detention and correctional facilities, regardless of licensure. They recommended that whenever a correctional facility has a program that is addressed specifically in the 2004 ADAAG, such as a long-term care facility, the 2004 ADAAG scoping and design features should apply for those elements. Similarly, a building code organization noted that its percentage requirements for accessible units is based on what occurs in the space, not on the building type.

The Department is persuaded by these comments and has added § 35.151(k)(3), which states that "[w]ith respect to medical and long-term care facilities in jails, prisons, and other detention and correctional facilities, public entities shall apply the 2010 Standards technical and scoping requirements for those facilities irrespective of whether those facilities are licensed."

Section 35.152 Detention and correctional facilities—program requirements

As noted in the discussion of § 35.151(k), the Department has determined that inmates with mobility and other disabilities in detention and correctional facilities do not have equal access to prison services. The Department's concerns are based not only on complaints it has received, but the Department's substantial experience in investigations and compliance reviews of jails, prisons, and other detention and correctional facilities. Based on that review, the Department has found that many detention and correctional facilities have too few or no accessible cells, toilets, and shower facilities to meet the needs of their inmates with mobility disabilities. These findings, coupled with statistics regarding the current percentage of inmates with mobility disabilities and the changing demographics of the inmate population reflecting thousands of prisoners serving life sentences and increasingly large numbers of aging inmates who are not eligible for parole, led the Department to conclude that a new regulation was necessary to address these concerns.

In the NPRM, the Department proposed a new section, § 35.152, which combined a range of provisions relating to both program accessibility and application of the proposed standards to detention and correctional facilities. As mentioned above, in the final rule, the Department is placing those provisions that refer to design, construction, and alteration of detention and correction facilities in new paragraph (k) in § 35.151 dealing with new construction and alterations for covered entities. Those portions of the final rule that address other program requirements remain in § 35.152.

The Department received many comments in response to the program accessibility requirements in proposed § 35.152. These comments are addressed below.

Facilities operated through contractual, licensing, or other arrangements with other public entities or private entities. The Department is aware that some public

entities are confused about the applicability of the title II requirements to correctional facilities built or run by other public entities or private entities. It has consistently been the Department's position that title II requirements apply to correctional facilities used by State or local government entities, irrespective of whether the public entity contracts with another public or private entity to build or run the correctional facility. The power to incarcerate citizens rests with the State or local government, not a private entity. As the Department stated in the preamble to the original title II regulation, "[a]ll governmental activities of public entities are covered, even if they are carried out by contractors." 28 CFR part 35, app. A at 558 (2009). If a prison is occupied by State prisoners and is inaccessible, the State is responsible under title II of the ADA. The same is true for a county or city jail. In essence, the private builder or contractor that operates the correctional facility does so at the direction of the government entity. Moreover, even if the State enters into a contractual, licensing, or other arrangement for correctional services with a public entity that has its own title II obligations, the State is still responsible for ensuring that the other public entity complies with title II in providing these services.

Also, through its experience in investigations and compliance reviews, the Department has noted that public entities contract for a number of services to be run by private or other public entities, for example, medical and mental health services, food services, laundry, prison industries, vocational programs, and drug treatment and substance abuse programs, all of which must be operated in accordance with title II requirements.

Proposed § 35.152(a) in the NPRM was designed to make it clear that title II applies to all State and local detention and correctional facilities, regardless of whether the detention or correctional facility is directly operated by the public entity or operated by a private entity through a contractual, licensing, or other arrangement. Commenters specifically supported the language of this section. One commenter cited Department of Justice statistics stating that of the approximately 1.6 million inmates in State and Federal facilities in December 2006, approximately 114,000 of these inmates were held in private prison facilities. *See* William J. Sabol *et al., Prisoners in 2006,* Bureau of Justice Statistics Bulletin, Dec. 2007, at 1, 4, available at *http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=908.* Some commenters wanted the text "through contracts or other arrangements" changed to read "through contracts or any other arrangements" to make the intent clear. However, a large number of commenters recommended that the text of the rule make explicit that it applies to correctional facilities operated by private contractors. Many commenters also suggested that the text make clear that the rule applies to adult facilities, juvenile justice facilities, and community correctional facilities. In the final rule, the Department is adopting these latter two suggestions in order to make the section's intent explicit.

Section 35.152(a) of the final rule states specifically that the requirements of the section apply to public entities responsible for the operation or management of correctional facilities, "either directly or through contractual, licensing, or other arrangements with public or private entities, in whole or in part, including private correctional facilities." Additionally, the section explicitly provides that it applies to adult and juvenile justice detention and correctional facilities and community correctional facilities.

Discrimination prohibited. In the NPRM, § 35.152(b)(1) proposed language stating that public entities are prohibited from excluding qualified detainees and inmates from participation in, or denying, benefits, services, programs, or activities because a facility is inaccessible to persons with disabilities "unless the public entity can demonstrate that the required actions would result in a fundamental alteration or undue burden." 73 FR 34446, 34507 (June 17, 2008). One large State department of corrections objected to the entire section applicable to detention and correctional facilities, stating that it sets a higher standard for correctional and detention facilities because it does not provide a defense for undue administrative burden. The Department has not retained the proposed NPRM language referring to the defenses of fundamental alteration or undue burden because the Department believes that these exceptions are covered by the general language of 35.150(a)(3), which states that a public entity is not required to take "any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens." The Department has revised the language of § 35.152(b)(1) accordingly.

Integration of inmates and detainees with disabilities. In the NPRM, the Department proposed language in § 35.152(b)(2) specifically applying the ADA's general integration mandate to detention and correctional facilities. The proposed language would have required public entities to ensure that individuals with disabilities are housed in the most integrated setting appropriate to the needs of the individual. It further stated that unless the public entity can demonstrate that it is appropriate to make an exception for a specific individual, a public entity:

(1) Should not place inmates or detainees with disabilities in locations that exceed their security classification because there are no accessible cells or beds in the appropriate classification;

(2) should not place inmates or detainees with disabilities in designated medical areas unless they are actually receiving medical care or treatment;

(3) should not place inmates or detainees with disabilities in facilities that do not offer the same programs as the facilities where they would ordinarily be housed; and

(4) should not place inmates or detainees with disabilities in facilities farther away from their families in order to provide accessible cells or beds, thus diminishing their opportunity for visitation based on their disability. 73 FR 34466, 34507 (June 17, 2008).

In the NPRM, the Department recognized that there are a wide range of considerations that affect decisions to house inmates or detainees and that in specific cases there may be compelling reasons why a placement that does not meet the general requirements of § 35.152(b)(2) may, nevertheless, comply with the ADA. However, the Department noted that it is essential that the planning process initially assume that inmates or detainees with disabilities will be assigned within the system under the same criteria that would be applied to inmates who do not have disabilities. Exceptions may be made on a case-by-case basis if the specific situation warrants different treatment. For example, if an inmate is deaf and communicates only using sign language, a prison may consider whether it is more appropriate to give priority to housing the prisoner in a facility close to his family that houses no other deaf inmates, or if it would be preferable to house the prisoner in a setting where there are sign language interpreters and other sign language users with whom he can communicate.

In general, commenters strongly supported the NPRM's clarification that the title II integration mandate applies to State and local corrections agencies and the facilities in which they house inmates. Commenters pointed out that inmates with disabilities continue to be segregated based on their disabilities and also excluded from participation in programs. An organization actively involved in addressing the needs of prisoners cited a number of recent lawsuits in which prisoners allege such discrimination.

The majority of commenters objected to the language in proposed § 35.152(b)(2) that creates an exception to the integration mandate when the "public entity can demonstrate that it is appropriate to make an exception for a specific individual." 73 FR 34466, 34507 (June 17, 2008). The vast majority of commenters asserted that, given the practice of many public entities to segregate and cluster inmates with disabilities, the exception will be used to justify the status quo. The commenters acknowledged that the intent of the section is to ensure that an individual with a disability who can be better served in a less integrated setting can legally be placed in that setting. They were concerned, however, that the proposed language would allow certain objectionable practices to continue, *e.g.,* automatically placing persons with disabilities in administrative segregation. An advocacy organization with extensive experience working with inmates recommended that the inmate have "input" in the placement decision.

Others commented that the exception does not provide sufficient guidance on when a government entity may make an exception, citing the need for objective standards. Some commenters posited that a prison administration may want to house a deaf inmate at a facility designated and equipped for deaf inmates that is several hundred miles from the inmate's home. Although under the exception language, such a placement may be appropriate, these commenters argued that this outcome appears to contradict the regulation's intent to eliminate or reduce the

segregation of inmates with disabilities and prevent them from being placed far from their families. The Department notes that in some jurisdictions, the likelihood of such outcomes is diminished because corrections facilities with different programs and levels of accessibility are clustered in close proximity to one another, so that being far from family is not an issue. The Department also takes note of advancements in technology that will ease the visitation dilemma, such as family visitation through the use of videoconferencing.

Only one commenter, a large State department of corrections, objected to the integration requirement. This commenter stated it houses all maximum security inmates in maximum security facilities. Inmates with lower security levels may or may not be housed in lower security facilities depending on a number of factors, such as availability of a bed, staffing, program availability, medical and mental health needs, and enemy separation. The commenter also objected to the proposal to prohibit housing inmates with disabilities in medical areas unless they are receiving medical care. This commenter stated that such housing may be necessary for several days, for example, at a stopover facility for an inmate with a disability who is being transferred from one facility to another. Also, this commenter stated that inmates with disabilities in disciplinary status may be housed in the infirmary because not every facility has accessible cells in disciplinary housing. Similarly the commenter objected to the prohibition on placing inmates in facilities without the same programs as facilities where they normally would be housed. Finally, the commenter objected to the prohibition on placing an inmate at a facility distant from where the inmate would normally be housed. The commenter stressed that in its system, there are few facilities near most inmates' homes. The commenter noted that most inmates are housed at facilities far from their homes, a fact shared by all inmates, not just inmates with disabilities. Another commenter noted that in some jurisdictions, inmates who need assistance in activities of daily living cannot obtain that assistance in the general population, but only in medical facilities where they must be housed.

The Department has considered the concerns raised by the commenters with respect to this section and recognizes that corrections systems may move inmates routinely and for a variety of reasons, such as crowding, safety, security, classification change, need for specialized programs, or to provide medical care. Sometimes these moves are within the same facility or prison system. On other occasions, inmates may be transferred to facilities in other cities, counties, and States. Given the nature of the prison environment, inmates have little say in their placement and administrators must have flexibility to meet the needs of the inmates and the system. The Department has revised the language of the exception contained in renumbered § 35.152(b)(2) to better accommodate corrections administrators' need for flexibility in making placement decisions based on legitimate, specific reasons. Moreover, the Department believes that temporary, short-term moves that are necessary for security or administrative purposes (e.g., placing an inmate with a disability in a medical area at a stopover facility during a transfer from one facility to another) do not violate the requirements of § 35.152(b)(2).

The Department notes that § 35.150(a)(3) states that a public entity is not required to take "any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." Thus, corrections systems would not have to comply with the requirements of § 35.152(b)(1) in any specific circumstance where these defenses are met.

Several commenters recommended that the word "should" be changed to "shall" in the subparts to § 35.152(b)(2). The Department agrees that because the rule contains a specific exception and because the integration requirement is subject to the defenses provided in paragraph (a) of that section, it is more appropriate to use the word "shall" and the Department accordingly is making that change in the final rule.

Program requirements. In a unanimous decision, the Supreme Court, in *Pennsylvania Department of Corrections* v. *Yeskey,* 524 U.S. 206 (1998), stated explicitly that the ADA covers the operations of State prisons; accordingly, title II's program accessibility requirements apply to State and local correctional and detention facilities. In the NPRM, in addressing the accessibility of existing correctional and detention facilities, the Department considered the challenges of applying the title II program access requirement for existing facilities under § 31.150(a) in light of the realities of many inaccessible correctional facilities and strained budgets.

Correctional and detention facilities commonly provide a variety of different programs for education, training, counseling, or other purposes related to rehabilitation. Some examples of programs generally available to inmates include programs to obtain GEDs, computer training, job skill training and on-the-job training, religious instruction and guidance, alcohol and substance abuse groups, anger management, work assignments, work release, halfway houses, and other programs. Historically, individuals with disabilities have been excluded from such programs because they are not located in accessible locations, or inmates with disabilities have been segregated in units without equivalent programs. In light of the Supreme Court's decision in *Yeskey* and the requirements of title II, however, it is critical that public entities provide these opportunities to inmates with disabilities. In proposed § 35.152, the Department sought to clarify that title II required equal access for inmates with disabilities to participate in programs offered to inmates without disabilities.

The Department wishes to emphasize that detention and correctional facilities are unique facilities under title II. Inmates cannot leave the facilities and must have their needs met by the corrections system, including needs relating to a disability. If the detention and correctional facilities fail to accommodate prisoners with disabilities, these individuals have little recourse, particularly when the need is great (*e.g.,* an accessible toilet; adequate catheters; or a shower chair). It is essential that corrections systems fulfill their nondiscrimination and program access obligations by adequately addressing the needs of prisoners with disabilities, which include, but are not limited to, proper medication and medical treatment, accessible toilet and shower facilities, devices such as a bed transfer or a shower chair, and assistance with hygiene methods for prisoners with physical disabilities.

In the NPRM, the Department also sought input on whether it should establish a program accessibility requirement that public entities modify additional cells at a detention or correctional facility to incorporate the accessibility features needed by specific inmates with mobility disabilities when the number of cells required by sections 232.2 and 232.3 of the 2004 ADAAG are inadequate to meet the needs of their inmate population.

Commenters supported a program accessibility requirement, viewing it as a flexible and practical means of allowing facilities to meet the needs of inmates in a cost effective and expedient manner. One organization supported a requirement to modify additional cells when the existing number of accessible cells is inadequate. It cited the example of a detainee who was held in a hospital because the local jail had no accessible cells. Similarly, a State agency recommended that the number of accessible cells should be sufficient to accommodate the population in need. One group of commenters voiced concern about accessibility being provided in a timely manner and recommended that the rule specify that the program accessibility requirement applies while waiting for the accessibility modifications. A group with experience addressing inmate needs recommended the inmate's input should be required to prevent inappropriate segregation or placement in an inaccessible or inappropriate area.

The Department is persuaded by these comments. Accordingly, § 35.152(b)(3) requires public entities to "implement reasonable policies, including physical modifications to additional cells in accordance with the 2010 Standards, so as to ensure that each inmate with a disability is housed in a cell with the accessible elements necessary to afford the inmate access to safe, appropriate housing."

Communication. Several large disability advocacy organizations commented on the 2004 ADAAG section 232.2.2 requirement that at least 2 percent of the general holding cells and housing cells must be equipped with audible emergency alarm systems. Permanently installed telephones within these cells must have volume control. Commenters said that the communication features in the 2004 ADAAG do not address the most common barriers that deaf and hard-of-hearing inmates face. They asserted that few cells have telephones and the requirements to make them accessible is limited to volume control, and that

emergency alarm systems are only a small part of the amplified information that inmates need. One large association commented that it receives many inmate complaints that announcements are made over loudspeakers or public address systems, and that inmates who do not hear announcements for inmate count or other instructions face disciplinary action for failure to comply. They asserted that inmates who miss announcements miss meals, exercise, showers, and recreation. They argued that systems that deliver audible announcements, signals, and emergency alarms must be made accessible and that TTYs must be made available. Commenters also recommended that correctional facilities should provide access to advanced forms of telecommunications. Additional commenters noted that few persons now use TTYs, preferring instead to communicate by email, texting, and videophones.

The Department agrees with the commenters that correctional facilities and jails must ensure that inmates who are deaf or hard of hearing actually receive the same information provided to other inmates. The Department believes, however, that the reasonable modifications, program access, and effective communications requirements of title II are sufficient to address the needs of individual deaf and hard of hearing inmates, and as a result, declines to add specific requirements for communications features in cells for deaf and hard of hearing inmates at this time. The Department notes that as part of its ongoing enforcement of the reasonable modifications, program access, and effective communications requirements of title II, the Department has required correctional facilities and jails to provide communication features in cells serving deaf and hard of hearing inmates.

Subpart E—Communications

Section 35.160 Communications.

Section 35.160 of the 1991 title II regulation requires a public entity to take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others. 28 CFR 35.160(a). In addition, a public entity must "furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity." 28 CFR 35.160(b)(1). Moreover, the public entity must give "primary consideration to the requests of the individual with disabilities" in determining what type of auxiliary aid and service is necessary. 28 CFR 35.160(b)(2).

Since promulgation of the 1991 title II regulation, the Department has investigated hundreds of complaints alleging failures by public entities to provide effective communication, and many of these investigations resulted in settlement agreements and consent decrees. From these investigations, the Department has concluded that public entities sometimes misunderstand the scope of their obligations under the statute and the regulation. Section 35.160 in the final rule codifies the Department's longstanding policies in this area and includes provisions that reflect technological advances in the area of auxiliary aids and services.

In the NPRM, the Department proposed adding "companion" to the scope of coverage under § 35.160 to codify the Department's longstanding position that a public entity's obligation to ensure effective communication extends not just to applicants, participants, and members of the public with disabilities, but to *companions* as well, if any of them are individuals with disabilities. The NPRM defined companion as a person who is a family member, friend, or associate of a program participant, who, along with the program participant, is "an appropriate person with whom the public entity should communicate." 73 FR 34466, 34507 (June 17, 2008).

Many commenters supported inclusion of "companions" in the rule, and urged even more specific language about public entities' obligations. Some commenters asked the Department to clarify that a companion with a disability may be entitled to effective communication from a public entity even though the applicants, participants, or members of the general public seeking access to, or participating in, the public entity's services, programs, or activities are not individuals with disabilities. Others requested that the Department explain the circumstances under which auxiliary aids and services should be provided to companions. Still others requested explicit clarification that where the individual seeking access to or participating in the public entity's program, services, or activities requires auxiliary aids and services, but the companion does not, the public entity may not seek out, or limit its communications to, the companion instead of communicating directly with the individual with a disability when it would be appropriate to do so.

Some in the medical community objected to the inclusion of any regulatory language regarding companions, asserting that such language is overbroad, seeks services for individuals whose presence is not required by the public entity, is not necessary for the delivery of the services or participation in the program, and places additional burdens on the medical community. These commenters asked that the Department limit the public entity's obligation to communicate effectively with a companion to situations where such communications are necessary to serve the interests of the person who is receiving the public entity's services.

After consideration of the many comments on this issue, the Department believes that explicit inclusion of "companions" in the final rule is appropriate to ensure that public entities understand the scope of their effective communication obligations. There are many situations in which the interests of program participants without disabilities require that their companions with disabilities be provided effective communication. In addition, the program participant need not be physically present to trigger the public entity's obligations to a companion. The controlling principle is that auxiliary aids and services must be provided if the companion is an appropriate person with whom the public entity should or would communicate.

Examples of such situations include back-to-school nights or parent-teacher conferences at a public school. If the faculty writes on the board or otherwise displays information in a visual context during a back-to-school night, this information must be communicated effectively to parents or guardians who are blind or have low vision. At a parent-teacher conference, deaf parents or guardians must be provided with appropriate auxiliary aids and services to communicate effectively with the teacher and administrators. It makes no difference that the child who attends the school does not have a disability. Likewise, when a deaf spouse attempts to communicate with public social service agencies about the services necessary for the hearing spouse, appropriate auxiliary aids and services to the deaf spouse must be provided by the public entity to ensure effective communication. Parents or guardians, including foster parents, who are individuals with disabilities, may need to interact with child services agencies on behalf of their children; in such a circumstance, the child services agencies would need to provide appropriate auxiliary aids and services to those parents or guardians.

Effective communication with companions is particularly critical in health care settings where miscommunication may lead to misdiagnosis and improper or delayed medical treatment. The Department has encountered confusion and reluctance by medical care providers regarding the scope of their obligation with respect to such companions. Effective communication with a companion is necessary in a variety of circumstances. For example, a companion may be legally authorized to make health care decisions on behalf of the patient or may need to help the patient with information or instructions given by hospital personnel. A companion may be the patient's next-of-kin or health care surrogate with whom hospital personnel must communicate about the patient's medical condition. A companion could be designated by the patient to communicate with hospital personnel about the patient's symptoms, needs, condition, or medical history. Or the companion could be a family member with whom hospital personnel normally would communicate.

Accordingly, § 35.160(a)(1) in the final rule now reads, "[a] public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others." Section 35.160(a)(2) further defines "companion" as "a family member, friend, or associate of an individual seeking access to a service, program, or activity of a public entity, who, along with the individual, is an appropriate person with whom the public entity should communicate." Section 35.160(b)(1) clarifies that the obligation to furnish auxiliary aids and services extends to companions who are individuals with disabilities, whether or not the individual accompanied also is an

individual with a disability. The provision now states that "[a] public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity."

These provisions make clear that if the companion is someone with whom the public entity normally would or should communicate, then the public entity must provide appropriate auxiliary aids and services to that companion to ensure effective communication with the companion. This common-sense rule provides the guidance necessary to enable public entities to properly implement the nondiscrimination requirements of the ADA.

As set out in the final rule, § 35.160(b)(2) states, in pertinent part, that "[t]he type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual, the nature, length, and complexity of the communication involved, and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities."

The second sentence of § 35.160(b)(2) of the final rule restores the "primary consideration" obligation set out at § 35.160(b)(2) in the 1991 title II regulation. This provision was inadvertently omitted from the NPRM, and the Department agrees with the many commenters on this issue that this provision should be retained. As noted in the preamble to the 1991 title II regulation, and reaffirmed here: "The public entity shall honor the choice [of the individual with a disability] unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under § 35.164. Deference to the request of the individual with a disability is desirable because of the range of disabilities, the variety of auxiliary aids and services, and different circumstances requiring effective communication." 28 CFR part 35, app. A at 580 (2009).

The first sentence in § 35.160(b)(2) codifies the axiom that the type of auxiliary aid or service necessary to ensure effective communication will vary with the situation, and provides factors for consideration in making the determination, including the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. Inclusion of this language under title II is consistent with longstanding policy in this area. *See, e.g., The Americans with Disabilities Act Title II Technical Assistance Manual Covering State and Local Government Programs and Services,* section II–7.1000, available at *www.ada.gov/taman2.html* ("The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the length and complexity of the communication involved. * * * Sign language or oral interpreters, for example, may be required when the information being communicated in a transaction with a deaf individual is complex, or is exchanged for a lengthy period of time. Factors to be considered in determining whether an interpreter is required include the context in which the communication is taking place, the number of people involved, and the importance of the communication."); *see also* 28 CFR part 35, app. A at 580 (2009). As explained in the NPRM, an individual who is deaf or hard of hearing may need a qualified interpreter to communicate with municipal hospital personnel about diagnoses, procedures, tests, treatment options, surgery, or prescribed medication (*e.g.,* dosage, side effects, drug interactions, etc.), or to explain follow-up treatments, therapies, test results, or recovery. In comparison, in a simpler, shorter interaction, the method to achieve effective communication can be more basic. An individual who is seeking local tax forms may only need an exchange of written notes to achieve effective communication.

Section 35.160(c)(1) has been added to the final rule to make clear that a public entity shall not require an individual with a disability to bring another individual to interpret for him or her. The Department receives many complaints from individuals who are deaf or hard of hearing alleging that public entities expect them to provide their own sign language interpreters. Proposed § 35.160(c)(1) was intended to clarify that when a public entity is interacting with a person with a disability, it is the public entity's responsibility to provide an interpreter to ensure effective communication. It is not appropriate to require the person with a disability to bring another individual to provide such services.

Section 35.160(c)(2) of the NPRM proposed codifying the Department's position that there are certain limited instances when a public entity may rely on an accompanying individual to interpret or facilitate communication: (1) In an emergency involving a threat to the public safety or welfare; or (2) if the individual with a disability specifically requests it, the accompanying individual agrees to provide the assistance, and reliance on that individual for this assistance is appropriate under the circumstances.

Many commenters supported this provision, but sought more specific language to address what they see as a particularly entrenched problem. Some commenters requested that the Department explicitly require the public entity first to notify the individual with a disability that the individual has a right to request and receive appropriate auxiliary aids and services without charge from the public entity before using that person's accompanying individual as a communication facilitator. Advocates stated that an individual who is unaware of his or her rights may decide to use a third party simply because he or she believes that is the only way to communicate with the public entity.

The Department has determined that inclusion of specific language requiring notification is unnecessary. Section 35.160(b)(1) already states that is the responsibility of the public entity to provide auxiliary aids and services. Moreover, § 35.130(f) already prohibits the public entity from imposing a surcharge on a particular individual with a disability or on any group of individuals with disabilities to cover the costs of auxiliary aids. However, the Department strongly advises public entities that they should first inform the individual with a disability that the public entity can and will provide auxiliary aids and services, and that there would be no cost for such aids or services.

Many commenters requested that the Department make clear that the public entity cannot request, rely upon, or coerce an adult accompanying an individual with a disability to provide effective communication for that individual with a disability—that only a voluntary offer is acceptable. The Department states unequivocally that consent of, and for, the adult accompanying the individual with a disability to facilitate communication must be provided freely and voluntarily both by the individual with a disability and the accompanying third party—absent an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available. The public entity may not coerce or attempt to persuade another adult to provide effective communication for the individual with a disability. Some commenters expressed concern that the regulation could be read by public entities, including medical providers, to prevent parents, guardians, or caregivers from providing effective communication for children or that a child, regardless of age, would have to specifically request that his or her caregiver act as interpreter. The Department does not intend § 35.160(c)(2) to prohibit parents, guardians, or caregivers from providing effective communication for children where so doing would be appropriate. Rather, the rule prohibits public entities, including medical providers, from requiring, relying on, or forcing adults accompanying individuals with disabilities, including parents, guardians, or caregivers, to facilitate communication.

Several commenters asked that the Department make absolutely clear that children are not to be used to provide effective communication for family members and friends, and that it is the public entity's responsibility to provide effective communication, stating that often interpreters are needed in settings where it would not be appropriate for children to be interpreting, such as those involving medical issues, domestic violence, or other situations involving the exchange of confidential or adult-related material. Commenters observed that children are often hesitant to turn down requests to provide communication services, and that such requests put them in a very difficult position vis-a-vis family members and friends. The Department agrees. It is the Department's position that a public entity shall not rely on a minor child to facilitate communication with a family member, friend, or other individual, except in an emergency involving imminent threat to the safety or welfare of an individual or the

public where there is no interpreter available. Accordingly, the Department has revised the rule to state: "A public entity shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving imminent threat to the safety or welfare of an individual or the public where there is no interpreter available." § 35.160(c)(3). Sections 35.160(c)(2) and (3) have no application in circumstances where an interpreter would not otherwise be required in order to provide effective communication (*e.g.,* in simple transactions such as purchasing movie tickets at a theater). The Department stresses that privacy and confidentiality must be maintained but notes that covered entities, such as hospitals, that are subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104–191, Privacy Rules are permitted to disclose to a patient's relative, close friend, or any other person identified by the patient (such as an interpreter) relevant patient information if the patient agrees to such disclosures. *See* 45 CFR parts 160 and 164. The agreement need not be in writing. Covered entities should consult the HIPAA Privacy Rules regarding other ways disclosures might be able to be made to such persons.

With regard to emergency situations, the NPRM proposed permitting reliance on an individual accompanying an individual with a disability to interpret or facilitate communication in an emergency involving a threat to the public safety or welfare. Commenters requested that the Department make clear that often a public entity can obtain appropriate auxiliary aids and services in advance of an emergency by making necessary advance arrangements, particularly in anticipated emergencies such as predicted dangerous weather or certain medical situations such as childbirth. These commenters did not want public entities to be relieved of their responsibilities to provide effective communication in emergency situations, noting that the obligation to provide effective communication may be more critical in such situations. Several commenters requested a separate rule that requires public entities to provide timely and effective communication in the event of an emergency, noting that the need for effective communication escalates in an emergency.

Commenters also expressed concern that public entities, particularly law enforcement authorities and medical personnel, would apply the "emergency situation" provision in inappropriate circumstances and would rely on accompanying individuals without making any effort to seek appropriate auxiliary aids and services. Other commenters asked that the Department narrow this provision so that it would not be available to entities that are responsible for emergency preparedness and response. Some commenters noted that certain exigent circumstances, such as those that exist during and perhaps immediately after, a major hurricane, temporarily may excuse public entities of their responsibilities to provide effective communication. However, they asked that the Department clarify that these obligations are ongoing and that, as soon as such situations begin to abate or stabilize, the public entity must provide effective communication.

The Department recognizes that the need for effective communication is critical in emergency situations. After due consideration of all of these concerns raised by commenters, the Department has revised § 35.160(c) to narrow the exception permitting reliance on individuals accompanying the individual with a disability during an emergency to make it clear that it only applies to emergencies involving an "imminent threat to the safety or welfare of an individual or the public." *See* § 35.160(c)(2)–(3). Arguably, all visits to an emergency room or situations to which emergency workers respond are by definition emergencies. Likewise, an argument can be made that most situations that law enforcement personnel respond to involve, in one way or another, a threat to the safety or welfare of an individual or the public. The imminent threat exception in § 35.160(c)(2)–(3) is not intended to apply to the typical and foreseeable emergency situations that are part of the normal operations of these institutions. As such, a public entity may rely on an accompanying individual to interpret or facilitate communication under the § 35.160(c)(2)–(3) imminent threat exception only where in truly exigent circumstances, i.e., where any delay in providing immediate services to the individual could have life-altering or life-ending consequences.

Many commenters urged the Department to stress the obligation of State and local courts to provide effective communication. The Department has received many complaints that State and local courts often do not provide needed qualified sign language interpreters to witnesses, litigants, jurors, potential jurors, and companions and associates of persons participating in the legal process. The Department cautions public entities that without appropriate auxiliary aids and services, such individuals are denied an opportunity to participate fully in the judicial process, and denied benefits of the judicial system that are available to others.

Another common complaint about access to State and local court systems is the failure to provide effective communication in deferral programs that are intended as an alternative to incarceration, or for other court-ordered treatment programs. These programs must provide effective communication, and courts referring individuals with disabilities to such programs should only refer individuals with disabilities to programs or treatment centers that provide effective communication. No person with a disability should be denied access to the benefits conferred through participation in a court-ordered referral program on the ground that the program purports to be unable to provide effective communication.

The general nondiscrimination provision in § 35.130(a) provides that no individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity. The Department consistently interprets this provision and § 35.160 to require effective communication in courts, jails, prisons, and with law enforcement officers. Persons with disabilities who are participating in the judicial process as witnesses, jurors, prospective jurors, parties before the court, or companions of persons with business in the court, should be provided auxiliary aids and services as needed for effective communication. The Department has developed a variety of technical assistance and guidance documents on the requirements for title II entities to provide effective communication; those materials are available on the Department Web site at: *http://www.ada.gov.*

Many advocacy groups urged the Department to add language in the final rule that would require public entities to provide accessible material in a manner that is timely, accurate, and private. The Department has included language in § 35.160(b)(2) stating that "[i]n order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way so as to protect the privacy and independence of the individual with a disability."

Because the appropriateness of particular auxiliary aids and services may vary as a situation changes, the Department strongly encourages public entities to do a communication assessment of the individual with a disability when the need for auxiliary aids and services is first identified, and to re-assess communication effectiveness regularly throughout the communication. For example, a deaf individual may go to an emergency department of a public community health center with what is at first believed to be a minor medical emergency, such as a sore knee, and the individual with a disability and the public community health center both believe that exchanging written notes will be effective. However, during that individual's visit, it is determined that the individual is, in fact, suffering from an anterior cruciate ligament tear and must have surgery to repair the torn ligament. As the situation develops and the diagnosis and recommended course of action evolve into surgery, an interpreter most likely will be necessary. A public entity has a continuing obligation to assess the auxiliary aids and services it is providing, and should consult with individuals with disabilities on a continuing basis to assess what measures are required to ensure effective communication. Public entities are further advised to keep individuals with disabilities apprised of the status of the expected arrival of an interpreter or the delivery of other requested or anticipated auxiliary aids and services.

Video remote interpreting (VRI) services. In § 35.160(d) of the NPRM, the Department proposed the inclusion of four performance standards for VRI (which the NPRM termed video interpreting services (VIS)), for effective communication: (1) High-quality, clear, real-time, full-motion video and audio over a dedicated high-speed Internet connection; (2) a clear, sufficiently large, and sharply delineated picture of the participating individual's head, arms, hands, and fingers, regardless of his body position; (3) clear transmission of voices; and (4)

persons who are trained to set up and operate the VRI quickly. Commenters generally approved of those performance standards, but recommended that some additional standards be included in the final rule. Some State agencies and advocates for persons with disabilities requested that the Department add more detail in the description of the first standard, including modifying the term "dedicated high-speed Internet connection" to read "dedicated high-speed, wide-bandwidth video connection." These commenters argued that this change was necessary to ensure a high-quality video image that will not produce lags, choppy images, or irregular pauses in communication. The Department agrees with those comments and has amended the provision in the final rule accordingly.

For persons who are deaf with limited vision, commenters requested that the Department include an explicit requirement that interpreters wear high-contrast clothing with no patterns that might distract from their hands as they are interpreting, so that a person with limited vision can see the signs made by the interpreter. While the Department reiterates the importance of such practices in the delivery of effective VRI, as well as in-person interpreting, the Department declines to adopt such performance standards as part of this rule. In general, professional interpreters already follow such practices—the Code of Professional Conduct for interpreters developed by the Registry of Interpreters for the Deaf, Inc. and the National Association of the Deaf incorporates attire considerations into their standards of professionalism and conduct. (This code is available at *http://www.vid.org/userfiles/file/pdfs/codeofethics.pdf* (Last visited July 18, 2010). Moreover, as a result of this code, many VRI agencies have adopted detailed dress standards that interpreters hired by the agency must follow. In addition, commenters urged that a clear image of the face and eyes of the interpreter and others be explicitly required. Because the face includes the eyes, the Department has amended § 35.160(d)(2) of the final rule to include a requirement that the interpreter's face be displayed.

In response to comments seeking more training for users and non-technicians responsible for VRI in title II facilities, the Department is extending the requirement in § 35.160(d)(4) to require training for "users of the technology" so that staff who would have reason to use the equipment in an emergency room, State or local court, or elsewhere are properly trained. Providing for such training will enhance the success of VRI as means of providing effective communication.

Captioning at sporting venues. In the NPRM at § 35.160(e), the Department proposed that sports stadiums that have a capacity of 25,000 or more shall provide captioning for safety and emergency information on scoreboards and video monitors. In addition, the Department posed four questions about captioning of information, especially safety and emergency information announcements, provided over public address (PA) systems. The Department received many extremely detailed and divergent responses to each of the four questions and the proposed regulatory text. Because comments submitted on the Department's title II and title III proposals were intertwined, because of the similarity of issues involved for title II entities and title III entities, and in recognition of the fact that many large sports stadiums are covered by both title II and title III as joint operations of State or local governments and one or more public accommodations, the Department presents here a single consolidated review and summary of the issues raised in comments.

The Department asked whether requiring captioning of safety and emergency information made over the public address system in stadiums seating fewer than 25,000 would create an undue burden for smaller entities, whether it would be feasible for small stadiums, or whether a larger threshold, such as sports stadiums with a capacity of 50,000 or more, would be appropriate.

There was a consensus among the commenters, including disability advocates as well as venue owners and stadium designers and operators, that using the stadium size or seating capacity as the exclusive deciding factor for any obligation to provide captioning for safety and emergency information broadcast over the PA system is not preferred. Most disability advocacy organizations and individuals with disabilities complained that using size or seating capacity as a threshold for captioning safety and emergency information would undermine the "undue burden" defense found in both titles II and III. Many commenters provided examples of facilities like professional hockey arenas that seat less than 25,000 fans but which, commenters argued, should be able to provide real-time captioning. Other commenters suggested that some high school or college stadiums, for example, may hold 25,000 fans or more and yet lack the resources to provide real-time captioning. Many commenters noted that real-time captioning would require trained stenographers and that most high school and college sports facilities rely upon volunteers to operate scoreboards and PA systems, and they would not be qualified stenographers, especially in case of an emergency. One national association noted that the typical stenographer expense for a professional football game in Washington, DC is about $550 per game. Similarly, one trade association representing venues estimated that the cost for a professional stenographer at a sporting event runs between $500 and $1,000 per game or event, the cost of which, they argued, would be unduly burdensome in many cases. Some commenters posited that schools that do not sell tickets to athletic events would find it difficult to meet such expenses, in contrast to major college athletic programs and professional sports teams, which would be less likely to prevail using an "undue burden" defense.

Some venue owners and operators and other covered entities argued that stadium size should not be the key consideration when requiring scoreboard captioning. Instead, these entities suggested that equipment already installed in the stadium, including necessary electrical equipment and backup power supply, should be the determining factor for whether captioning is mandated. Many commenters argued that the requirement to provide captioning should only apply to stadiums with scoreboards that meet the National Fire Protection Association (NFPA) National Fire Alarm Code (NFPA 72). Commenters reported that NFPA 72 requires at least two independent and reliable power supplies for emergency information systems, including one source that is a generator or battery sufficient to run the system in the event the primary power fails. Alternatively, some stadium designers and title II entities commented that the requirement should apply when the facility has at least one elevator providing firefighter emergency operation, along with approval of authorities with responsibility for fire safety. Other commenters argued for flexibility in the requirements for providing captioning and that any requirement should only apply to stadiums constructed after the effective date of the regulation.

In the NPRM, the Department also asked whether the rule should address the specific means of captioning equipment, whether it should be provided through any effective means (scoreboards, line boards, handheld devices, or other means), or whether some means, such as handheld devices, should be eliminated as options. This question elicited many comments from advocates for persons with disabilities as well as from covered entities. Advocacy organizations and individuals with experience using handheld devices argue that such devices do not provide effective communication. These commenters noted that information is often delayed in the transmission to such devices, making them hard to use when following action on the playing field or in the event of an emergency when the crowd is already reacting to aural information provided over the PA system well before it is received on the handheld device.

Several venue owners and operators and others commented that handheld technology offers advantages of flexibility and portability so that it may be used successfully regardless of where in the facility the user is located, even when not in the line of sight of a scoreboard or other captioning system. Still other commenters urged the Department not to regulate in such a way as to limit innovation and use of such technology now and in the future. Cost considerations were included in some comments from some stadium designers and venue owners and operators, who reported that the cost of providing handheld systems is far less than the cost of real-time captioning on scoreboards, especially in facilities that do not currently have the capacity to provide real-time captions on existing equipment. Others noted that handheld technology is not covered by fire and safety model codes, including the NFPA, and thus would be more easily adapted into existing facilities if captioning were required by the Department.

The Department also asked about providing open captioning of all public address announcements, and not limiting captioning to safety and emergency information. A variety of advocates and persons with disabilities argued that all

information broadcast over a PA system should be captioned in real time at all facilities in order to provide effective communication and that a requirement only to provide emergency and safety information would not be sufficient. A few organizations for persons with disabilities commented that installation of new systems should not be required, but that all systems within existing facilities that are capable of providing captioning must be utilized to the maximum extent possible to provide captioning of as much information as possible. Several organizations representing persons with disabilities commented that all facilities must include in safety planning the requirement to caption all aurally-provided information for patrons with communication disabilities. Some advocates suggested that demand for captions will only increase as the number of deaf and hard of hearing persons grows with the aging of the general population and with increasing numbers of veterans returning from war with disabilities. Multiple comments noted that the captioning would benefit others as well as those with communication disabilities.

By contrast, venue owners and operators and others commented that the action on the sports field is self-explanatory and does not require captioning and they objected to an explicit requirement to provide real-time captioning for all information broadcast on the PA system at a sporting event. Other commenters objected to requiring captioning even for emergency and safety information over the scoreboard rather than through some other means. By contrast, venue operators, State government agencies, and some model code groups, including NFPA, commented that emergency and safety information must be provided in an accessible format and that public safety is a paramount concern. Other commenters argued that the best method to deliver safety and emergency information would be television monitors showing local TV broadcasts with captions already mandated by the FCC. Some commenters posited that the most reliable information about a major emergency would be provided on the television news broadcasts. Several commenters argued that television monitors may be located throughout the facility, improving line of sight for patrons, some of whom might not be able to see the scoreboard from their seats or elsewhere in the facility. Some stadium designers, venue operators, and model code groups pointed out that video monitors are not regulated by the NFPA or other agencies, so that such monitors could be more easily provided. Video monitors may receive transmissions from within the facility and could provide real-time captions if there is the necessary software and equipment to feed the captioning signal to a closed video network within the facility. Several comments suggested that using monitors would be preferable to requiring captions on the scoreboard if the regulation mandates real-time captioning. Some venue owners and operators argued that retrofitting existing stadiums with new systems could easily cost hundreds of thousands of dollars per scoreboard or system. Some stadium designers and others argued that captioning should only be required in stadiums built after the effective date of the regulation. For stadiums with existing systems that allow for real-time captioning, one commenter posited that dedicating the system exclusively to real-time captioning would lead to an annual loss of between $2 and $3 million per stadium in revenue from advertising currently running in that space.

After carefully considering the wide range of public comments on this issue, the Department has concluded that the final rule will not provide additional requirements for effective communication or emergency information provided at sports stadiums at this time. The 1991 title II and title III regulations and statutory requirements are not in any way affected by this decision. The decision to postpone rulemaking on this complex issue is based on a number of factors, including the multiple layers of existing regulation by various agencies and levels of government, and the wide array of information, requests, and recommendations related to developing technology offered by the public. In addition, there is a huge variety of covered entities, information and communication systems, and differing characteristics among sports stadiums. The Department has concluded that further consideration and review would be prudent before it issues specific regulatory requirements.

Section 35.161 Telecommunications.

The Department proposed to retitle this section "Telecommunications" to reflect situations in which the public entity must provide an effective means to communicate by telephone for individuals with disabilities. First, the NPRM proposed redesignating § 35.161 as § 35.161(a) and replacing the term "Telecommunications devices for the deaf (TDD)" with "Text telephones (TTY)." Public comment was universally supportive of this change in nomenclature to TTY.

In the NPRM, at § 35.161(b), the Department addressed automated-attendant systems that handle telephone calls electronically. Often individuals with disabilities, including persons who are deaf or hard of hearing, are unable to use such automated systems. Some systems are not compatible with TTYs or the telecommunications relay service. Automated systems can and often do disconnect calls from TTYs or relay calls, making it impossible for persons using a TTY or relay system to do business with title II entities in the same manner as others. The Department proposed language that would require a telecommunications service to permit persons using relay or TTYs or other assistive technology to use the automated-attendant system provided by the public entity. The FCC raised this concern with the Department after the 1991 title II regulation went into effect, and the Department acted upon that request in the NPRM. Comments from disability advocates and persons with disabilities consistently requested the provision be amended to cover "voice mail, messaging, auto-attendant, and interactive voice response systems." The Department recognizes that those are important features of widely used telecommunications technology that should be as accessible to persons who are deaf or hard of hearing as they are to others, and has amended the section in the final rule to include the additional features.

Many commenters, including advocates and persons with disabilities, as well as State agencies and national organizations, asked that all automated systems have an option for the caller to bypass the automated system and speak to a live person who could communicate using relay services. The Department understands that automated telecommunications systems typically do not offer the opportunity to avoid or bypass the automated system and speak to a live person. The Department believes that at this time it is inappropriate to add a requirement that all such systems provide an override capacity that permits a TTY or relay caller to speak with a live clerk on a telecommunications relay system. However, if a system already provides an option to speak to a person, that system must accept TTY and relay calls and must not disconnect or refuse to accept such calls.

Other comments from advocacy organizations and individuals urged the Department to require specifications for the operation of such systems that would involve issuing technical requirements for encoding and storage of automated text, as well as controls for speed, pause, rewind, and repeat, and prompts without any background noise. The same comments urged that these requirements should be consistent with a pending advisory committee report to the Access Board, submitted in April 2008. *See* Telecommunications and Electronic Information Technology Advisory Committee, Report to the Access Board Refreshed Accessibility Standards and Guidelines in Telecommunications and Electronic and Information Technology (Apr. 2008) available at *http://www.access-board.gov/sec508/refresh/report/*. The Department is declining at this time to preempt ongoing consideration of these issues by the Board. Instead, the Department will monitor activity by the Board. The Department is convinced that the general requirement to make such automated systems usable by persons with disabilities is appropriate at this time and title II entities should evaluate their automated systems in light of concerns about providing systems that offer effective communication to persons with disabilities.

Finally, the Department has adopted in § 35.161(c) of the final rule the requirement that all such systems must not disconnect or refuse to take calls from all forms of FCC-approved telecommunications relay systems, including Internet-based relay systems. (Internet-based relay systems refer to the mechanism by which the message is relayed). They do not require a public entity to have specialized computer equipment. Commenters from some State agencies, many advocacy organizations, and individuals strongly urged the Department to mandate such action because of the high proportion of TTY calls and relay service calls that are not completed because the title II entity's phone system or employees do not take the calls. This presents a serious obstacle for persons

doing business with State and local government and denies persons with disabilities access to use the telephone for business that is typically handled over the phone for others.

In addition, commenters requested that the Department include "real-time" before any mention of "computer-aided" technology to highlight the value of simultaneous translation of any communication. The Department has added "real-time" before "computer-aided transcription services" in the definition of "auxiliary aids in § 35.104 and before "communication" in § 35.161(b).

Subpart F—Compliance Procedures

Section 35.171 Acceptance of complaints.

In the NPRM, the Department proposed changing the current language in § 35.171(a)(2)(i) regarding misdirected complaints to make it clear that if an agency receives a complaint for which it lacks jurisdiction either under section 504 or as a designated agency under the ADA, the agency may refer the complaint to the appropriate agency with title II or section 504 jurisdiction or to the Department of Justice. The language of the 1991 title II regulation only requires the agency to refer such a complaint to the Department, which in turn refers the complaint to the appropriate designated agency. The proposed revisions to § 35.171 made it clear that an agency can refer a misdirected complaint either directly to the appropriate agency or to the Department. This amendment was intended to protect against the unnecessary backlogging of complaints and to prevent undue delay in an agency taking action on a complaint.

Several commenters supported this amendment as a more efficient means of directing title II complaints to the appropriate enforcing agency. One commenter requested that the Department emphasize the need for timeliness in referring a complaint. The Department does not believe it is appropriate to adopt a specific time frame but will continue to encourage designated agencies to make timely referrals. The final rule retains, with minor modifications, the language in proposed § 35.171(a)(2)(i). The Department has also amended § 35.171(a)(2)(ii) to be consistent with the changes in the rule at § 35.190(e), as discussed below.

Section 35.172 Investigations and compliance reviews.

In the NPRM, the Department proposed a number of changes to language in § 35.172 relating to the resolution of complaints. Subtitle A of title II of the ADA defines the remedies, procedures, and rights provided for qualified individuals with disabilities who are discriminated against on the basis of disability in the services, programs, or activities of State and local governments. 42 U.S.C. 12131–12134. Subpart F of the current regulation establishes administrative procedures for the enforcement of title II of the ADA. 28 CFR 35.170–35.178. Subpart G identifies eight "designated agencies," including the Department, that have responsibility for investigating complaints under title II. *See* 28 CFR 35.190(b).

The Department's 1991 title II regulation is based on the enforcement procedures established in regulations implementing section 504. Thus, the Department's 1991 title II regulation provides that the designated agency "shall investigate each complete complaint" alleging a violation of title II and shall "attempt informal resolution" of such complaint. 28 CFR 35.172(a). The full range of remedies (including compensatory damages) that are available to the Department when it resolves a complaint or resolves issues raised in a compliance review are available to designated agencies when they are engaged in informal complaint resolution or resolution of issues raised in a compliance review under title II.

In the years since the 1991 title II regulation went into effect, the Department has received many more complaints alleging violations of title II than its resources permit it to resolve. The Department has reviewed each complaint that the Department has received and directed its resources to resolving the most critical matters. In the NPRM, the Department proposed deleting the word "each" as it appears before "complaint" in § 35.172(a) of the 1991 title II regulation as a means of clarifying that designated agencies may exercise discretion in selecting title II complaints for resolution.

Many commenters opposed the removal of the term "each," requesting that all title II complaints be investigated. The commenters explained that complaints against title II entities implicate the fundamental right of access to government facilities and programs, making an administrative enforcement mechanism critical. Rather than aligning enforcement discretion of title II complaints with the discretion under the enforcement procedures of title III, the commenters favored obtaining additional resources to address more complaints. The commenters highlighted the advantage afforded by Federal involvement in complaint investigations in securing favorable voluntary resolutions. When Federal involvement results in settlement agreements, commenters believed those agreements are more persuasive to other public entities than private settlements. Private litigation as a viable alternative was rejected by the commenters because of the financial limitations of many complainants, and because in some scenarios legal barriers foreclose private litigation as an option.

Several of those opposing this amendment argued that designated agencies are required to investigate each complaint under section 504, and a departure for title II complaints would be an inconsistency. The Department believes that § 35.171(a) of the final rule is consistent with the obligation to evaluate all complaints. However, there is no statutory requirement that every title II complaint receive a full investigation. Section 203 of the ADA, 42 U.S.C. 12133, adopts the "remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973" (29 U.S.C. 794a). Section 505 of the Rehabilitation Act, in turn, incorporates the remedies available under title VI of the Civil Rights Act of 1964 into section 504. Under these statutes, agencies may engage in conscientious enforcement without fully investigating each citizen complaint. An agency's decision to conduct a full investigation requires a complicated balancing of a number of factors that are particularly within its expertise. Thus, the agency must not only assess whether a violation may have occurred, but also whether agency resources are best spent on this complaint or another, whether the agency is likely to succeed if it acts, and whether the particular enforcement action requested best fits the agency's overall policies. Availability of resources will always be a factor, and the Department believes discretion to maximize these limited resources will result in the most effective enforcement program. If agencies are bound to investigate each complaint fully, regardless of merit, such a requirement could have a deleterious effect on their overall enforcement efforts. The Department continues to expect that each designated agency will review the complaints the agency receives to determine whether further investigation is appropriate.

The Department also proposed revising § 35.172 to add a new paragraph (b) that provided explicit authority for compliance reviews consistent with the Department's longstanding position that such authority exists. The proposed section stated, "[t]he designated agency may conduct compliance reviews of public entities based on information indicating a possible failure to comply with the nondiscrimination requirements of this part." Several commenters supported this amendment, identifying title III compliance reviews as having been a successful means for the Department and designated agencies to improve accessibility. The Department has retained this section. However, the Department has modified the language of the section to make the authority to conduct compliance reviews consistent with that available under section 504 and title VI. *See, e.g.,* 28 CFR 42.107(a). The new provision reads as follows: "(b) The designated agency may conduct compliance reviews of public entities in order to ascertain whether there has been a failure to comply with the nondiscrimination requirements of this part." The Department has also added a provision to § 35.172(c)(2) clarifying the Department's longstanding view that agencies may obtain compensatory damages on behalf of complainants as the result of a finding of discrimination pursuant to a compliance review or in informal resolution of a complaint.

Finally, in the NPRM, the Department proposed revising the requirements for letters of findings for clarification and to reflect current practice. Section 35.172(a) of the 1991 title II regulation required designated agencies to issue a letter of findings at the conclusion of an investigation if the complaint was not resolved informally, and to attempt to negotiate a voluntary compliance agreement if a violation was found. The Department's proposed changes to the 1991 title II regulation moved the discussion of letters of findings to a new paragraph (c) in the NPRM, and clarified that letters of findings are only required when a violation is found.

One commenter opposed the proposal to eliminate the obligation of the Department and designated agencies to issue letters of finding at the conclusion of every investigation. The commenter argued that it is beneficial for public entities, as well as complainants, for the Department to provide a reasonable explanation of both compliance and noncompliance findings.

The Department has considered this comment but continues to believe that this change will promote the overall effectiveness of its enforcement program. The final rule retains the proposed language.

Subpart G—Designated Agencies

Section 35.190 Designated agencies.

Subpart G of the 1991 title II regulation designates specific Federal agencies to investigate certain title II complaints. Paragraph 35.190(b) specifies these agency designations. Paragraphs 35.190(c) and (d), respectively, grant the Department discretion to designate further oversight responsibilities for matters not specifically assigned or where there are apparent conflicts of jurisdiction. The NPRM proposed adding a new § 35.190(e) further refining procedures for complaints filed with the Department of Justice. Proposed § 35.190(e) provides that when the Department receives a complaint alleging a violation of title II that is directed to the Attorney General but may fall within the jurisdiction of a designated agency or another Federal agency with jurisdiction under section 504, the Department may exercise its discretion to retain the complaint for investigation under this part. The Department would, of course, consult with the designated agency when the Department plans to retain a complaint. In appropriate circumstances, the Department and the designated agency may conduct a joint investigation.

Several commenters supported this amendment as a more efficient means of processing title II complaints. The commenters supported the Department using its discretion to conduct timely investigations of such complaints. The language of the proposed § 35.190(e) remains unchanged in the final rule.

Other Issues

Questions Posed in the NPRM Regarding Costs and Benefits of Complying With the 2010 Standards

In the NPRM, the Department requested comment on various cost and benefit issues related to eight requirements in the Department's Initial Regulatory Impact Analysis (Initial RIA), available at *ada.gov/NPRM2008/ria.htm*), that were projected to have incremental costs exceeding monetized benefits by more than $100 million when using the 1991 Standards as the comparative baseline, *i.e.,* side reach, water closet clearances in single-user toilet rooms with in-swinging doors, stairs, elevators, location of accessible routes to stages, accessible attorney areas and witness stands, assistive listening systems, and accessible teeing grounds, putting greens, and weather shelters at golf courses. 73 FR 34466, 34469 (June 17, 2008). The Department noted that pursuant to the ADA, the Department does not have statutory authority to modify the 2004 ADAAG and is required instead to issue regulations implementing the ADA that are consistent with the Board's guidelines. In that regard, the Department also requested comment about whether any of these eight elements in the 2010 Standards should be returned to the Access Board for further consideration, in particular as applied to alterations. Many of the comments received by the Department in response to these questions addressed both titles II and III. As a result, the Department's discussion of these comments and its response are collectively presented for both titles.

Side reach. The 1991 Standards at section 4.2.6 establish a maximum side-reach height of 54 inches. The 2010 Standards at section 308.3 reduce that maximum height to 48 inches. The 2010 Standards also add exceptions for certain elements to the scoping requirement for operable parts.

The vast majority of comments the Department received were in support of the lower side-reach maximum of 48 inches in the 2010 Standards. Most of these comments, but not all, were received from individuals of short stature, relatives of individuals of short stature, or organizations representing the interests of persons with disabilities, including individuals of short stature. Comments from individuals with disabilities and disability advocacy groups stated that the 48-inch side reach would permit independence in performing many activities of daily living for individuals with disabilities, including individuals of short stature, persons who use wheelchairs, and persons who have limited upper body strength. In this regard, one commenter who is a business owner pointed out that as a person of short stature there were many occasions when he was unable to exit a public restroom independently because he could not reach the door handle. The commenter said that often elevator control buttons are out of his reach and, if he is alone, he often must wait for someone else to enter the elevator so that he can ask that person to press a floor button for him. Another commenter, who is also a person of short stature, said that he has on several occasions pulled into a gas station only to find that he was unable to reach the credit card reader on the gas pump. Unlike other customers who can reach the card reader, swipe their credit or debit cards, pump their gas and leave the station, he must use another method to pay for his gas. Another comment from a person of short stature pointed out that as more businesses take steps to reduce labor costs—a trend expected to continue—staffed booths are being replaced with automatic machines for the sale, for example, of parking tickets and other products. He observed that the "ability to access and operate these machines becomes ever more critical to function in society," and, on that basis, urged the Department to adopt the 48-inch side-reach requirement. Another individual commented that persons of short stature should not have to carry with them adaptive tools in order to access building or facility elements that are out of their reach, any more than persons in wheelchairs should have to carry ramps with them in order to gain access to facilities.

Many of the commenters who supported the revised side-reach requirement pointed out that lowering the side-reach requirement to 48 inches would avoid a problem sometimes encountered in the built environment when an element was mounted for a parallel approach at 54 inches only to find afterwards that a parallel approach was not possible. Some commenters also suggested that lowering the maximum unobstructed side reach to 48 inches would reduce confusion among design professionals by making the unobstructed forward and side-reach maximums the same (the unobstructed forward reach in both the 1991 and 2010 Standards is 48 inches maximum). These commenters also pointed out that the ICC/ANSI A117.1 Standard, which is a private sector model accessibility standard, has included a 48-inch maximum high side-reach requirement since 1998. Many jurisdictions have already incorporated this requirement into their building codes, which these commenters believed would reduce the cost of compliance with the 2010 Standards. Because numerous jurisdictions have already adopted the 48-inch side-reach requirement, the Department's failure to adopt the 48-inch side-reach requirement in the 2010 Standards, in the view of many commenters, would result in a significant reduction in accessibility, and would frustrate efforts that have been made to harmonize private sector model construction and accessibility codes with Federal accessibility requirements. Given these concerns, they overwhelmingly opposed the idea of returning the revised side-reach requirement to the Access Board for further consideration.

The Department also received comments in support of the 48-inch side-reach requirement from an association of professional commercial property managers and operators and from State governmental entities. The association of property managers pointed out that the revised side-reach requirement provided a reasonable approach to "regulating elevator controls and all other operable parts" in existing facilities in light of the manner in which the safe harbor, barrier removal, and alterations obligations will operate in the 2010 Standards. One governmental entity, while fully supporting the 48-inch side-reach requirement, encouraged the Department to adopt an exception to the lower reach range for existing facilities similar to the exception permitted in the ICC/ANSI A117.1 Standard. In response to this latter concern, the Department notes that under the safe harbor, existing facilities that are in compliance with the 1991 Standards, which require a 54-inch side-reach maximum, would not be required to comply with the lower side-reach requirement, unless there is an alteration. *See* § 35.150(b)(2).

A number of commenters expressed either concern with, or opposition to, the 48-inch side-reach requirement and suggested that it be returned to the Access Board for further consideration. These commenters included trade and business associations, associations of retail stores, associations of restaurant owners, retail and convenience store chains,

and a model code organization. Several businesses expressed the view that the lower side-reach requirement would discourage the use of their products and equipment by most of the general public. In particular, concerns were expressed by a national association of pay phone service providers regarding the possibility that pay telephones mounted at the lower height would not be used as frequently by the public to place calls, which would result in an economic burden on the pay phone industry. The commenter described the lower height required for side reach as creating a new "barrier" to pay phone use, which would reduce revenues collected from pay phones and, consequently, further discourage the installation of new pay telephones. In addition, the commenter expressed concern that phone service providers would simply decide to remove existing pay phones rather than incur the costs of relocating them at the lower height. With regard to this latter concern, the commenter misunderstood the manner in which the safe harbor obligation will operate in the revised title II regulation for elements that comply with the 1991 Standards. If the pay phones comply with the 1991 Standards or UFAS, the adoption of the 2010 Standards does not require retrofitting of these elements to reflect incremental changes in the 2010 Standards (*see* § 35.150(b)(2)). However, pay telephones that were required to meet the 1991 Standards as part of new construction or alterations, but do not in fact comply with those standards, will need to be brought into compliance with the 2010 Standards as of 18 months from the publication date of this final rule. *See* § 35.151(c)(5)(ii).

The Department does not agree with the concerns expressed by the commenter about reduced revenues from pay phones mounted at lower heights. The Department believes that, while given the choice some individuals may prefer to use a pay phone that is at a higher height, the availability of some phones at a lower height will not deter individuals from making needed calls.

The 2010 Standards will not require every pay phone to be installed or moved to a lowered height. The table accompanying section 217.2 of the 2010 Standards makes clear that, where one or more telephones are provided on a floor, level, or an exterior site, only one phone per floor, level, or exterior site must be placed at an accessible height. Similarly, where there is one bank of phones per floor, level, or exterior site, only one phone per floor, level, or exterior site must be accessible. And if there are two or more banks of phones per floor, level, or exterior site, only one phone per bank must be placed at an accessible height.

Another comment in opposition to the lower reach range requirement was submitted on behalf of a chain of convenience stores with fuel stops. The commenter expressed the concern that the 48-inch side reach "will make it uncomfortable for the majority of the public," including persons of taller stature who would need to stoop to use equipment such as fuel dispensers mounted at the lower height. The commenter offered no objective support for the observation that a majority of the public would be rendered uncomfortable if, as required in the 2010 Standards, at least one of each type of fuel dispenser at a facility was made accessible in compliance with the lower reach range. Indeed, the Department received no comments from any individuals of tall stature expressing concern about accessible elements or equipment being mounted at the 48-inch height.

Several convenience store, restaurant, and amusement park commenters expressed concern about the burden the lower side-reach requirement would place on their businesses in terms of self-service food stations and vending areas if the 48-inch requirement were applied retroactively. The cost of lowering counter height, in combination with the lack of control businesses exercise over certain prefabricated service or vending fixtures, outweighed, they argued, any benefits to persons with disabilities. For this reason, they suggested the lower side-reach requirement be referred back to the Access Board.

These commenters misunderstood the safe harbor and barrier removal obligations that will be in effect under the 2010 Standards. Those existing self-service food stations and vending areas that already are in compliance with the 1991 Standards will not be required to satisfy the 2010 Standards unless they engage in alterations. With regard to prefabricated vending machines and food service components that will be purchased and installed in businesses after the 2010 Standards become effective, the Department expects that companies will design these machines and fixtures to comply with the 2010 Standards in the future, as many have already done in the 10 years since the 48-inch side-reach requirement has been a part of the model codes and standards used by many jurisdictions as the basis for their construction codes.

A model code organization commented that the lower side-reach requirement would create a significant burden if it required entities to lower the mounting height for light switches, environmental controls, and outlets when an alteration did not include the walls where these elements were located, such as when "an area is altered or as a path of travel obligation." The Department believes that the final rule adequately addresses those situations about which the commenter expressed concern by not requiring the relocation of existing elements, such as light switches, environmental controls, and outlets, unless they are altered. Moreover, under § 35.151(b)(4)(iii) of the final rule, costs for altering the path of travel to an altered area of primary function that exceed 20 percent of the overall costs of the alteration will be deemed disproportionate.

The Department has determined that the revised side-reach requirement should not be returned to the Access Board for further consideration, based in large part on the views expressed by a majority of the commenters regarding the need for, and importance of, the lower side-reach requirement to ensure access for persons with disabilities.

Alterations and Water Closet Clearances in Single-User Toilet Rooms With In-Swinging Doors

The 1991 Standards allow a lavatory to be placed a minimum of 18 inches from the water closet centerline and a minimum of 36 inches from the side wall adjacent to the water closet, which precludes side transfers. The 1991 Standards do not allow an in-swinging door in a toilet or bathing room to overlap the required clear floor space at any accessible fixture. To allow greater transfer options, section 604.3.2 of the 2010 Standards prohibits lavatories from overlapping the clear floor space at water closets, except in residential dwelling units. Section 603.2.3 of the 2010 Standards maintains the prohibition on doors swinging into the clear floor space or clearance required for any fixture, except that they permit the doors of toilet or bathing rooms to swing into the required turning space, provided that there is sufficient clearance space for the wheelchair outside the door swing. In addition, in single-user toilet or bathing rooms, exception 2 of section 603.2.3 of the 2010 Standards permits the door to swing into the clear floor space of an accessible fixture if a clear floor space that measures at least 30 inches by 48 inches is available outside the arc of the door swing.

The majority of commenters believed that this requirement would increase the number of toilet rooms accessible to individuals with disabilities who use wheelchairs or mobility scooters, and will make it easier for them to transfer. A number of commenters stated that there was no reason to return this provision to the Access Board. Numerous commenters noted that this requirement is already included in other model accessibility standards and many State and local building codes and that the adoption of the 2010 Standards is an important part of harmonization efforts.

Other commenters, mostly trade associations, opposed this requirement, arguing that the added cost to the industry outweighs any increase in accessibility. Two commenters stated that these proposed requirements would add two feet to the width of an accessible single-user toilet room; however, another commenter said the drawings in the proposed regulation demonstrated that there would be no substantial increase in the size of the toilet room. Several commenters stated that this requirement would require moving plumbing fixtures, walls, or doors at significant additional expense. Two commenters wanted the permissible overlap between the door swing and clearance around any fixture eliminated. One commenter stated that these new requirements will result in fewer alterations to toilet rooms to avoid triggering the requirement for increased clearances, and suggested that the Department specify that repairs, maintenance, or minor alterations would not trigger the need to provide increased clearances. Another commenter requested that the Department exempt existing guest room bathrooms and single-user toilet rooms that comply with the 1991 Standards from complying with the increased clearances in alterations.

After careful consideration of these comments, the Department believes that the

revised clearances for single-user toilet rooms will allow safer and easier transfers for individuals with disabilities, and will enable a caregiver, aide, or other person to accompany an individual with a disability into the toilet room to provide assistance. The illustrations in Appendix B to the final title III rule, "Analysis and Commentary on the 2010 ADA Standards for Accessible Design," published elsewhere in this volume and codified as Appendix B to 28 CFR part 36, describe several ways for public entities and public accommodations to make alterations while minimizing additional costs or loss of space. Further, in any isolated instances where existing structural limitations may entail loss of space, the public entity and public accommodation may have a technical infeasibility defense for that alteration. The Department also recognizes that in attempting to create the required clear floor space pursuant to section 604.3.2, there may be certain specific circumstances where it would be technically infeasible for a covered entity to comply with the clear floor space requirement, such as where an entity must move a plumbing wall in a multistory building where the mechanical chase for plumbing is an integral part of a building's structure or where the relocation of a wall or fixture would violate applicable plumbing codes. In such circumstances, the required clear floor space would not have to be provided although the covered entity would have to provide accessibility to the maximum extent feasible. The Department has, therefore, decided not to return this requirement to the Access Board.

Alterations to stairs. The 1991 Standards only require interior and exterior stairs to be accessible when they provide access to levels that are not connected by an elevator, ramp, or other accessible means of vertical access. In contrast, section 210.1 of the 2010 Standards requires all newly constructed stairs that are part of a means of egress to be accessible. However, exception 2 of section 210.1 of the 2010 Standards provides that in alterations, stairs between levels connected by an accessible route need not be accessible, except that handrails shall be provided. Most commenters were in favor of this requirement for handrails in alterations, and stated that adding handrails to stairs during alterations was not only feasible and not cost-prohibitive, but also provided important safety benefits. One commenter stated that making all points of egress accessible increased the number of people who could use the stairs in an emergency. A majority of the commenters did not want this requirement returned to the Access Board for further consideration.

The International Building Code (IBC), which is a private sector model construction code, contains a similar provision, and most jurisdictions enforce a version of the IBC as their building code, thereby minimizing the impact of this provision on public entities and public accommodations. The Department believes that by requiring only the addition of handrails to altered stairs where levels are connected by an accessible route, the costs of compliance for public entities and public accommodations are minimized, while safe egress for individuals with disabilities is increased. Therefore, the Department has decided not to return this requirement to the Access Board.

Alterations to elevators. Under the 1991 Standards, if an existing elevator is altered, only that altered elevator must comply with the new construction requirements for accessible elevators to the maximum extent feasible. It is therefore possible that a bank of elevators controlled by a single call system may contain just one accessible elevator, leaving an individual with a disability with no way to call an accessible elevator and thus having to wait indefinitely until an accessible elevator happens to respond to the call system. In the 2010 Standards, when an element in one elevator is altered, section 206.6.1 will require the same element to be altered in all elevators that are programmed to respond to the same call button as the altered elevator.

Most commenters favored the proposed requirement. This requirement, according to these commenters, is necessary so a person with a disability need not wait until an accessible elevator responds to his or her call. One commenter suggested that elevator owners could also comply by modifying the call system so the accessible elevator could be summoned independently. One commenter suggested that this requirement would be difficult for small businesses located in older buildings, and one commenter suggested that this requirement be sent back to the Access Board.

After considering the comments, the Department agrees that this requirement is necessary to ensure that when an individual with a disability presses a call button, an accessible elevator will arrive in a timely manner. The IBC contains a similar provision, and most jurisdictions enforce a version of the IBC as their building code, minimizing the impact of this provision on public entities and public accommodations. Public entities and businesses located in older buildings need not comply with this requirement where it is technically infeasible to do so. Further, as pointed out by one commenter, modifying the call system so the accessible elevator can be summoned independently is another means of complying with this requirement in lieu of altering all other elevators programmed to respond to the same call button. Therefore, the Department has decided not to return this requirement to the Access Board.

Location of accessible routes to stages. The 1991 Standards at section 4.33.5 require an accessible route to connect the accessible seating and the stage, as well as other ancillary spaces used by performers. The 2010 Standards at section 206.2.6 provide in addition that where a circulation path directly connects the seating area and the stage, the accessible route must directly connect the accessible seating and the stage, and, like the 1991 Standards, an accessible route must connect the stage with the ancillary spaces used by performers.

In the NPRM, the Department asked operators of auditoria about the extent to which auditoria already provide direct access to stages and whether there were planned alterations over the next 15 years that included accessible direct routes to stages. The Department also asked how to quantify the benefits of this requirement for persons with disabilities, and invited commenters to provide illustrative anecdotal experiences about the requirement's benefits. The Department received many comments regarding the costs and benefits of this requirement. Although little detail was provided, many industry and governmental entity commenters anticipated that the costs of this requirement would be great and that it would be difficult to implement. They noted that premium seats may have to be removed and that load-bearing walls may have to be relocated. These commenters suggested that the significant costs would deter alterations to the stage area for a great many auditoria. Some commenters suggested that ramps to the front of the stage may interfere with means of egress and emergency exits. Several commenters requested that the requirement apply to new construction only, and one industry commenter requested an exemption for stages used in arenas or amusement parks where there is no audience participation or where the stage is a work area for performers only. One commenter requested that the requirement not apply to temporary stages.

The final rule does not require a direct accessible route to be constructed where a direct circulation path from the seating area to the stage does not exist. Consequently, those commenters who expressed concern about the burden imposed by the revised requirement (i.e., where the stage is constructed with no direct circulation path connecting the general seating and performing area) should note that the final rule will not require the provision of a direct accessible route under these circumstances. The final rule applies to permanent stages, as well as "temporary stages," if there is a direct circulation path from the seating area to the stage. However, the Department does recognize that in some circumstances, such as an alteration to a primary function area, the ability to provide a direct accessible route to a stage may be costly or technically infeasible, the auditorium owner is not precluded by the revised requirement from asserting defenses available under the regulation. In addition, the Department notes that since section 4.33.5 of the 1991 Standards requires an accessible route to a stage, the safe harbor will apply to existing facilities whose stages comply with the 1991 Standards.

Several governmental entities supported accessible auditoria and the revised requirement. One governmental entity noted that its State building code already required direct access, that it was possible to provide direct access, and that creative solutions had been found to do so.

Many advocacy groups and individual commenters strongly supported the revised requirement, discussing the acute need for direct access to stages as it impacts a great number of people at important life events such as graduations and awards ceremonies, at collegiate and competitive performances and other school events, and at entertainment events that include audience participation. Many commenters expressed the belief that direct access is essential for integration

mandates to be satisfied and that separate routes are stigmatizing and unequal. The Department agrees with these concerns.

Commenters described the impact felt by persons in wheelchairs who are unable to access the stage at all when others are able to do so. Some of these commenters also discussed the need for performers and production staff who use wheelchairs to have direct access to the stage and provided a number of examples that illustrated the importance of the rule proposed in the NPRM. Personal anecdotes were provided in comments and at the Department's public hearing on the NPRM. One mother spoke passionately and eloquently about the unequal treatment experienced by her daughter, who uses a wheelchair, at awards ceremonies and band concerts. Her daughter was embarrassed and ashamed to be carried by her father onto a stage at one band concert. When the venue had to be changed for another concert to an accessible auditorium, the band director made sure to comment that he was unhappy with the switch. Rather than endure the embarrassment and indignities, her child dropped out of band the following year. Another father commented about how he was unable to speak from the stage at a PTA meeting at his child's school. Speaking from the floor limited his line of sight and his participation. Several examples were provided of children who could not participate on stage during graduation, awards programs, or special school events, such as plays and festivities. One student did not attend his college graduation because he would not be able to get on stage. Another student was unable to participate in the class Christmas programs or end-of-year parties unless her father could attend and lift her onto the stage. These commenters did not provide a method to quantify the benefits that would accrue by having direct access to stages. One commenter stated, however, that "the cost of dignity and respect is without measure."

Many industry commenters and governmental entities suggested that the requirement be sent back to the Access Board for further consideration. One industry commenter mistakenly noted that some international building codes do not incorporate the requirement and that therefore there is a need for further consideration. However, the Department notes that both the 2003 and 2006 editions of the IBC include scoping provisions that are almost identical to this requirement and that these editions of the model code are the most frequently used. Many individuals and advocacy group commenters requested that the requirement be adopted without further delay. These commenters spoke of the acute need for direct access to stages and the amount of time it would take to resubmit the requirement to the Access Board. Several commenters noted that the 2004 ADAAG tracks recent model codes and thus there is no need for further consideration. The Department agrees that no further delay is necessary and therefore has decided not to return the requirement to the Access Board for further consideration.

Attorney areas and witness stands. The 1991 Standards do not require that public entities meet specific architectural standards with regard to the construction and alteration of courtrooms and judicial facilities. Because it is apparent that the judicial facilities of State and local governments have often been inaccessible to individuals with disabilities, as part of the NPRM, the Department proposed the adoption of sections 206.2.4, 231.2, 808, 304, 305, and 902 of the 2004 ADAAG concerning judicial facilities and courtrooms, including requirements for accessible courtroom stations and accessible jury boxes and witness stands.

Those who commented on access to judicial facilities and courtrooms uniformly favored the adoption of the 2010 Standards. Virtually all of the commenters stated that accessible judicial facilities are crucial to ensuring that individuals with disabilities are afforded due process under law and have an equal opportunity to participate in the judicial process. None of the commenters favored returning this requirement to the Access Board for further consideration.

The majority of commenters, including many disability rights and advocacy organizations, stated that it is crucial for individuals with disabilities to have effective and meaningful access to our judicial system so as to afford them due process under law. They objected to asking the Access Board to reconsider this requirement. In addition to criticizing the initial RIA for virtually ignoring the intangible and non-monetary benefits associated with accessible courtrooms, these commenters frequently cited the Supreme Court's decision in *Tennessee* v. *Lane,* 541 U.S. 509, 531 (2004),[4] as ample justification for the requirement, noting the Court's finding that "[t]he unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination." *Id.* at 531. These commenters also made a number of observations, including the following: providing effective access to individuals with mobility impairments is not possible when architectural barriers impede their path of travel and negatively emphasize an individual's disability; the perception generated by makeshift accommodations discredits witnesses and attorneys with disabilities, who should not be stigmatized or treated like second-class citizens; the cost of accessibility modifications to existing courthouses can often be significantly decreased by planning ahead, by focusing on low-cost options that provide effective access, and by addressing existing barriers when reasonable modifications to the courtroom can be made; by planning ahead and by following best practices, jurisdictions can avoid those situations where it is apparent that someone's disability is the reason why ad hoc arrangements have to be made prior to the beginning of court proceedings; and accessibility should be a key concern during the planning and construction process so as to ensure that both courtroom grandeur and accessibility are achieved. One commenter stated that, in order for attorneys with disabilities to perform their professional duties to their clients and the court, it is essential that accessible courtrooms, conference rooms, law libraries, judicial chambers, and other areas of a courthouse be made barrier-free by taking accessible design into account prior to construction.

Numerous commenters identified a variety of benefits that would accrue as a result of requiring judicial facilities to be accessible. These included the following: maintaining the decorum of the courtroom and eliminating the disruption of court proceedings when individuals confront physical barriers; providing an accessible route to the witness stand and attorney area and clear floor space to accommodate a wheelchair within the witness area; establishing crucial lines of sight between the judge, jury, witnesses, and attorneys—which commenters described as crucial; ensuring that the judge and the jury will not miss key visual indicators of a witness; maintaining a witness's or attorney's dignity and credibility; shifting the focus from a witness's disability to the substance of that person's testimony; fostering the independence of an individual with disability; allowing persons with mobility impairments to testify as witnesses, including as expert witnesses; ensuring the safety of various participants in a courtroom proceeding; and avoiding unlawful discrimination. One commenter stated that equal access to the well of the courtroom for both attorney and client is important for equal participation and representation in our court system. Other commenters indicated that accessible judicial facilities benefit a wide range of people, including many persons without disabilities, senior citizens, parents using strollers with small children, and attorneys and court personnel wheeling documents into the courtroom. One commenter urged the adoption of the work area provisions because they would result in better workplace accessibility and increased productivity. Several commenters urged the adoption of the rule because it harmonizes the ADAAG with the model IBC, the standards developed by the American National Standards Institute (ANSI), and model codes that have been widely adopted by State and local building departments, thus increasing the prospects for better understanding and compliance with the ADAAG by architects, designers, and builders.

Several commenters mentioned the report "Justice for All: Designing Accessible Courthouses" (Nov. 15, 2006), available at *http://www.access-board.gov/caac/report.htm* (Nov. 24, 2009) (last visited June 24, 2010). The report, prepared by the Courthouse Access Advisory Committee for the Access Board, contained recommendations for the Board's use in developing and disseminating guidance on accessible courthouse design under the ADA and the ABA. These commenters identified some of the report's best practices concerning courtroom accessibility for witness stands, jury boxes, and attorney areas; addressed the

[4] The Supreme Court in *Tennessee* v. *Lane,* 541 U.S. 509, 533–534 (2004), held that title II of the ADA constitutes a valid exercise of Congress' enforcement power under the Fourteenth Amendment in cases implicating the fundamental right of access to the courts.

costs and benefits arising from the use of accessible courtrooms; and recommended that the report be incorporated into the Department's final rule. With respect to existing courtrooms, one commenter in this group suggested that consideration be given to ensuring that there are barrier-free emergency evacuation routes for all persons in the courtroom, including different evacuation routes for different classes of individuals given the unique nature of judicial facilities and courtrooms.

The Department declines to incorporate the report into the regulation. However, the Department encourages State and local governments to consult the Committee report as a useful guide on ways to facilitate and increase accessibility of their judicial facilities. The report includes many excellent examples of accessible courtroom design.

One commenter proposed that the regulation also require a sufficient number of accessible benches for judges with disabilities. Under section 206.2.4 of the 2004 ADAAG, raised courtroom stations used by judges and other judicial staff are not required to provide full vertical access when first constructed or altered, as long as the required clear floor space, maneuvering space, and any necessary electrical service for future installation of a means of vertical access, is provided at the time of new construction or can be achieved without substantial reconstruction during alterations. The Department believes that this standard easily allows a courtroom station to be adapted to provide vertical access in the event a judge requires an accessible judge's bench.

The Department received several anecdotal accounts of courtroom experiences of individuals with disabilities. One commenter recalled numerous difficulties that her law partner faced as the result of inaccessible courtrooms, and their concerns that the attention of judge and jury was directed away from the merits of case to the lawyer and his disability. Among other things, the lawyer had to ask the judges on an appellate panel to wait while he maneuvered through insufficient space to the counsel table; ask judges to relocate bench conferences to accessible areas; and make last-minute preparations and rearrangements that his peers without disabilities did not have to make. Another commenter with extensive experience as a lawyer, witness, juror, and consultant observed that it is common practice for a witness who uses mobility devices to sit in front of the witness stand. He described how disconcerting and unsettling it has been for him to testify in front of the witness stand, which allowed individuals in the courtroom to see his hands or legs shaking because of spasticity, making him feel like a second-class citizen.

Two other commenters with mobility disabilities described their experiences testifying in court. One accessibility consultant stated that she was able to represent her clients successfully when she had access to an accessible witness stand because it gave her the ability "to look the judge in the eye, speak comfortably and be heard, hold up visual aids that could be seen by the judge, and perform without an architectural stigma." She did not believe that she was able to achieve a comparable outcome or have meaningful access to the justice system when she testified from an inaccessible location. Similarly, a licensed clinical social worker indicated that she has testified in several cases in accessible courtrooms, and that having full access to the witness stand in the presence of the judge and the jury was important to her effectiveness as an expert witness. She noted that accessible courtrooms often are not available, and that she was aware of instances in which victims, witnesses, and attorneys with disabilities have not been able to obtain needed disability accommodations in order to fulfill their roles at trial.

Two other commenters indicated that they had been chosen for jury duty but that they were effectively denied their right to participate as jurors because the courtrooms were not accessible. Another commenter indicated that he has had to sit apart from the other jurors because the jury box was inaccessible.

A number of commenters expressed approval of actions taken by States to facilitate access in judicial facilities. A member of a State commission on disability noted that the State had been working toward full accessibility since 1997 when the Uniform Building Code required interior accessible routes. This commenter stated that the State's district courts had been renovated to the maximum extent feasible to provide greater access. This commenter also noted that a combination of Community Development Block Grant money and State funds are often awarded for renovations of courtroom areas. One advocacy group that has dealt with court access issues stated that members of the State legal community and disability advocates have long been promoting efforts to ensure that the State courts are accessible to individuals with disabilities. The comment cited a publication distributed to the Washington State courts by the State bar association entitled, "Ensuring Equal Access to the Courts for Persons with Disabilities." (Aug. 2006), available at *http://www.wsba.org/ensuringaccessguidebook.pdf* (last visited July 20, 2010). In addition, the commenter also indicated that the State supreme court had promulgated a new rule governing how the courts should respond to requests of accommodation based upon disability; the State legislature had created the position of Disability Access Coordinator for Courts to facilitate accessibility in the court system; and the State legislature had passed a law requiring that all planned improvements and alterations to historic courthouses be approved by the ADA State facilities program manager and committee in order to ensure that the alterations will enhance accessibility.

The Department has decided to adopt the requirements in the 2004 ADAAG with respect to judicial facilities and courtrooms and will not ask the Access Board to review these requirements. The final rule is wholly consistent with the objectives of the ADA. It addresses a well-documented history of discrimination with respect to judicial administration and significantly increases accessibility for individuals with disabilities. It helps ensure that they will have an opportunity to participate equally in the judicial process. As stated, the final rule is consistent with a number of model and local building codes that have been widely adopted by State and local building departments and provides greater uniformity for planners, architects, and builders.

Assistive listening systems. The 1991 Standards at sections 4.33.6 and 4.33.7 require assistive listening systems (ALS) in assembly areas and prescribe general performance standards for ALS systems. In the NPRM, the Department proposed adopting the technical specifications in the 2004 ADAAG for ALS that are intended to ensure better quality and effective delivery of sound and information for persons with hearing impairments, especially those using hearing aids. The Department noted in the NPRM that since 1991, advancements in ALS and the advent of digital technology have made these systems more amenable to uniform standards, which, among other things, should ensure that a certain percentage of required ALS systems are hearing-aid compatible. 73 FR 34466, 34471 (June 17, 2008). The 2010 Standards at section 219 provide scoping requirements and at section 706 address receiver jacks, hearing aid compatibility, sound pressure level, signal-to-noise ratio, and peak clipping level. The Department requested comments specifically from arena and assembly area administrators on the cost and maintenance issues associated with ALS, asked generally about the costs and benefits of ALS, and asked whether, based upon the expected costs of ALS, the issue should be returned to the Access Board for further consideration.

Comments from advocacy organizations noted that persons who develop significant hearing loss often discontinue their normal routines and activities, including meetings, entertainment, and large group events, due to a sense of isolation caused by the hearing loss or embarrassment. Individuals with longstanding hearing loss may never have participated in group activities for many of the same reasons. Requiring ALS may allow individuals with disabilities to contribute to the community by joining in government and public events, and increasing economic activity associated with community activities and entertainment. Making public events and entertainment accessible to persons with hearing loss also brings families and other groups that include persons with hearing loss into more community events and activities, thus exponentially increasing the benefit from ALS.

Many commenters noted that when a person has significant hearing loss, that person may be able to hear and understand information in a quiet situation with the use of hearing aids or cochlear implants; however, as background noise increases and the distance between the source of the sound and the listener grows, and especially where there is distortion in the sound, an ALS becomes essential for basic comprehension and understanding. Commenters noted that among the 31 million Americans with hearing loss, and with a projected increase to over 78 million Americans with hearing loss by 2030, the benefit from ALS is huge and

growing. Advocates for persons with disabilities and individuals commented that they appreciated the improvements in the 2004 ADAAG standards for ALS, including specifications for the ALS systems and performance standards. They noted that neckloops that translate the signal from the ALS transmitter to a frequency that can be heard on a hearing aid or cochlear implant are much more effective than separate ALS system headsets, which sometimes create feedback, often malfunction, and may create distractions for others seated nearby. Comments from advocates and users of ALS systems consistently noted that the Department's regulation should, at a minimum, be consistent with the 2004 ADAAG. Although there were requests for adjustments in the scoping requirements from advocates seeking increased scoping requirements, and from large venue operators seeking fewer requirements, there was no significant concern expressed by commenters about the technical specifications for ALS in the 2004 ADAAG.

Some commenters from trade associations and large venue owners criticized the scoping requirements as too onerous and one commenter asked for a remand to the Access Board for new scoping rules. However, one State agency commented that the 2004 ADAAG largely duplicates the requirements in the 2006 IBC and the 2003 ANSI codes, which means that entities that comply with those standards would not incur additional costs associated with ADA compliance.

According to one State office of the courts, the cost to install either an infrared system or an FM system at average-sized facilities, including most courtrooms covered by title II, would be between $500 and $2,000, which the agency viewed as a small price in comparison to the benefits of inclusion. Advocacy organizations estimated wholesale costs of ALS systems at about $250 each and individual neckloops to link the signal from the ALS transmitter to hearing aids or cochlear implants at less than $50 per unit. Many commenters pointed out that if a facility already is using induction neckloops, it would already be in compliance and would not have any additional installation costs. One major city commented that annual maintenance is about $2,000 for the entire system of performance venues in the city. A trade association representing very large venues estimated annual maintenance and upkeep expenses, including labor and replacement parts, to be at most about $25,000 for a very large professional sports stadium.

One commenter suggested that the scoping requirements for ALS in the 2004 ADAAG were too stringent and that the Department should return them to the Access Board for further review and consideration. Others commented that the requirement for new ALS systems should mandate multichannel receivers capable of receiving audio description for persons who are blind, in addition to a channel for amplification for persons who are hard of hearing. Some comments suggested that the Department should require a set schedule and protocol of mandatory maintenance. Department regulations already require maintenance of accessible features at § 35.133(a) of the title II regulation, which obligates a title II entity to maintain ALS in good working order. The Department recognizes that maintenance of ALS is key to its usability. Necessary maintenance will vary dramatically from venue to venue based upon a variety of factors including frequency of use, number of units, quality of equipment, and others items. Accordingly, the Department has determined that it is not appropriate to mandate details of maintenance, but notes that failure to maintain ALS would violate § 35.133(a) of this rule.

The NPRM asked whether the Department should return the issue of ALS requirements to the Access Board. The Department has received substantial feedback on the technical and scoping requirements for ALS and is convinced that these requirements are reasonable and that the benefits justify the requirements. In addition, the Department believes that the new specifications will make ALS work more effectively for more persons with disabilities, which, together with a growing population of new users, will increase demand for ALS, thus mooting criticism from some large venue operators about insufficient demand. Thus, the Department has determined that it is unnecessary to refer this issue back to the Access Board for reconsideration.

Accessible teeing grounds, putting greens, and weather shelters. In the NPRM, the Department sought public input on the proposed requirements for accessible golf courses. These requirements specifically relate to accessible routes within the boundaries of courses, as well as the accessibility of golfing elements (*e.g.,* teeing grounds, putting greens, weather shelters).

In the NPRM, the Department sought information from the owners and operators of golf courses, both public and private, on the extent to which their courses already have golf car passages, and, if so, whether they intended to avail themselves of the proposed accessible route exception for golf car passages. 73 FR 34466, 34471 (June 17, 2008).

Most commenters expressed support for the adoption of an accessible route requirement that includes an exception permitting golf car passage as all or part of an accessible route. Comments in favor of the proposed standard came from golf course owners and operators, individuals, organizations, and disability rights groups, while comments opposing adoption of the golf course requirements generally came from golf courses and organizations representing the golf course industry.

The majority of commenters expressed the general viewpoint that nearly all golf courses provide golf cars and have either well-defined paths or permit golf cars to drive on the course where paths are not present, thus meeting the accessible route requirement. Several commenters disagreed with the assumption in the initial RIA, that virtually every tee and putting green on an existing course would need to be regraded in order to provide compliant accessible routes. According to one commenter, many golf courses are relatively flat with little slope, especially those heavily used by recreational golfers. This commenter concurred with the Department that it is likely that most existing golf courses have a golf car passage to tees and greens, thereby substantially minimizing the cost of bringing an existing golf course into compliance with the proposed standards. One commenter reported that golf course access audits found that the vast majority of public golf courses would have little difficulty in meeting the proposed golf course requirements. In the view of some commenters, providing access to golf courses would increase golf participation by individuals with disabilities.

The Department also received many comments requesting clarification of the term "golf car passage." For example, one commenter requesting clarification of the term "golf car passage" argued that golf courses typically do not provide golf car paths or pedestrian paths onto the actual teeing grounds or greens, many of which are higher or lower than the car path. This commenter argued that if golf car passages were required to extend onto teeing grounds and greens in order to qualify for an exception, then some golf courses would have to substantially regrade teeing grounds and greens at a high cost.

After careful consideration of the comments, the Department has decided to adopt the 2010 Standards specific to golf facilities. The Department believes that in order for individuals with mobility disabilities to have an opportunity to play golf that is equal to golfers without disabilities, it is essential that golf courses provide an accessible route or accessible golf car passage to connect accessible elements and spaces within the boundary of the golf course, including teeing grounds, putting greens, and weather shelters.

Public Comments on Other NPRM Issues

Equipment and furniture. In the 1991 title II regulation, there are no specific provisions addressing equipment and furniture, although § 35.150(b) states that one means by which a public entity can make its program accessible to individuals with disabilities is "redesign of equipment." In the NPRM, the Department announced its intention not to regulate equipment, proposing instead to continue with the current approach, under which equipment and furniture are covered by other provisions, including those requiring reasonable modifications of policies, practices, or procedures, program accessibility, and effective communication. The Department suggested that entities apply the accessibility standards for fixed equipment in the 2004 ADAAG to analogous free-standing equipment in order to ensure that such equipment is accessible, and that entities consult relevant portions of the 2004 ADAAG and standards from other Federal agencies to make equipment accessible to individuals who are blind or have low vision (*e.g.,* the communication-related standards for ATMs in the 2004 ADAAG).

The Department received numerous comments objecting to this decision and urging the Department to issue equipment and furniture regulations. Based on these comments, the Department has decided that it needs to revisit the issuance of equipment and furniture regulations and it intends to do so in future rulemaking.

Among the commenters' key concerns, many from the disability community and some public entities, were objections to the Department's earlier decision not to issue equipment regulations, especially for medical equipment. These groups recommended that the Department list by name certain types of medical equipment that must be accessible, including exam tables (that lower to 15 inches above floor or lower), scales, medical and dental chairs, and radiologic equipment (including mammography equipment). These commenters emphasized that the provision of medically related equipment and furniture should also be specifically regulated since they are not included in the 2004 ADAAG (while depositories, change machines, fuel dispensers, and ATMs were) and because of their crucial role in the provision of healthcare. Commenters described how the lack of accessible medical equipment negatively affects the health of individuals with disabilities. For example, some individuals with mobility disabilities do not get thorough medical care because their health providers do not have accessible examination tables or scales.

Commenters also said that the Department's stated plan to assess the financial impact of free-standing equipment on businesses was not necessary, as any regulations could include a financial balancing test. Other commenters representing persons who are blind or have low vision urged the Department to mandate accessibility for a wide range of equipment—including household appliances (stoves, washers, microwaves, and coffee makers), audiovisual equipment (stereos and DVD players), exercise machines, vending equipment, ATMs, computers at Internet cafes or hotel business centers, reservations kiosks at hotels, and point-of-sale devices—through speech output and tactile labels and controls. They argued that modern technology allows such equipment to be made accessible at minimal cost. According to these commenters, the lack of such accessibility in point-of-sale devices is particularly problematic because it forces blind individuals to provide personal or sensitive information (such as personal identification numbers) to third parties, which exposes them to identity fraud. Because the ADA does not apply directly to the manufacture of products, the Department lacks the authority to issue design requirements for equipment designed exclusively for use in private homes. *See* Department of Justice, Americans with Disabilities Act, *ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities,* III–4.4200, available at *http://www.ada.gov/taman3.*

Some commenters urged the Department to require swimming pool operators to provide aquatic wheelchairs for the use of persons with disabilities when the swimming pool has a sloped entry. If there is a sloped entry, a person who uses a wheelchair would require a wheelchair designed for use in the water in order to gain access to the pool because taking a personal wheelchair into water would rust and corrode the metal on the chair and damage any electrical components of a power wheelchair. Providing an aquatic wheelchair made of non-corrosive materials and designed for access into the water will protect the water from contamination and avoid damage to personal wheelchairs or other mobility aids.

Additionally, many commenters urged the Department to regulate the height of beds in accessible hotel guest rooms and to ensure that such beds have clearance at the floor to accommodate a mechanical lift. These commenters noted that in recent years, hotel beds have become higher as hotels use thicker mattresses, thereby making it difficult or impossible for many individuals who use wheelchairs to transfer onto hotel beds. In addition, many hotel beds use a solid-sided platform base with no clearance at the floor, which prevents the use of a portable lift to transfer an individual onto the bed. Consequently, individuals who bring their own lift to transfer onto the bed cannot independently get themselves onto the bed. Some commenters suggested various design options that might avoid these situations.

The Department intends to provide specific guidance relating to both hotel beds and aquatic wheelchairs in a future rulemaking. For the present, the Department reminds covered entities that they have an obligation to undertake reasonable modifications to their current policies and to make their programs accessible to persons with disabilities. In many cases, providing aquatic wheelchairs or adjusting hotel bed heights may be necessary to comply with those requirements.

The Department has decided not to add specific scoping or technical requirements for equipment and furniture in this final rule. Other provisions of the regulation, including those requiring reasonable modifications of policies, practices, or procedures, program accessibility, and effective communication may require the provision of accessible equipment in individual circumstances. The 1991 title II regulation at § 35.150(a) requires that entities operate each service, program, or activity so that, when viewed in its entirety, each is readily accessible to, and usable by, individuals with disabilities, subject to a defense of fundamental alteration or undue financial and administrative burdens. Section 35.150(b) specifies that such entities may meet their program accessibility obligation through the "redesign of equipment." The Department expects to undertake a rulemaking to address these issues in the near future.

Accessible golf cars. An accessible golf car means a device that is designed and manufactured to be driven on all areas of a golf course, is independently usable by individuals with mobility disabilities, has a hand-operated brake and accelerator, carries golf clubs in an accessible location, and has a seat that both swivels and raises to put the golfer in a standing or semi-standing position.

The 1991 title II regulation contained no language specifically referencing accessible golf cars. After considering the comments addressing the ANPRM's proposed requirement that golf courses make at least one specialized golf car available for the use of individuals with disabilities, and the safety of accessible golf cars and their use on golf course greens, the Department stated in the NPRM that it would not issue regulations specific to golf cars.

The Department received many comments in response to its decision to propose no new regulation specific to accessible golf cars. The majority of commenters urged the Department to require golf courses to provide accessible golf cars. These comments came from individuals, disability advocacy and recreation groups, a manufacturer of accessible golf cars, and representatives of local government. Comments supporting the Department's decision not to propose a new regulation came from golf course owners, associations, and individuals.

Many commenters argued that while the existing title II regulation covered the issue, the Department should nonetheless adopt specific regulatory language requiring golf courses to provide accessible golf cars. Some commenters noted that many local governments and park authorities that operate public golf courses have already provided accessible golf cars. Experience indicates that such golf cars may be used without damaging courses. Some argued that having accessible golf cars would increase golf course revenue by enabling more golfers with disabilities to play the game. Several commenters requested that the Department adopt a regulation specifically requiring each golf course to provide one or more accessible golf cars. Other commenters recommended allowing golf courses to make "pooling" arrangements to meet demands for such cars. A few commenters expressed support for using accessible golf cars to accommodate golfers with and without disabilities. Commenters also pointed out that the Departments of the Interior and Defense have already mandated that golf courses under their jurisdictional control must make accessible golf cars available unless it can be demonstrated that doing so would change the fundamental nature of the game.

While an industry association argued that at least two models of accessible golf cars meet the specifications recognized in the field, and that accessible golf cars cause no more damage to greens or other parts of golf courses than players standing or walking across the course, other commenters expressed concerns about the potential for damage associated with the use of accessible golf cars. Citing safety concerns, golf organizations recommended that an industry safety standard be developed.

Although the Department declines to add specific scoping or technical requirements for golf cars to this final rule, the Department expects to address requirements for accessible golf cars in future rulemaking. In the meantime, the Department believes that golfers with disabilities who need accessible golf cars are protected by other existing provisions in the title II regulation, including those requiring reasonable modifications of policies, practices, or procedures, and program accessibility.

Web site accessibility. Many commenters expressed disappointment that the NPRM did not require title II entities to make their Web sites, through which they offer programs and services, accessible to individuals with

disabilities, including those who are blind or have low vision. Commenters argued that the cost of making Web sites accessible, through Web site design, is minimal, yet critical to enabling individuals with disabilities to benefit from the entity's programs and services. Internet Web sites, when accessible, provide individuals with disabilities great independence, and have become an essential tool for many Americans. Commenters recommended that the Department require covered entities, at a minimum, to meet the section 508 Standard for Electronic and Information Technology for Internet accessibility. Under section 508 of the Rehabilitation Act of 1973, Federal agencies are required to make their Web sites accessible. 29 U.S.C. 794(d); 36 CFR 1194.

The Department agrees that the ability to access, on an equal basis, the programs and activities offered by public entities through Internet-based Web sites is of great importance to individuals with disabilities, particularly those who are blind or who have low vision. When the ADA was enacted in 1990, the Internet was unknown to most Americans. Today, the Internet plays a critical role in daily life for personal, civic, commercial, and business purposes. In a period of shrinking resources, public entities increasingly rely on the web as an efficient and comprehensive way to deliver services and to inform and communicate with their citizens and the general public. In light of the growing importance Web sites play in providing access to public services and to disseminating the information citizens need to participate fully in civic life, accessing the Web sites of public entities can play a significant role in fulfilling the goals of the ADA.

Although the language of the ADA does not explicitly mention the Internet, the Department has taken the position that title II covers Internet Web site access. Public entities that choose to provide services through web-based applications (*e.g.,* renewing library books or driver's licenses) or that communicate with their constituents or provide information through the Internet must ensure that individuals with disabilities have equal access to such services or information, unless doing so would result in an undue financial and administrative burden or a fundamental alteration in the nature of the programs, services, or activities being offered. The Department has issued guidance on the ADA as applied to the Web sites of public entities in a 2003 publication entitled, *Accessibility of State and Local Government Web sites to People with Disabilities,* (June 2003) available at *http://www.ada.gov/websites2.htm.* As the Department stated in that publication, an agency with an inaccessible Web site may also meet its legal obligations by providing an alternative accessible way for citizens to use the programs or services, such as a staffed telephone information line. However, such an alternative must provide an equal degree of access in terms of hours of operation and the range of options and programs available. For example, if job announcements and application forms are posted on an inaccessible Web site that is available 24 hours a day, seven days a week to individuals without disabilities, then the alternative accessible method must also be available 24 hours a day, 7 days a week. Additional guidance is available in the Web Content Accessibility Guidelines (WCAG), (May 5, 1999) available at *http://www.w3.org/TR/WAI–WEBCONTENT* (last visited June 24, 2010) which are developed and maintained by the Web Accessibility Initiative, a subgroup of the World Wide Web Consortium (W3C®).

The Department expects to engage in rulemaking relating to website accessibility under the ADA in the near future. The Department has enforced the ADA in the area of website accessibility on a case-by-case basis under existing rules consistent with the guidance noted above, and will continue to do so until the issue is addressed in a final regulation.

Multiple chemical sensitivities. The Department received comments from a number of individuals asking the Department to add specific language to the final rule addressing the needs of individuals with chemical sensitivities. These commenters expressed concern that the presence of chemicals interferes with their ability to participate in a wide range of activities. These commenters also urged the Department to add multiple chemical sensitivities to the definition of a disability.

The Department has determined not to include specific provisions addressing multiple chemical sensitivities in the final rule. In order to be viewed as a disability under the ADA, an impairment must substantially limit one or more major life activities. An individual's major life activities of respiratory or neurological functioning may be substantially limited by allergies or sensitivity to a degree that he or she is a person with a disability. When a person has this type of disability, a covered entity may have to make reasonable modifications in its policies and practices for that person. However, this determination is an individual assessment and must be made on a case-by-case basis.

Examinations and Courses. The Department received one comment requesting that it specifically include language regarding examinations and courses in the title II regulation. Because section 309 of the ADA 42 U.S.C. 12189, reaches "[a]ny person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post secondary education, professional, or trade purposes," public entities also are covered by this section of the ADA. Indeed, the requirements contained in title II (including the general prohibitions against discrimination, the program access requirements, the reasonable modifications requirements, and the communications requirements) apply to courses and examinations administered by public entities that meet the requirements of section 309. While the Department considers these requirements to be sufficient to ensure that examinations and courses administered by public entities meet the section 309 requirements, the Department acknowledges that the title III regulation, because it addresses examinations in some detail, is useful as a guide for determining what constitutes discriminatory conduct by a public entity in testing situations. *See* 28 CFR 36.309.

Hotel Reservations. In the NPRM, at § 36.302(e), the Department proposed adding specific language to title III addressing the requirements that hotels, timeshare resorts, and other places of lodging make reasonable modifications to their policies, practices, or procedures, when necessary to ensure that individuals with disabilities are able to reserve accessible hotel rooms with the same efficiency, immediacy, and convenience as those who do not need accessible guest rooms. The NPRM did not propose adding comparable language to the title II regulation as the Department believes that the general nondiscrimination, program access, effective communication, and reasonable modifications requirements of title II provide sufficient guidance to public entities that operate places of lodging (*i.e.,* lodges in State parks, hotels on public college campuses). The Department received no public comments suggesting that it add language on hotel reservations comparable to that proposed for the title III regulation. Although the Department continues to believe that it is unnecessary to add specific language to the title II regulation on this issue, the Department acknowledges that the title III regulation, because it addresses hotel reservations in some detail, is useful as a guide for determining what constitutes discriminatory conduct by a public entity that operates a reservation system serving a place of lodging. *See* 28 CFR 36.302(e).

■ 18. Revise the heading to Appendix B to read as follows:

Appendix B to Part 35—Guidance on ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services Originally Published July 26, 1991

Dated: July 23, 2010.

Eric H. Holder, Jr.,

Attorney General.

[FR Doc. 2010–21821 Filed 9–14–10; 8:45 am]

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DEPARTMENT OF JUSTICE

28 CFR Part 36

[CRT Docket No. 106; AG Order No. 3181–2010]

RIN 1190–AA44

Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities

AGENCY: Department of Justice, Civil Rights Division.

ACTION: Final rule.

SUMMARY: This final rule revises the Department of Justice (Department) regulation that implements title III of the Americans with Disabilities Act

(ADA), relating to nondiscrimination on the basis of disability by public accommodations and in commercial facilities. The Department is issuing this final rule in order to adopt enforceable accessibility standards under the Americans with Disabilities Act of 1990 (ADA) that are consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board, and to update or amend certain provisions of the title III regulation so that they comport with the Department's legal and practical experiences in enforcing the ADA since 1991. Concurrently with the publication of the final rule for title III, the Department is publishing a final rule amending its ADA title II regulation, which covers nondiscrimination on the basis of disability in State and local government services.

DATES: *Effective Date:* March 15, 2011.

FOR FURTHER INFORMATION CONTACT: Janet L. Blizard, Deputy Chief, or Christina Galindo-Walsh, Attorney Advisor, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, at (202) 307–0663 (voice or TTY). This is not a toll-free number. Information may also be obtained from the Department's toll-free ADA Information Line at (800) 514–0301 (voice) or (800) 514–0383 (TTY).

This rule is also available in an accessible format on the ADA Home Page at *http://www.ada.gov.* You may obtain copies of this rule in large print or on computer disk by calling the ADA Information Line listed above.

SUPPLEMENTARY INFORMATION:

The Roles of the Access Board and the Department of Justice

The Access Board was established by section 502 of the Rehabilitation Act of 1973. 29 U.S.C. 792. The Board consists of 13 public members appointed by the President, the majority of whom must be individuals with disabilities, and the heads of 12 Federal departments and agencies specified by statute, including the heads of the Department of Justice and the Department of Transportation (DOT). Originally, the Access Board was established to develop and maintain accessibility guidelines for facilities designed, constructed, altered, or leased with Federal dollars under the Architectural Barriers Act of 1968 (ABA). 42 U.S.C. 4151 *et seq.* The passage of the ADA expanded the Access Board's responsibilities.

The ADA requires the Access Board to "issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of subchapters II and III of this chapter * * * to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities." 42 U.S.C. 12204. The ADA requires the Department to issue regulations that include enforceable accessibility standards applicable to facilities subject to title II or title III that are consistent with the "minimum guidelines" issued by the Access Board, 42 U.S.C. 12134(c), 12186(c), but vests in the Attorney General sole responsibility for the promulgation of those standards that fall within the Department's jurisdiction and enforcement of the regulations.

The ADA also requires the Department to develop regulations with respect to existing facilities subject to title II (Subtitle A) and title III. How and to what extent the Access Board's guidelines are used with respect to the barrier removal requirement applicable to existing facilities under title III of the ADA and to the provision of program accessibility under title II of the ADA are solely within the discretion of the Department.

Enactment of the ADA and Issuance of the 1991 Regulations

On July 26, 1990, President George H.W. Bush signed into law the ADA, a comprehensive civil rights law prohibiting discrimination on the basis of disability.[1] The ADA broadly protects the rights of individuals with disabilities in employment, access to State and local government services, places of public accommodation, transportation, and other important areas of American life. The ADA also requires newly designed and constructed or altered State and local government facilities, public accommodations, and commercial facilities to be readily accessible to and usable by individuals with disabilities. 42 U.S.C. 12101 *et seq.* Section 306(a) of the ADA directs the Secretary of Transportation to issue regulations for demand responsive or fixed route systems operated by private entities not primarily engaged in the business of transporting people (sections 302(b)(2)(B) and (C)) and for private entities that are primarily engaged in the business of transporting people (section 304). *See* 42 U.S.C. 12182(b), 12184, 12186(a). Section 306(b) directs the Attorney General to promulgate regulations to carry out the provisions of the rest of title III. 42 U.S.C. 12186(b).

Title II applies to State and local government entities, and, in Subtitle A, protects qualified individuals with disabilities from discrimination on the basis of disability in services, programs, and activities provided by State and local government entities. Title II extends the prohibition on discrimination established by section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794 (section 504), to all activities of State and local governments regardless of whether these entities receive Federal financial assistance. 42 U.S.C. 12131–65.

Title III, which this rule addresses, prohibits discrimination on the basis of disability in the activities of places of public accommodation (businesses that are generally open to the public and that fall into one of 12 categories listed in the ADA, such as restaurants, movie theaters, schools, day care facilities, recreation facilities, and doctors' offices) and requires newly constructed or altered places of public accommodation—as well as commercial facilities (privately owned, nonresidential facilities such as factories, warehouses, or office buildings)—to comply with the ADA Standards. 42 U.S.C. 12181–89.

On July 26, 1991, the Department issued rules implementing title II and title III, which are codified at 28 CFR part 35 (title II) and part 36 (title III). Appendix A of the 1991 title III regulation, which is republished as Appendix D to 28 CFR part 36, contains the ADA Standards for Accessible Design (1991 Standards), which were based upon the version of the Americans with Disabilities Act Accessibility Guidelines (1991 ADAAG) published by the Access Board on the same date. Under the Department's 1991 title III regulation, places of public accommodation and commercial facilities currently are required to comply with the 1991 Standards with respect to newly constructed or altered facilities.

The Access Board's publication of the 2004 ADA/ABA Guidelines was the culmination of a long-term effort to facilitate ADA compliance by eliminating, to the extent possible, inconsistencies among Federal accessibility requirements and between

[1] On September 25, 2008, President George W. Bush signed into law the Americans with Disabilities Amendments Act of 2008 (ADA Amendments Act), Public Law 110–325. The ADA Amendments Act amended the ADA definition of disability to clarify its coverage of persons with disabilities and to provide guidance on the application of the definition. This final rule does not contain regulatory language implementing the ADA Amendments Act. The Department intends to publish a supplemental rule to amend the regulatory definition of "disability" to implement the changes mandated by that law.

Federal accessibility requirements and State and local building codes. In support of this effort, the Department is amending its regulation implementing title III and adopting standards consistent with ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the 2004 ADA/ABA Guidelines. The Department is also amending its title II regulation, which prohibits discrimination on the basis of disability in State and local government services, concurrently with the publication of this rule in this issue of the **Federal Register**.

Development of the 2004 ADA/ABA Guidelines

In 1994, the Access Board began the process of updating the 1991 ADAAG by establishing an advisory committee composed of members of the design and construction industry, the building code community, and State and local government entities, as well as individuals with disabilities. In 1998, the Access Board added specific guidelines on State and local government facilities, 63 FR 2000 (Jan. 13, 1998), and building elements designed for use by children, 63 FR 2060 (Jan. 13, 1998). In 1999, based largely on the report and recommendations of the advisory committee, the Access Board issued a notice of proposed rulemaking (NPRM) to update and revise its ADA and ABA Accessibility Guidelines. *See* 64 FR 62248 (Nov. 16, 1999). In 2000, the Access Board added specific guidelines on play areas. *See* 65 FR 62498 (Oct. 18, 2000). The Access Board released an interim draft of its guidelines to the public on April 2, 2002, 67 FR 15509, in order to provide an opportunity for entities with model codes to consider amendments that would promote further harmonization. In September of 2002, the Access Board set forth specific guidelines on recreation facilities. 67 FR 56352 (Sept. 3, 2002).

By the date of its final publication on July 23, 2004, the 2004 ADA/ABA Guidelines had been the subject of extraordinary review and public participation. The Access Board received more than 2,500 comments from individuals with disabilities, affected industries, State and local governments, and others. The Access Board provided further opportunity for participation by holding public hearings.

The Department was involved extensively in the development of the 2004 ADA/ABA Guidelines. As a Federal member of the Access Board, the Attorney General's representative voted to approve the revised guidelines. ADA Chapter 1 and ADA Chapter 2 of the 2004 ADA/ABA Guidelines provide scoping requirements for facilities subject to the ADA; "scoping" is a term used in the 2004 ADA/ABA Guidelines to describe requirements that prescribe which elements and spaces—and, in some cases, how many—must comply with the technical specifications. ABA Chapter 1 and ABA Chapter 2 provide scoping requirements for facilities subject to the ABA (*i.e.,* facilities designed, built, altered, or leased with Federal funds). Chapters 3 through 10 of the 2004 ADA/ABA Guidelines provide uniform technical specifications for facilities subject to either the ADA or the ABA. This revised format is designed to eliminate unintended conflicts between the two sets of Federal accessibility standards and to minimize conflicts between the Federal regulations and the model codes that form the basis of many State and local building codes. For the purposes of this final rule, the Department will refer to ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the 2004 ADA/ABA Guidelines as the 2004 ADAAG.

These amendments to the 1991 ADAAG have not been adopted previously by the Department as ADA Standards. Through this rule, the Department is adopting revised ADA Standards consistent with the 2004 ADAAG, including all of the amendments to the 1991 ADAAG since 1998. For the purposes of this part, the Department's revised standards are entitled "The 2010 Standards for Accessible Design" and consist of the 2004 ADAAG and the requirements contained in subpart D of 28 CFR part 36. Because the Department has adopted the 2004 ADAAG as part of its title II and title III regulations, once the Department's final rules become effective, the 2004 ADAAG will have legal effect with respect to the Department's title II and title III regulations and will cease to be mere guidance for those areas regulated by the Department. In 2006, DOT adopted the 2004 ADAAG. With respect to those areas regulated by DOT, these guidelines, as adopted by DOT, have had legal effect since 2006.

Under this regulation, the Department of Justice covers passenger vessels operated by private entities not primarily engaged in the business of transporting people with respect to the provision of goods and services of a public accommodation on the vessel. For example, a vessel operator whose vessel departs from Point A, takes passengers on a recreational trip, and returns passengers to Point A without ever providing for disembarkation at a Point B (*e.g.,* a dinner or harbor cruise, a fishing charter) is a public accommodation operated by a private entity not primarily engaged in the business of transporting people. This regulation covers those aspects of the vessel's operation relating to the use and enjoyment of the public accommodation, including, for example, the boarding process, safety policies, accessible routes on the vessel, and the provision of effective communication. Persons with complaints or concerns about discrimination on the basis of disability by vessel operators who are private entities not primarily engaged in the business of transporting people, or questions about how this regulation applies to such operators and vessels, should contact the Department of Justice.

Vessels operated by private entities primarily engaged in the business of transporting people and that provide the goods and services of a public accommodation are covered by this regulation and the Department of Transportation's passenger vessel rule, 49 CFR part 39. A vessel operator whose vessel takes passengers from Point A to Point B (*e.g.,* a cruise ship that sails from Miami to one or more Caribbean islands, a private ferry boat between two points on either side of a river or bay, a water taxi between two points in an urban area) is most likely a private entity primarily engaged in the business of transporting people. Persons with questions about how this regulation applies to such operators and vessels may contact the Department of Justice or the Department of Transportation for guidance or further information. However, the Department of Justice has enforcement authority for all private entities under title III of the ADA, so individuals with complaints about noncompliance with part 39 should provide those complaints to the Department of Justice.

The provisions of this rule and 49 CFR part 39 are intended to be substantively consistent with one another. Consequently, in interpreting the application of this rule to vessel operators who are private entities not primarily engaged in the business of transporting people, the Department of Justice views the obligations of those vessel operators as being similar to those of private entities primarily engaged in the business of transporting people under the provisions of 49 CFR part 39.

The Department's Rulemaking History

The Department published an advance notice of proposed rulemaking (ANPRM) on September 30, 2004, 69 FR

58768, for two reasons: (1) To begin the process of adopting the 2004 ADAAG by soliciting public input on issues relating to the potential application of the Access Board's revisions once the Department adopts them as revised standards; and (2) to request background information that would assist the Department in preparing a regulatory analysis under the guidance provided in Office of Management and Budget (OMB) Circular A–4 sections D (Analytical Approaches) and E (Identifying and Measuring Benefits and Costs) (Sept. 17, 2003), available at *http://www.whitehouse.gov/OMB/circulars/a004/a-4.pdf* (last visited June 24, 2010). While underscoring that the Department, as a member of the Access Board, already had reviewed comments provided to the Access Board during its development of the 2004 ADAAG, the Department specifically requested public comment on the potential application of the 2004 ADAAG to existing facilities. The extent to which the 2004 ADAAG is used with respect to the barrier removal requirement applicable to existing facilities under title III (as well as with respect to the program access requirement in title II) is within the sole discretion of the Department. The ANPRM dealt with the Department's responsibilities under both title II and title III.

The public response to the ANPRM was substantial. The Department extended the comment deadline by four months at the public's request. 70 FR 2992 (Jan. 19, 2005). By the end of the extended comment period, the Department had received more than 900 comments covering a broad range of issues. Many of the commenters responded to questions posed specifically by the Department, including questions regarding the Department's application of the 2004 ADAAG once adopted by the Department and the Department's regulatory assessment of the costs and benefits of particular elements. Many other commenters addressed areas of desired regulation or of particular concern.

To enhance accessibility strides made since the enactment of the ADA, commenters asked the Department to focus on previously unregulated areas, such as ticketing in assembly areas; reservations for hotel rooms, rental cars, and boat slips; and captioning. They also asked for clarification on some issues in the 1991 regulations, such as the requirements regarding service animals. Other commenters dealt with specific requirements in the 2004 ADAAG or responded to questions regarding elements scoped for the first time in the 2004 ADAAG, including recreation facilities and play areas. Commenters also provided some information on how to assess the cost of elements in small facilities, office buildings, hotels and motels, assembly areas, hospitals and long-term care facilities, residential units, recreation facilities, and play areas. Still other commenters addressed the effective date of the proposed standards, the triggering event by which the effective date is calculated for new construction, and variations on a safe harbor that would excuse elements built in compliance with the 1991 Standards from compliance with the proposed standards.

After careful consideration of the public comments in response to the ANPRM, on June 17, 2008, the Department published an NPRM covering title III. 73 FR 34508. The Department also published an NPRM on that day covering title II. 73 FR 34466. The NPRMs addressed the issues raised in the public's comments to the ANPRM and sought additional comment, generally and in specific areas, such as the Department's adoption of the 2004 ADAAG, the Department's regulatory assessment of the costs and benefits of the rule, its updates and amendments of certain provisions of the existing title II and III regulations, and areas that were in need of additional clarification or specificity.

A public hearing was held on July 15, 2008, in Washington, DC. Forty-five individuals testified in person or by phone. The hearing was streamed live over the Internet. By the end of the 60-day comment period, the Department had received 4,435 comments addressing a broad range of issues, many of which were common to the title II and title III NPRMs, from representatives of businesses and industries, State and local government agencies, disability advocacy organizations, and private individuals.

The Department notes that this rulemaking was unusual in that much of the proposed regulatory text and many of the questions asked across titles II and III were the same. Consequently, many of the commenters did not provide separate sets of documents for the proposed title II and title III rules, and in many instances, the commenters did not specify which title was being commented upon. As a result, where comments could be read to apply to both titles II and III, the Department included them in the comments and responses for each final rule.

Most of the commenters responded to questions posed specifically by the Department, including what were the most appropriate definitions for terms such as "wheelchair," "mobility device," and "service animal"; how to quantify various benefits that are difficult to monetize; what requirements to adopt for ticketing and assembly areas; whether to adopt safe harbors for small businesses; and how best to regulate captioning. Some comments addressed specific requirements in the 2004 ADAAG or responded to questions regarding elements scoped for the first time in the 2004 ADAAG, including recreation facilities and play areas. Other comments responded to questions posed by the Department concerning certain specific requirements in the 2004 ADAAG.

Relationship to Other Laws

The Department of Justice regulation implementing title III, 28 CFR 36.103, provides the following:

(a) *Rule of interpretation.* Except as otherwise provided in this part, this part shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 791) or the regulations issued by Federal agencies pursuant to that title.

(b) *Section 504.* This part does not affect the obligations of a recipient of Federal financial assistance to comply with the requirements of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and regulations issued by Federal agencies implementing section 504.

(c) *Other laws.* This part does not invalidate or limit the remedies, rights, and procedures of any other Federal, State, or local laws (including State common law) that provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them.

These provisions remain unchanged by the final rule. The Department recognizes that public accommodations subject to title III of the ADA may also be subject to title I of the ADA, which prohibits discrimination on the basis of disability in employment; section 504 of the Rehabilitation Act of 1973 and other Federal statutes that prohibit discrimination on the basis of disability in the programs and activities of recipients of Federal financial assistance; and other Federal statutes such as the Air Carrier Access Act (ACAA), 49 U.S.C. 41705 *et seq.,* and the Fair Housing Act (FHAct), 42 U.S.C. 3601 *et seq.* Compliance with the Department's title II and title III regulations does not ensure compliance with other Federal statutes.

Public accommodations that are subject to the ADA as well as other Federal disability discrimination laws

must be aware of the requirements of all applicable laws and must comply with these laws and their implementing regulations. Although in many cases similar provisions of different statutes are interpreted to impose similar requirements, there are circumstances in which similar provisions are applied differently because of the nature of the covered entity or activity, or because of distinctions between the statutes. For example, emotional support animals that do not qualify as service animals under the Department's title III regulations may nevertheless qualify as permitted reasonable accommodations for persons with disabilities under the FHAct and the ACAA. *See, e.g., Overlook Mutual Homes, Inc.* v. *Spencer,* 666 F. Supp. 2d 850 (S.D. Ohio 2009). Public accommodations that operate housing facilities must ensure that they apply the reasonable accommodation requirements of the FHAct in determining whether to allow a particular animal needed by a person with a disability into housing and may not use the ADA definition as a justification for reducing their FHAct obligations. In addition, nothing in the ADA prevents a public accommodation subject to one statute from modifying its policies and providing greater access in order to assist individuals with disabilities in achieving access to entities subject to other Federal statutes. For example, a quick service restaurant at an airport is, as a public accommodation, subject to the title III requirements, not to the ACAA requirements. Conversely, an air carrier that flies in and out of the same airport is required to comply with the ACAA, but is not covered by title III of the ADA. If a particular animal is a service animal for purposes of the ACAA and is thus allowed on an airplane, but is not a service animal for purposes of the ADA, nothing in the ADA prohibits an airport restaurant from allowing a ticketed passenger with a disability who is traveling with a service animal that meets the ACAA's definition of a service animal to bring that animal into the facility even though under the ADA's definition of service animal the animal lawfully could be excluded.

Organization of This Rule

Throughout this rule, the original ADA Standards, which are republished as Appendix D to 28 CFR part 36, will be referred to as the "1991 Standards." The original title III regulation, codified at 28 CFR part 36 (2009), will be referred to as the "1991 regulation" or the "1991 title III regulation." ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the 2004 ADA/ABA Guidelines, 36 CFR part 1191, app. B and D (2009), will be referred to as the "2004 ADAAG." The Department's Notice of Proposed Rulemaking, 73 FR 34508 (June 17, 2008), will be referred to as the "NPRM." As noted above, the 2004 ADAAG, taken together with the requirements contained in subpart D of 28 CFR part 36 (New Construction and Alterations) of the final rule, will be referred to as the "2010 Standards." The amendments made to the 1991 title III regulation and the adoption of the 2004 ADAAG, taken together, will be referred to as the "final rule."

In performing the required periodic review of its existing regulation, the Department has reviewed the title III regulation section by section, and, as a result, has made several clarifications and amendments in this rule. Appendix A of the final rule, "Guidance on Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and Commercial Facilities," codified as Appendix A to 28 CFR part 36, provides the Department's response to comments and its explanations of the changes to the regulation. The section entitled "Section-by-Section Analysis and Response to Comments" in Appendix A provides a detailed discussion of the changes to the title III regulation. The Section-by-Section Analysis follows the order of the 1991 title III regulation, except that regulatory sections that remain unchanged are not referenced. The discussion within each section explains the changes and the reasoning behind them, as well as the Department's response to related public comments. Subject areas that deal with more than one section of the regulation include references to the related sections, where appropriate. The Section-by-Section Analysis also discusses many of the questions asked by the Department for specific public response. The section of Appendix A entitled "Other Issues" discusses public comment on several issues of concern to the Department that were the subject of questions that are not specifically addressed in the Section-by-Section Analysis.

The Department's description of the 2010 Standards, as well as a discussion of the public comments on specific sections of the 2004 ADAAG, is found in Appendix B of this final rule, "Analysis and Commentary on the 2010 ADA Standards for Accessible Design," codified as Appendix B to 28 CFR part 36.

The provisions of this rule generally take effect six months from its publication in the **Federal Register**. The Department has determined, however, that compliance with the requirements related to new construction and alterations and reservations at a place of lodging shall not be required until 18 months from the publication date of this rule. These exceptions are set forth in §§ 36.406(a) and 36.302(e)(3), respectively, and are discussed in greater detail in Appendix A. *See* discussions in Appendix A entitled "Section 36.406 Standards for New Construction and Alterations" and "Section 36.302(e) Hotel Reservations."

This final rule only addresses issues that were identified in the NPRM as subjects the Department intended to regulate through this rulemaking proceeding. Because the Department indicated in the NPRM that it did not intend to regulate certain areas, including equipment and furniture, accessible golf cars, and movie captioning and video description, as part of this rulemaking proceeding, the Department believes it would be appropriate to solicit more public comment about these areas prior to making them the subject of a rulemaking. The Department intends to engage in additional rulemaking in the near future addressing accessibility in these areas and others, including next generation 9–1–1 and accessibility of Web sites operated by covered public entities and public accommodations.

ADDITIONAL INFORMATION:

Regulatory Process Matters (SBREFA, Regulatory Flexibility Act, and Executive Orders)

The Department must provide two types of assessments as part of its final rule: An analysis of the costs and benefits of adopting the changes contained in this rule, and a periodic review of its existing regulations to consider their impact on small entities, including small businesses, small nonprofit organizations, and small governmental jurisdictions. *See* E.O. 12866, 58 FR 51735, 3 CFR, 1994 Comp., p. 638, as amended; Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 610(a); OMB Circular A–4, available at *http://www.whitehouse.gov/OMB/circulars/a004/a-4.pdf* (last visited June 24, 2010); E.O. 13272, 67 FR 53461, 3 CFR, 2003 Comp., p. 247.

In the NPRM, the Department kept open the possibility that, if warranted by public comments received on an issue raised by the 2004 ADAAG or by the results of the Department's Initial Regulatory Impact Analysis (Initial RIA), available at *http://www.ada.gov/NPRM2008/ria.htm,* showing that the

likely costs of making a particular feature or facility accessible were disproportionate to the benefits (including both monetized and non-monetized benefits) to persons with disabilities, the Attorney General, as a member of the Access Board, could return the issue to the Access Board for further consideration. After careful consideration, the Department has determined that it is unnecessary to return any issues to the Access Board for additional consideration.

Executive Order 12866

This rule has been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866. The Department has evaluated its existing regulations for title II and title III section by section, and many of the provisions in the final rule for both titles reflect its efforts to mitigate any negative effects on small entities. A Final Regulatory Impact Analysis (Final RIA or RIA) was prepared by the Department's contractor, HDR|HLB Decision Economics, Inc. (HDR). In accordance with Executive Order 12866, as amended, and OMB Circular A–4, the Department has reviewed and considered the Final RIA and has accepted the results of this analysis as its assessment of the benefits and costs of the final rules.

Executive Order 12866 refers explicitly not only to monetizable costs and benefits but also to "distributive impacts" and "equity," *see* E.O. 12866, section 1(a), and it is important to recognize that the ADA is intended to provide important benefits that are distributional and equitable in character. The ADA states, "[i]t is the purpose of this [Act] (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; [and] (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities[.]" 42 U.S.C. 12101(b). Many of the benefits of this rule stem from the provision of such standards, which will promote inclusion, reduce stigma and potential embarrassment, and combat isolation, segregation, and second-class citizenship of individuals with disabilities. Some of these benefits are, in the words of Executive Order 12866, "difficult to quantify, but nevertheless essential to consider." E.O. 12866, section 1(a). The Department has considered such benefits here.

Final Regulatory Impact Analysis

The Final RIA embodies a comprehensive benefit-cost analysis of the final rules for both title II and title III and assesses the incremental benefits and costs of the 2010 Standards relative to a primary baseline scenario (1991 Standards). In addition, the Department conducted additional research and analyses for requirements having the highest negative net present values under the primary baseline scenario. This approach was taken because, while the 1991 Standards are the only uniform set of accessibility standards that apply to public accommodations, commercial facilities, and State and local government facilities nationwide, it is also understood that many State and local jurisdictions have already adopted IBC/ANSI model code provisions that mirror those in the 2004 ADAAG. The assessments based on this approach assume that covered entities currently implementing codes that mirror the 2004 ADAAG will not need to modify their code requirements once the rules are finalized. They also assume that, even without the final rules, the current level of compliance would be unchanged. The Final RIA contains specific information, including data in chart form, detailing which States have already adopted the accessibility standards for this subset of six requirements. The Department believes that the estimates resulting from this approach represent a reasonable upper and lower measure of the likely effects these requirements will have that the Department was able to quantify and monetize.

The Final RIA estimates the benefits and costs for all new (referred to as "supplemental") requirements and revised requirements across all types of newly constructed and existing facilities. The Final RIA also incorporates a sophisticated risk analysis process that quantifies the inherent uncertainties in estimating costs and benefits and then assesses (through computer simulations) the relative impact of these factors when varied simultaneously. A copy of the Final RIA will be made available online for public review on the Department's ADA Home Page (*http://www.ada.gov*).

From an economic perspective (as specified in OMB Circular A–B4), the results of the Final RIA demonstrate that the Department's final rules increase social resources and thus represent a public good because monetized benefits exceed monetized costs—that is, the regulations have a positive net present value (NPV). Indeed, under every scenario assessed in the Final RIA, the final rules have a positive NPV. The Final RIA's first scenario examines the incremental impact of the final rules using the "main" set of assumptions (*i.e.,* assuming a primary baseline (1991 Standards), that the safe harbor applies, and that for title III entities barrier removal is readily achievable for 50 percent of elements subject to supplemental requirements).

EXPECTED IMPACT OF THE RULES [2]
[In billions]

Discount rate	Expected NPV	Total expected PV (benefits)	Total expected PV (costs)
3%	$40.4	$66.2	$25.8
7	9.3	22.0	12.8

Under this set of assumptions, the final rules have an expected NPV of $9.3 billion (7 percent discount rate) and $40.4 billion (3 percent discount rate). *See* Final RIA, table ES–1 & figure ES–2.

Water Closet Clearances

The Department gave careful consideration to the costs and benefits of its adoption of the standards relating to water closet clearances in single-user toilet rooms. The primary effect of the Department's proposed final rules governing water closet clearances in single-user toilet rooms with in-swinging and out-swinging doors is to allow sufficient room for "side" or "parallel" methods of transferring from a wheelchair to a toilet. Under the current 1991 Standards, the requisite clearance space in single-user toilet rooms between and around the toilet and the lavatory does not permit these methods of transfer. Side or parallel transfers are used by large numbers of persons who use wheelchairs and are regularly taught in rehabilitation and occupational therapy. Currently, persons who use side or parallel transfer methods from their wheelchairs are faced with a stark choice at establishments with single-user toilet rooms—*i.e.,* patronize the establishment but run the risk of needing assistance when using the restroom, travel with someone who would be able to provide assistance in toileting, or forgo the visit entirely. The revised water closet clearance regulations would make single-user toilet rooms accessible to all persons

[2] The analysis assumes these regulations will be in force for 15 years. Incremental costs and benefits are calculated for all construction, alterations, and barrier removal that is expected to occur during these 15 years. The analysis also assumes that any new or revised ADA rules enacted 15 years from now will include a safe harbor provision. Thus, any facilities constructed in year 14 of the final rules are assumed to continue to generate benefits to users, and to incur any operating or replacement costs for the life of these buildings, which is assumed to be 40 years.

who use wheelchairs, not just those with the physical strength, balance, and dexterity and the training to use a front-transfer method. Single-user toilet rooms are located in a wide variety of public and private facilities, including restaurants, fast-food establishments, schools, retail stores, parks, sports stadiums, and hospitals. Final promulgation of these requirements might thus, for example, enable a person who uses a side or parallel transfer method to use the restroom (or use the restroom independently) at his or her local coffee shop for the first time.

Because of the complex nature of its cost-benefit analysis, the Department is providing "plain language" descriptions of the benefits calculations for the two revised requirements with the highest estimated total costs: Water closet clearance in single-user toilet rooms with out-swinging doors (RIA Req. #28) (section 604.3 of the 2010 Standards) and water closet clearance in single-user toilet rooms with in-swinging doors (RIA Req. #32) (sections 604.3 and 603.2.3 Exception 2 of the 2010 Standards). Since many of the concepts and calculations in the Final RIA are highly technical, it is hoped that, by providing "lay" descriptions of how benefits are monetized for an illustrative set of requirements, the Final RIA will be more transparent and afford readers a more complete understanding of the benefits model generally. Because of the widespread adoption of the water closet clearance standards in existing State and local building codes, the following calculations use the IBC/ANSI baseline.

General description of monetized benefits for water closet clearance in single-user toilet rooms—out-swinging doors (Req. #28). In order to assess monetized benefits for the requirement covering water closet clearances in single-user toilet rooms with out-swinging doors, a determination needed to be made concerning the population of users with disabilities who would likely benefit from this revised standard. Based on input received from a panel of experts jointly convened by HDR and the Department to discuss benefits-related estimates and assumptions used in the RIA model, it was assumed that accessibility changes brought about by this requirement would benefit persons with any type of ambulatory (*i.e.,* mobility-related) disability, such as persons who use wheelchairs, walkers, or braces. Recent census figures estimate that about 11.9 percent of Americans ages 15 and older have an ambulatory disability, or about 35 million people. This expert panel also estimated that single-user toilet rooms with out-swinging doors would be used slightly less than once every other visit to a facility with such toilet rooms covered by the final rules (or, viewed another way, about once every two hours spent at a covered facility assumed to have one or more single-user toilet rooms with out-swinging doors) by an individual with an ambulatory disability. The expert panel further estimated that, for such individuals, the revised requirement would result in an average time savings of about five and a half minutes when using the restroom. This time savings is due to the revised water closet clearance standard, which permits, among other things, greater flexibility in terms of access to the toilet by parallel or side transfer, thereby perhaps reducing the wait for another person to assist with toileting and the need to twist or struggle to access the toilet independently. Based on average hourly wage rates compiled by the U.S. Department of Labor, the time savings for Req. #28 is valued at just under $10 per hour.

For public and private facilities covered by the final rules, it is estimated that there are currently about 11 million single-user toilet rooms with out-swinging doors. The majority of these types of single-user toilet rooms, nearly 7 million, are assumed to be located at "Indoor Service Establishments," a broad facility group that encompasses various types of indoor retail stores such as bakeries, grocery stores, clothing stores, and hardware stores. Based on construction industry data, it was estimated that approximately 3 percent of existing single-user toilet rooms with out-swinging doors would be altered each year, and that the number of newly constructed facilities with these types of toilet rooms would increase at the rate of about 1 percent each year. However, due to the widespread adoption at the State and local level of model code provisions that mirror Req. #28, it is further understood that about half of all existing facilities assumed to have single-user toilet rooms with out-swinging doors already are covered by State or local building codes that require equivalent water closet clearances. Due to the general element-by-element safe harbor provision in the final rules, no unaltered single-user toilet rooms that comply with the current 1991 Standards will be required to retrofit to meet the revised clearance requirements in the final rules.

With respect to new construction, it is assumed that each single-user toilet room with an out-swinging door will last the life of the building, about 40 years. For alterations, the amount of time such a toilet room will be used depends upon the remaining life of the building (*i.e.,* a period of time between 1 and 39 years).

Summing up monetized benefits to users with disabilities across all types of public and private facilities covered by the final rules, and assuming 46 percent of covered facilities nationwide are located in jurisdictions that have adopted the relevant equivalent IBC/ANSI model code provisions, it is expected that the revised requirement for water closet clearance in single-user toilet rooms with out-swinging doors will result in net benefits of approximately $900 million over the life of these regulations.

General description of monetized benefits for water closet clearance in single-user toilet rooms—in-swinging doors (Req. # 32). For the water closet clearance in single-user toilet rooms with the in-swinging door requirement (Req. #32), the expert panel determined that the primary beneficiaries would be persons who use wheelchairs. As compared to single-user toilet rooms with out-swinging doors, those with in-swinging doors tend to be larger (in terms of square footage) in order to accommodate clearance for the in-swinging door and, thus, are already likely to have adequate clear floor space for persons with disabilities who use other types of mobility aids such as walkers and crutches.

The expert benefits panel estimated that single-user toilet rooms with in-swinging doors are used less frequently on average—about once every 20 visits to a facility with such a toilet room by a person who uses a wheelchair—than their counterpart toilet rooms with out-swinging doors. This panel also determined that, on average, each user would realize a time savings of about 9 minutes as a result of the enhanced clearances required by this revised standard.

The RIA estimates that there are about 4 million single-user toilet rooms with in-swinging doors in existing facilities. About half of the single-user toilet rooms with in-swinging doors are assumed to be located in single-level stores, and about a quarter of them are assumed to be located in restaurants. Based on construction industry data, it was estimated that approximately 3 percent of existing single-user toilet rooms with in-swinging doors would be altered each year, and that the number of newly constructed facilities with these types of toilet rooms would increase at the rate of about 1 percent each year. However, due to the widespread adoption at the State and local level of model code provisions that mirror Req. #32, it is further understood that slightly more than 70 percent of all

existing facilities assumed to have single-user toilet rooms with in-swinging doors already are covered by State or local building codes that require equivalent water closet clearances. Due to the general element-by-element safe harbor provision in the final rules, no unaltered single-user toilet rooms that comply with the current 1991 Standards will be required to retrofit to meet the revised clearance requirements in the final rules.

Similar to the assumptions for Req. #28, it is assumed that newly constructed single-user toilet rooms with in-swinging doors will last the life of the building, about 40 years. For alterations, the amount of time such a toilet room will be used depends upon the remaining life of the building (*i.e.,* a period of time between 1 and 39 years). Over this time period, the total estimated value of benefits to users of water closets with in-swinging doors from the time they will save and decreased discomfort they will experience is nearly $12 million.

Additional benefits of water closet clearance standards. The standards requiring sufficient space in single-user toilet rooms for a wheelchair user to effect a side or parallel transfer are among the most costly (in monetary terms) of the new provisions in the Access Board's guidelines that the Department adopts in this rule—but also, the Department believes, one of the most beneficial in non-monetary terms. Although the monetized costs of these requirements substantially exceed the monetized benefits, the additional benefits that persons with disabilities will derive from greater safety, enhanced independence, and the avoidance of stigma and humiliation—benefits that the Department's economic model could not put in monetary terms—are, in the Department's experience and considered judgment, likely to be quite high. Wheelchair users, including veterans returning from our Nation's wars with disabilities, are taught to transfer onto toilets from the side. Side transfers are the safest, most efficient, and most independence-promoting way for wheelchair users to get onto the toilet. The opportunity to effect a side transfer will often obviate the need for a wheelchair user or individual with another type of mobility impairment to obtain the assistance of another person to engage in what is, for most people, among the most private of activities. Executive Order 12866 refers explicitly not only to monetizable costs and benefits but also to "distributive impacts" and "equity," *see* E.O. 12866, section 1(a), and it is important to recognize that the ADA is intended to provide important benefits that are distributional and equitable in character. These water closet clearance provisions will have non-monetized benefits that promote equal access and equal opportunity for individuals with disabilities, and will further the ADA's purpose of providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1).

The Department's calculations indicated that, in fact, people with the relevant disabilities would have to place only a very small monetary value on these quite substantial benefits for the costs and benefits of these water closet clearance standards to break even. To make these calculations, the Department separated out toilet rooms with out-swinging doors from those with in-swinging doors, because the costs and benefits of the respective water closet clearance requirements are significantly different. The Department estimates that, assuming 46 percent of covered facilities nationwide are located in jurisdictions that have adopted the relevant equivalent IBC/ANSI model code provisions, the costs of the requirement as applied to toilet rooms with out-swinging doors will exceed the monetized benefits by $454 million, an annualized net cost of approximately $32.6 million. But a large number of people with disabilities will realize benefits of independence, safety, and avoided stigma and humiliation as a result of the requirement's application in this context. Based on the estimates of its expert panel and its own experience, the Department believes that both wheelchair users and people with a variety of other mobility disabilities will benefit. The Department estimates that people with the relevant disabilities will use a newly accessible single-user toilet room with an out-swinging door approximately 677 million times per year. Dividing the $32.6 million annual cost by the 677 million annual uses, the Department concludes that for the costs and benefits to break even in this context, people with the relevant disabilities will have to value safety, independence, and the avoidance of stigma and humiliation at just under 5 cents per visit. The Department believes, based on its experience and informed judgment, that 5 cents substantially understates the value people with the relevant disabilities would place on these benefits in this context.

There are substantially fewer single-user toilet rooms with in-swinging doors, and substantially fewer people with disabilities will benefit from making those rooms accessible. While both wheelchair users and individuals with other ambulatory disabilities will benefit from the additional space in a room with an out-swinging door, the Department believes, based on the estimates of its expert panel and its own experience, that wheelchair users likely will be the primary beneficiaries of the in-swinging door requirement. The Department estimates that people with the relevant disabilities will use a newly accessible single-user toilet room with an in-swinging door approximately 8.7 million times per year. Moreover, the alteration costs to make a single-user toilet room with an in-swinging door accessible are substantially higher (because of the space taken up by the door) than the equivalent costs of making a room with an out-swinging door accessible. Thus, the Department calculates that, assuming 72 percent of covered facilities nationwide are located in jurisdictions that have adopted the relevant equivalent IBC/ANSI model code provisions, the costs of applying the toilet room accessibility standard to rooms with in-swinging doors will exceed the monetized benefits of doing so by $266.3 million over the life of the regulations, or approximately $19.14 million per year. Dividing the $19.14 million annual cost by the 8.7 million annual uses, the Department concludes that for the costs and benefits to break even in this context, people with the relevant disabilities will have to value safety, independence, and the avoidance of stigma and humiliation at approximately $2.20 per visit. The Department believes, based on its experience and informed judgment, that this figure approximates, and probably understates, the value wheelchair users place on safety, independence, and the avoidance of stigma and humiliation in this context.

Alternate Scenarios

Another scenario in the Final RIA explores the incremental impact of varying the assumptions concerning the percentage of existing elements subject to supplemental requirements for which barrier removal would be readily achievable. Readily achievable barrier removal rates are modeled at 0 percent, 50 percent, and 100 percent levels. The results of this scenario show that the expected NPV is positive for each readily achievable barrier removal rate and that varying this assumed rate has little impact on expected NPV. *See* Final RIA, figure ES–3.

A third set of analyses in the Final RIA demonstrates the impact of using alternate baselines based on model codes instead of the primary baseline.

The IBC model codes, which have been widely adopted by State and local jurisdictions around the country, are significant because many of the requirements in the final rules mirror accessibility provisions in the IBC model codes (or standards incorporated therein by reference, such as ANSI A117.1). The actual economic impact of the Department's final rules is, therefore, tempered by the fact that many jurisdictions nationwide have already adopted and are enforcing portions of the final rules—indeed, this was one of the goals underlying the Access Board's efforts to harmonize the 2004 ADAAG Standards with the model codes. However, capturing the economic impact of this reality poses a difficult modeling challenge due to the variety of methods by which States and localities have adopted the IBC/ANSI model codes (*e.g.,* in whole, in part, and with or without amendments), as well as the lack of a national "facility census" establishing the location, type, and age of existing ADA-covered facilities.

As a result, in the first set of alternate IBC baseline analyses, the Final RIA assumes that all of the three IBC model codes—IBC 2000, IBC 2003, and IBC 2006—have been fully adopted by all jurisdictions and apply to all facilities nationwide. As with the primary baseline scenarios examined in the Final RIA, use of these three alternate IBC baselines results in positive expected NPVs in all cases. *See* Final RIA, figure ES–4. These results also indicate that IBC 2000 and IBC 2006 respectively have the highest and lowest expected NPVs. These results are due to changes in the make-up of the set of requirements that is included in each alternative baseline.

Additionally, a second, more limited alternate baseline analysis in the Final RIA uses a State-specific and requirement-specific alternate IBC/ANSI baseline in order to demonstrate the likely actual incremental impact of an illustrative subset of 20 requirements under current conditions nationwide. For this analysis, research was conducted on a subset of 20 requirements in the final rules that have negative net present values under the primary baseline and readily identifiable IBC/ANSI counterparts to determine the extent to which they each respectively have been adopted at the State or local level. With respect to facilities, the population of adopting jurisdictions was used as a proxy for facility location. In other words, it was assumed that the number of ADA-covered facilities respectively compliant with these 20 requirements was equal to the percentage of the United States population (based on statistics from the Census Bureau) currently residing in those States or local jurisdictions that have adopted the IBC/ANSI counterparts to these requirements. The results of this more limited analysis, using State-specific and requirement-specific alternate IBC/ANSI baselines for these 20 requirements, demonstrate that the widespread adoption of IBC model codes by States and localities significantly lessens the financial impact of these specific requirements. Indeed, the Final RIA estimates that, if the NPVs for these 20 requirements resulting from the requirement-specific alternate IBC/ANSI baseline are substituted for their respective results under the primary baseline, the overall NPV for the final rules increases from $9.2 billion to $12.0 billion. *See* Final RIA, section 6.2.2 & table 10.

Benefits Not Monetized in the Formal Analysis

Finally, the RIA recognizes that additional benefits are likely to result from the new standards. Many of these benefits are more difficult to quantify. Among the potential benefits that have been discussed by researchers and advocates are reduced administrative costs due to harmonized guidelines, increased business opportunities, increased social development, and improved health benefits. For example, the final rules will substantially increase accessibility at newly scoped facilities such as recreation facilities and judicial facilities, which previously have been very difficult for persons with disabilities to access. Areas where the Department believes entities may incur benefits that are not monetized in the formal analysis include, but may not be limited to, the following:

Use benefits accruing to persons with disabilities. The final rules should improve the overall sense of well-being of persons with disabilities, who will know that public entities and places of public accommodation are generally accessible, and who will have improved individual experiences. Some of the most frequently cited qualitative benefits of increased access are the increase in one's personal sense of dignity that arises from increased access and the decrease in possibly humiliating incidents due to accessibility barriers. Struggling to join classmates on a stage, to use a bathroom with too little clearance, or to enter a swimming pool all negatively affect a person's sense of independence and can lead to humiliating accidents, derisive comments, or embarrassment. These humiliations, together with feelings of being stigmatized as different or inferior from being relegated to use other, less comfortable or pleasant elements of a facility (such as a bathroom instead of a kitchen sink for rinsing a coffee mug at work), all have a negative effect on persons with disabilities.

Use benefits accruing to persons without disabilities. Improved accessibility can affect more than just the rule's target population; persons without disabilities may also benefit from many of the requirements. Even though the requirements were not designed to benefit persons without disabilities, any time savings or easier access to a facility experienced by persons without disabilities are also benefits that should properly be attributed to that change in accessibility. Curb cuts in sidewalks make life easier for those using wheeled suitcases or pushing a baby stroller. For people with a lot of luggage or a need to change clothes, the larger bathroom stalls can be highly valued. A ramp into a pool can allow a child (or adult) with a fear of water to ease into that pool. All are examples of "unintended" benefits of the rule. And ideally, all should be part of the calculus of the benefits to society of the rule.

Social benefits. Evidence supports the notion that children with and without disabilities benefit in their social development from interaction with one another. Therefore, there will likely be social development benefits generated by an increase in accessible play areas. However, these benefits are nearly impossible to quantify for several reasons. First, there is no guarantee that accessibility will generate play opportunities between children with and without disabilities. Second, there may be substantial overlap between interactions at accessible play areas and interactions at other facilities, such as schools and religious facilities. Third, it is not certain what the unit of measurement for social development should be.

Non-use benefits. There are additional, indirect benefits to society that arise from improved accessibility. For instance, resource savings may arise from reduced social service agency outlays when people are able to access centralized points of service delivery rather than receiving home-based care. Home-based and other social services may include home health care visits and welfare benefits. Third-party employment effects can arise when enhanced accessibility results in increasing rates of consumption by disabled and non-disabled populations, which in turn results in reduced unemployment.

Two additional forms of benefits are discussed less often, let alone quantified: Option value and existence value. Option value is the value that people with and without disabilities derive from the option of using accessible facilities at some point in the future. As with insurance, people derive benefit from the knowledge that the option to use the accessible facility exists, even if it ultimately goes unused. Simply because an individual is a non-user of accessible elements today does not mean that he or she will remain so tomorrow. In any given year, there is some probability that an individual will develop a disability (either temporary or permanent) that will necessitate use of these features. For example, the 2000 Census found that 41.9 percent of adults 65 years and older identified themselves as having a disability. Census Bureau figures, moreover, project that the number of people 65 years and older will more than double between 2000 and 2030—from 35 million to 71.5 million. Therefore, even individuals who have no direct use for accessibility features today get a direct benefit from the knowledge of their existence should such individuals need them in the future.

Existence value is the benefit that individuals get from the plain existence of a good, service or resource—in this case, accessibility. It can also be described as the value that people both with and without disabilities derive from the guarantees of equal treatment and non-discrimination that are accorded through the provision of accessible facilities. In other words, people value living in a country that affords protections to individuals with disabilities, whether or not they themselves are directly or indirectly affected. Unlike use benefits and option value, existence value does not require an individual ever to use the resource or plan on using the resource in the future. There are numerous reasons why individuals might value accessibility even if they do not require it now and do not anticipate needing it in the future.

Costs Not Monetized in the Formal Analysis

The Department also recognizes that in addition to benefits that cannot reasonably be quantified or monetized, there may be negative consequences and costs that fall into this category as well. The absence of a quantitative assessment of such costs in the formal regulatory analysis is not meant to minimize their importance to affected entities; rather, it reflects the inherent difficulty in estimating those costs. Areas where the Department believes entities may incur costs that are not monetized in the formal analysis include, but may not be limited to, the following:

Costs from deferring or forgoing alterations. Entities covered by the final rules may choose to delay otherwise desired alterations to their facilities due to the increased incremental costs imposed by compliance with the new requirements. This may lead to facility deterioration and decrease in the value of such facilities. In extreme cases, the costs of complying with the new requirements may lead some entities to opt to not build certain facilities at all. For example, the Department estimates that the incremental costs of building a new wading pool associated with the final rules will increase by about $142,500 on average. Some facilities may opt to not build such pools to avoid incurring this increased cost.

Loss of productive space while modifying an existing facility. During complex alterations, such as where moving walls or plumbing systems will be necessary to comply with the final rules, productive space may be unavailable until the alterations are complete. For example, a hotel altering its bathrooms to comply with the final rules will be unable to allow guests to occupy these rooms while construction activities are underway, and thus the hotel may forgo revenue from these rooms during this time. While the amount of time necessary to perform alterations varies significantly, the costs associated with unproductive space could be high in certain cases, especially if space is already limited or if an entity or facility is located in an area where real estate values are particularly high (*e.g.,* New York or San Francisco).

Expert fees. Another type of cost to entities that is not monetized in the formal analysis is legal fees to determine what, if anything, a facility needs to do in order to comply with the new rules or to respond to lawsuits. Several commenters indicated that entities will incur increased legal costs because the requirements are changing for the first time since 1991. Since litigation risk could increase, entities could spend more on legal fees than in the past. Likewise, covered entities may face incremental costs when undertaking alterations because their engineers, architects, or other consultants may also need to consider what modifications are necessary to comply with the new requirements. The Department has not quantified the incremental costs of the services of these kinds of experts.

Reduction in facility value and losses to individuals without disabilities due to the new accessibility requirements. It is possible that some changes made by entities to their facilities in order to comply with the new requirements may result in fewer individuals without disabilities using such facilities (because of decreased enjoyment) and may create a disadvantage for individuals without disabilities, even though the change might increase accessibility for individuals with disabilities. For example, the new requirements for wading pools might decrease the value of the pool to the entity that owns it due to fewer individuals using it (because the new requirements for a sloped entry might make the pool too shallow). Similarly, several commenters from the miniature golf industry expressed concern that it would be difficult to comply with the regulations for accessible holes without significantly degrading the experience for other users. Finally, with respect to costs to individuals who do not have disabilities, a very tall person, for example, may be inconvenienced by having to reach further for a lowered light switch.

Section 610 Review

The Department also is required to conduct a periodic regulatory review pursuant to section 610 of the RFA, as amended by the SBREFA.

The review requires agencies to consider five factors: (1) The continued need for the rule; (2) the nature of complaints or comments received concerning the rule from the public; (3) the complexity of the rule; (4) the extent to which the rule overlaps, duplicates, or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule. 5 U.S.C. 610(b). Based on these factors, the agency is required to determine whether to continue the rule without change or to amend or rescind the rule, to minimize any significant economic impact of the rule on a substantial number of small entities. *See id.* 610(a).

In developing the 2010 Standards, the Department reviewed the 1991 Standards section by section, and, as a result, has made several clarifications and amendments in both the title II and title III implementing regulations. The changes reflect the Department's analysis and review of complaints or comments from the public, as well as changes in technology. Many of the

amendments aim to clarify and simplify the obligations of covered entities. As discussed in greater detail above, one significant goal of the development of the 2004 ADAAG was to eliminate duplication or overlap in Federal accessibility guidelines, as well as to harmonize the Federal guidelines with model codes. The Department also has worked to create harmony where appropriate between the requirements of titles II and III. Finally, while the regulation is required by statute and there is a continued need for it as a whole, the Department proposes several modifications that are intended to reduce its effects on small entities.

The Department has consulted with the Small Business Administration's Office of Advocacy about this process. The Office of Advocacy has advised that although the process followed by the Department was ancillary to the proposed adoption of revised ADA Standards, the steps taken to solicit public input and to respond to public concerns are functionally equivalent to the process required to complete a section 610 review. Therefore, this rulemaking fulfills the Department's obligations under the RFA.

Final Regulatory Flexibility Analysis

This final rule also has been reviewed by the Small Business Administration's Office of Advocacy (Advocacy) in accordance with Executive Order 13272, 67 FR 53461, 3 CFR, 2003 Comp., p. 247. Chapter Seven of the Final RIA demonstrates that the final rule will not have a significant economic impact on a substantial number of small entities. The Department has also conducted a final regulatory flexibility analysis (FRFA) as a component of this rulemaking. Collectively, the ANPRM, NPRM, Initial RIA, Final RIA, and 2010 Standards include all of the elements of a FRFA required by the RFA. *See* 5 U.S.C. 604(a)(1)–(5).

Section 604(a) lists the specific requirements for a FRFA. The Department has addressed these RFA requirements throughout the ANPRM, NPRM, the 2010 Standards, and the RIA. In summary, the Department has satisfied its FRFA obligations under section 604(a) by providing the following:

1. *Succinct summaries of the need for, and objectives of, the final rule.* The Department is issuing this final rule in order to comply with its obligations under both the ADA and the SBREFA. The Department is also updating or amending certain provisions of the existing title III regulation so that they are consistent with the title II regulations and comport with the Department's legal and practical experiences in enforcing the ADA.

The ADA requires the Department to adopt enforceable accessibility standards under the ADA that are consistent with the Access Board's minimum accessibility guidelines and requirements. Accordingly, this rule adopts ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the 2004 ADA/ABA Guidelines as part of the 2010 Standards, which will give the guidelines legal effect with respect to the Department's title II and title III regulations.

Under the SBREFA, the Department is required to perform a periodic review of its 1991 rule because the rule may have a significant economic impact on a substantial number of small entities. The SBREFA also requires the Department to make a regulatory assessment of the costs and benefits of any significant regulatory action. *See* preamble sections of the final rules for titles II and III entitled "Summary"; Department of Justice Advanced Notice of Proposed Rulemaking, 69 FR 58768, 58768B70, (Sept. 30, 2004) (outlining the regulatory history, goals, and rationale underlying the Department's proposal to revise its regulations implementing titles II and III of the ADA); and Department of Justice Notice of Proposed Rulemaking, 73 FR 34508, 34508B14 (June 17, 2008) (outlining the regulatory history and rationale underlying the Department's proposal to revise its regulations implementing titles II and III of the ADA).

2. *Summaries of significant issues raised by public comments in response to the Department's initial regulatory flexibility analysis (IRFA) and discussions of regulatory revisions made as a result of such comments.* The majority of the comments received by the Department addressing its IRFA set forth in the title III NPRM were submitted by the Advocacy. Advocacy acknowledged that the Department took into account the comments and concerns of small businesses; however, Advocacy remained concerned about certain items in the Department's NPRM and requested clarification or additional guidance on certain items.

General Safe Harbor. Advocacy expressed support for the Department's proposal to allow an element-by-element safe harbor for elements that now comply with the 1991 Standards and encouraged the Department to include specific technical assistance in the Small Business Compliance Guide that the Department is required to publish pursuant to section 212 of the SBREFA, 5 U.S.C. 610 *et seq.* Advocacy requested that technical assistance outlining which standards are subject to the safe harbor be included in the Department's guidance. The Department has provided a list of the new requirements in the 2010 Standards that are not eligible for the safe harbor in § 36.304(d)(2)(iii)(A)–(L) of the final rule and plans to include additional information about the application of the safe harbor in the Department's Small Business Compliance Guide. Advocacy also requested that guidance regarding the two effective dates for regulations also be provided, and the Department plans to include such guidance in its Small Business Compliance Guide.

Small Business Safe Harbor. Advocacy expressed disappointment that the Department did not include a small business safe harbor in the final rule. In the NPRM, the Department proposed to include a small business safe harbor. Advocacy conceptually supported this safe harbor but had concerns regarding its application. Commenters from both the disability community and the business community uniformly, and quite adamantly, opposed the Department's proposal. Some business commenters suggested alternative safe harbors, but there was no common thread among their suggestions that would enable the Department to craft a proposal that would draw support from the affected communities.

Advocacy recommended that the Department continue to study how the proposed small business safe harbor might be made workable in future rulemakings, and recommended that the Department also seek other alternatives that minimize the economic impact of the ADA rulemakings in the future. The Department is mindful of its obligations under the SBREFA and will be sensitive to the need to mitigate costs for small businesses in any future rulemaking; however, based on the information currently available, the Department has declined to commit to a specific regulatory approach in the final rule.

Indirect Costs. Advocacy and other commenters representing business interests expressed concern that businesses would incur substantial indirect costs under the final rule for accessibility consultants, legal counsel, training, and the development of new policies and procedures. The Department believes that such "indirect costs," even assuming they would occur as described by these commenters, are not properly attributed to the Department's final rule implementing the ADA.

The vast majority of the new requirements are incremental changes subject to a safe harbor. All businesses

currently in compliance with the 1991 Standards will neither need to undertake further retrofits nor require the services of a consultant to tell them so. If, on the other hand, elements at an existing facility are *not* currently in compliance with the 1991 Standards, then the cost of making such a determination and bringing these elements into compliance are not properly attributed to the final rule, but to lack of compliance with the 1991 Standards.

For the limited number of requirements in the final rule that are supplemental, the Department believes that covered entities simply need to determine whether they have an element covered by a supplemental requirement (*e.g.,* a swimming pool) and then conduct any necessary barrier removal work either in-house or by contacting a local contractor. Determining whether such an element exists is expected to take only a minimal amount of staff time. Nevertheless, Chapter 5 of the Final RIA has a high-end estimate of the additional management costs of such evaluation (from 1 to 8 hours of staff time).

The Department also anticipates that businesses will incur minimal costs for accessibility consultants to ensure compliance with the new requirements for New Construction and Alterations in the final rule. Both the 2004 ADAAG and the proposed requirements have been made public for some time and are already being incorporated into design plans by architects and builders. Further, in adopting the final rule, the Department has sought to harmonize, to the greatest extent possible, the ADA Standards with model codes that have been adopted on a widespread basis by State and local jurisdictions across the country. Accordingly, many of the requirements in the final rule are already incorporated into building codes nationwide. Additionally, it is assumed to be part of the regular course of business—and thereby incorporated into standard professional services or construction contracts—for architects and contractors to keep abreast of changes in applicable Federal, State, and local laws and building codes. Given these considerations, the Department has determined that the additional costs, if any, for architectural or contractor services that arise out of the final rule should be minimal.

Some commenters stated that the final rule would require them to develop new policies or manuals to retrain employees on the revised ADA standards. However, it is the Department's view that because the revised and supplemental requirements address architectural issues and features, the final rule would require minimal, if any, changes to the overall policies and procedures of covered entities.

Finally, commenters representing business interests expressed the view that the final rule would cause businesses to incur significant legal costs in order to defend ADA lawsuits. However, regulatory impact analyses are not an appropriate forum for assessing the cost covered entities may bear, or the repercussions they may face, for failing to comply (or allegedly failing to comply) with current law. *See* Final RIA, Ch. 3, section 3.1.4, "Other Management Transition Costs"; Ch. 5, "Updates to the Regulatory Impact Analysis"; and table 15, "Impact of NPV of Estimated Managerial Costs for Supplemental Requirements at All Facilities."

3. *Estimates of the number and type of small entities to which the final rule will apply.* The Department estimates that the final rule will apply to approximately three million small entities or facilities covered by title III. *See* Final RIA, Ch. 7, "Small Business Impact Analysis," table 17, and app. 5, "Small Business Data"; *see also* 73 FR 36964, 36996–37009 (June 30, 2008) (estimating the number of small entities the Department believes may be impacted by the NPRM and calculating the likely incremental economic impact of the rule on small facilities/entities versus "typical" (*i.e.,* average-sized) facilities/entities).

4. *A description of the projected reporting, record-keeping, and other compliance requirements of the final rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.* The final rule imposes no new record-keeping or reporting requirements. *See* preamble section entitled "Paperwork Reduction Act." Small entities may incur costs as a result of complying with the final rules. These costs are detailed in the Final RIA, Chapter 7, "Small Business Impact Analysis" and accompanying Appendix 5, "Small Business Data."

5. *Descriptions of the steps taken by the Department to minimize any significant economic impact on small entities consistent with the stated objectives of the ADA, including the reasons for selecting the alternatives adopted in the final rule and for rejecting other significant alternatives.* From the outset of this rulemaking, the Department has been mindful of small entities and has taken numerous steps to minimize the impact of the final rule on small businesses. Several of these steps are summarized below.

As an initial matter, the Department—as a voting member of the Access Board—was extensively involved in the development of the 2004 ADAAG. These guidelines, which are incorporated into the 2010 Standards, reflect a conscious effort to mitigate any significant economic impact on small businesses in several respects. First, one of the express goals of the 2004 ADAAG is harmonization of Federal accessibility guidelines with industry standards and model codes that often form the basis of State and local building codes, thereby minimizing the impact of these guidelines on all covered entities, but especially small businesses. Second, the 2004 ADAAG is the product of a 10-year rulemaking effort in which a host of private and public entities, including small business groups, worked cooperatively to develop accessibility guidelines that achieved an appropriate balance between accessibility and cost. For example, as originally recommended by the Access Board's Recreation Access Advisory Committee, all holes on a miniature golf course would be required to be accessible except for sloped surfaces where the ball could not come to rest. *See, e.g.,* "ADA Accessibility Guidelines for Buildings and Facilities—Recreation Facilities and Outdoor Developed Areas," Access Board Advance Notice of Proposed Rulemaking, 59 FR 48542 (Sept. 21, 1994). Miniature golf trade groups and facility operators, who are nearly all small businesses, expressed significant concern that such requirements would be prohibitively expensive, would require additional space, and might fundamentally alter the nature of their courses. *See, e.g.,* "ADA Accessibility Guidelines for Buildings and Facilities—Recreation Facilities," Access Board Notice of Proposed Rulemaking, 64 FR 37326 (July 9, 1999). In consideration of such concerns and after holding informational meetings with miniature golf representatives and persons with disabilities, the Access Board significantly revised the final miniature golf guidelines. The final guidelines not only reduced significantly the number of holes required to be accessible to 50 percent of all holes (with one break in the sequence of consecutive holes permitted), but also added an exemption for carpets used on playing surfaces, modified ramp landing slope and size requirements, and reduced the space required for start of play areas. *See, e.g.,* Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings

and Facilities—Recreation Facilities Final Rule, 36 CFR parts 1190 and 1191.

The Department also published an ANPRM to solicit public input on the adoption of the 2004 ADAAG as the revised Federal accessibility standards implementing titles II and III of the ADA. Among other things, the ANPRM specifically invited comment from small entities regarding the proposed rule's potential economic impact and suggested regulatory alternatives to ameliorate any such impact. *See* "Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities," Department of Justice Advance Notice of Proposed Rulemaking, 69 FR 58768, 58778–79 (Sept. 30, 2004). The Department received over 900 comments, and small business interests figured prominently. *See* "Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities," Department of Justice Notice of Proposed Rulemaking, 73 FR 34508, 34511, 34550 (June 17, 2008).

Subsequently, when the Department published its NPRM in June 2008, several regulatory proposals were included to address concerns raised by the small business community in ANPRM comments. First, to mitigate costs to existing facilities, the Department proposed an element-by-element safe harbor that would exempt elements in compliance with applicable technical and scoping requirements in the 1991 Standards from any retrofit obligations under the revised title III rule. *Id.* at 34514–15, 34532–33. While this proposed safe harbor applied to title III covered entities irrespective of size, it was small businesses that especially stood to benefit since, according to comments from small business advocates, small businesses are more likely to operate in older buildings and facilities. The title III NPRM also offered for public comment a novel safe harbor provision specifically designed to address small business advocates' request for clearer guidance on the readily achievable barrier removal requirement. This proposal provided that qualified small businesses would be deemed to have satisfied their readily achievable barrier removal obligations for a given year if, during that tax year, they had spent at least 1 percent of their respective gross revenues undertaking measures in compliance with title III barrier removal requirements. *Id.* at 34538–39. Lastly, the NPRM sought public input on the inclusion of reduced scoping provisions for certain types of small existing recreation facilities (*i.e.,* swimming pools, play areas, and saunas). *Id.* at 34515, 34534–37.

During the NPRM comment period, the Department engaged in considerable public outreach to the small business community. A public hearing was held in Washington, D.C., during which nearly 50 persons, including several small business owners, testified in person or by phone. *See Transcript of the Public Hearing on Notices of Proposed Rulemaking* (July 15, 2008), available at *www.ada.gov/NPRM2008/public_hearing_transcript.htm.* This hearing was also streamed live over the Internet. By the end of the 60-day comment period, the Department had also received nearly 4,500 public comments on the title III NPRM, including a significant number of comments reflecting small businesses' perspectives on a wide range of regulatory issues.

In addition to soliciting input from small entities through the formal process for public comment, the Department also targeted the small business community with less formal regulatory discussions, including a Small Business Roundtable convened by the Office of Advocacy and held at the offices of the Small Business Administration in Washington, D.C., and an informational question-and-answer session concerning the titles II and III NPRMs at the Department of Justice in which business representatives attended in-person and by telephone. These outreach efforts provided the small business community with information on the NPRM proposals being considered by the Department and gave small businesses the opportunity to ask questions of the Department and provide feedback.

As a result of the feedback provided by representatives of small business interests on the title III NPRM, the Department was able to assess the impact of various alternatives on small businesses before adopting its final rule and took steps to minimize any significant impact on small entities. Most notably, the final rule retains the element-by-element safe harbor for which the small business community voiced strong support. *See* Appendix A discussion of removal of barriers (§ 36.304). The Department believes that this element-by-element safe harbor provision will go a long way toward mitigating the economic impact of the final rule on existing facilities owned or operated by small businesses. Indeed, as demonstrated in the Final RIA, the element-by-element safe harbor will provide substantial relief to small businesses that is estimated at $ 7.5 billion over the expected life of the final rule.

Additional regulatory measures mitigating the economic impact of the final rule on title III-covered entities (including small businesses) include deletion of the proposed requirement for captioning of safety and emergency information on scoreboards at sporting venues, retention of the proposed path of travel safe harbor, extension of the compliance date of the 2010 Standards as applied to new construction and alterations from 6 months to 18 months after publication of the final rule, and, in response to public comments, modification of the triggering event for application of the 2010 Standards to new construction and alterations from a unitary approach (commencement of physical construction) to a two-pronged approach (date of last application for building permit or commencement of physical construction) depending on whether a building permit is or is not required for the type of construction at issue by State or local building authorities. *See* Appendix A discussions of captioning at sporting venues (§ 36.303), alterations and path of travel (§ 36.403), and compliance dates and triggering events for new construction and alterations (§ 36.406).

Two sets of proposed alternative measures that would have potentially provided some cost savings to small businesses—the safe harbor for qualified small businesses and reduced scoping for certain existing recreation facilities—were not adopted by the Department in the final rule. As discussed in more depth previously, the safe harbor for qualified small businesses was omitted from the final rule because the general safe harbor already provides significant relief for small businesses located in existing facilities, the proposed safe harbor provision lacked support from the small business community and no consensus emerged from business commenters concerning feasible bases for the final regulatory provision, and commenters noted practical considerations that would potentially make some small businesses incur greater expense or administrative burden. *See* Appendix A discussion of the safe harbor for qualified small businesses (§ 36.304).

The Department also omitted the proposals to reduce scoping for certain existing recreation facilities in the final rule. While these proposals were not specific to small entities, they nonetheless might have mitigated the impact of the final rule for some small businesses that owned or operated existing facilities at which these recreational elements were located. *See*

Appendix A discussion of reduced scoping for play areas and other recreation facilities (§ 36.304). The Department gave careful consideration to how best to insulate small businesses from overly burdensome barrier removal costs under the 2010 Standards for existing small play areas, swimming pools, and saunas, while still providing accessible and integrated recreation facilities that are of great importance to persons with disabilities. The Department concluded that the existing readily achievable barrier removal standard, rather than specific exemptions for these types of existing facilities, is the most efficacious method by which to protect small businesses.

Once the final rule is promulgated, small businesses will also have a wealth of documents to assist them in complying with the 2010 Standards. For example, accompanying the final rule in the **Federal Register** is the Department's "Analysis and Commentary on the 2010 ADA Standards for Accessible Design," which provides a plain language description of the revised scoping and technical requirements in these Standards and provides illustrative figures. The Department also expects to publish guidance specifically tailored to small businesses in the form of a small business compliance guide, as well as to publish technical assistance materials of general interest to all covered entities following promulgation of the final rule. Additionally, the Access Board has published a number of guides that discuss and illustrate application of the 2010 Standards to play areas and various types of recreation facilities.

Executive Order 13132: Federalism

Executive Order 13132, 64 FR 43255, 3 CFR, 2000 Comp., p. 206, requires executive branch agencies to consider whether a rule will have federalism implications. That is, the rulemaking agency must determine whether the rule is likely to have substantial direct effects on State and local governments, a substantial direct effect on the relationship between the Federal government and the States and localities, or a substantial direct effect on the distribution of power and responsibilities among the different levels of government. If an agency believes that a rule is likely to have federalism implications, it must consult with State and local elected officials about how to minimize or eliminate the effects.

Title III of the ADA covers public accommodations and commercial facilities. These facilities are generally subject to regulation by different levels of government, including Federal, State, and local governments. The ADA and the 2010 Standards set minimum civil rights protections for individuals with disabilities that in turn may affect the implementation of State and local laws, particularly building codes. The 2010 Standards address federalism concerns and mitigate federalism implications, particularly the provisions that streamline the administrative process for State and local governments seeking ADA code certification under title III.

As a member of the Access Board, the Department was privy to substantial feedback from State and local governments throughout the development of the Board's 2004 guidelines. Before those guidelines were finalized as the 2004 ADA/ABA Guidelines, they addressed and minimized federalism concerns expressed by State and local governments during the development process. Because the Department adopted ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the 2004 ADA/ABA Guidelines as part of the 2010 Standards, the steps taken in the 2004 ADA/ABA Guidelines to address federalism concerns are reflected in the 2010 Standards.

The Department also solicited and received input from public entities in the September 2004 ANPRM and the June 2008 NPRM. Through the ANPRM and NPRM processes, the Department solicited comments from elected State and local officials and their representative national organizations about the potential federalism implications. The Department received comments addressing whether the ANPRM and NPRM directly affected State and local governments, the relationship between the Federal government and the States, and the distribution of power and responsibilities among the various levels of government. The rule preempts State laws affecting entities subject to the ADA only to the extent that those laws conflict with the requirements of the ADA, as set forth in the rule.

National Technology Transfer and Advancement Act of 1995

The National Technology Transfer and Advancement Act of 1995 (NTTAA) directs that, as a general matter, all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, which are private, generally non-profit organizations that develop technical standards or specifications using well-defined procedures that require openness, balanced participation among affected interests and groups, fairness and due process, and an opportunity for appeal, as a means to carry out policy objectives or activities. Public Law 104–113 section 12(d)(1) (15 U.S.C. 272 Note). In addition, the NTTAA directs agencies to consult with voluntary, private sector, consensus standards bodies and requires that agencies participate with such bodies in the development of technical standards when such participation is in the public interest and is compatible with agency and departmental missions, authorities, priorities, and budget resources. *Id.* section 12(d)(1). The Department, as a member of the Access Board, was an active participant in the lengthy process of developing the 2004 ADAAG, on which the 2010 Standards are based. As part of this update, the Board has made its guidelines more consistent with model building codes, such as the IBC, and industry standards. It coordinated extensively with model code groups and standard-setting bodies throughout the process so that differences could be reconciled. As a result, an historic level of harmonization has been achieved that has brought about improvements to the guidelines, as well as to counterpart provisions in the IBC and key industry standards, including those for accessible facilities issued through the American National Standards Institute.

Plain Language Instructions

The Department makes every effort to promote clarity and transparency in its rulemaking. In any regulation, there is a tension between drafting language that is simple and straightforward and drafting language that gives full effect to issues of legal interpretation. The Department operates a toll-free ADA Information Line (800) 514–0301 (voice); (800) 514–0383 (TTY) that the public is welcome to call at any time to obtain assistance in understanding anything in this rule. If any commenter has suggestions for how the regulation could be written more clearly, please contact Janet L. Blizard, Deputy Chief, Disability Rights Section, whose contact information is provided in the introductory section of this rule, entitled **FOR FURTHER INFORMATION CONTACT.**

Paperwork Reduction Act

The Paperwork Reduction Act of 1980 (PRA) requires agencies to clear forms and recordkeeping requirements with OMB before they can be introduced. 44 U.S.C. 3501 *et seq.* This rule does not contain any paperwork or recordkeeping requirements and does not require clearance under the PRA.

Unfunded Mandates Reform Act

Section 4(2) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1503(2), excludes from coverage under that Act any proposed or final Federal regulation that "establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability." Accordingly, this rulemaking is not subject to the provisions of the Unfunded Mandates Reform Act.

List of Subjects for 28 CFR Part 36

Administrative practice and procedure, Buildings and facilities, Business and industry, Civil rights, Individuals with disabilities, Penalties, Reporting and recordkeeping requirements.

■ By the authority vested in me as Attorney General by law, including 28 U.S.C. 509 and 510, 5 U.S.C. 301, and section 306 of the Americans with Disabilities Act of 1990, Public Law 101–336 (42 U.S.C. 12186), and for the reasons set forth in Appendix A to 28 CFR part 36, chapter I of title 28 of the Code of Federal Regulations is amended as follows:

PART 36—NONDISCRIMINATION ON THE BASIS OF DISABILITY BY PUBLIC ACCOMMODATIONS AND IN COMMERCIAL FACILITIES

Subpart A—General

■ 1. The authority citation for 28 CFR part 36 is revised to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12186(b).

■ 2. Amend § 36.104 by adding the following definitions of *1991 Standards, 2004 ADAAG, 2010 Standards, direct threat, existing facility, housing at a place of education, other power-driven mobility device, qualified reader, video remote interpreting (VRI) service,* and *wheelchair* in alphabetical order and revising the definitions of *place of public accommodation, qualified interpreter,* and *service animal* to read as follows:

§ 36.104 Definitions.

1991 Standards means requirements set forth in the ADA Standards for Accessible Design, originally published on July 26, 1991, and republished as Appendix D to this part.

2004 ADAAG means the requirements set forth in appendices B and D to 36 CFR part 1191 (2009).

2010 Standards means the 2010 ADA Standards for Accessible Design, which consist of the 2004 ADAAG and the requirements contained in subpart D of this part.

* * * * *

Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services, as provided in § 36.208.

* * * * *

Existing facility means a facility in existence on any given date, without regard to whether the facility may also be considered newly constructed or altered under this part.

* * * * *

Housing at a place of education means housing operated by or on behalf of an elementary, secondary, undergraduate, or postgraduate school, or other place of education, including dormitories, suites, apartments, or other places of residence.

* * * * *

Other power-driven mobility device means any mobility device powered by batteries, fuel, or other engines—whether or not designed primarily for use by individuals with mobility disabilities—that is used by individuals with mobility disabilities for the purpose of locomotion, including golf cars, electronic personal assistance mobility devices (EPAMDs), such as the Segway® PT, or any mobility device designed to operate in areas without defined pedestrian routes, but that is not a wheelchair within the meaning of this section. This definition does not apply to Federal wilderness areas; wheelchairs in such areas are defined in section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2).

* * * * *

Place of public accommodation means a facility operated by a private entity whose operations affect commerce and fall within at least one of the following categories—

(1) Place of lodging, except for an establishment located within a facility that contains not more than five rooms for rent or hire and that actually is occupied by the proprietor of the establishment as the residence of the proprietor. For purposes of this part, a facility is a "place of lodging" if it is—

(i) An inn, hotel, or motel; or

(ii) A facility that—

(A) Provides guest rooms for sleeping for stays that primarily are short-term in nature (generally 30 days or less) where the occupant does not have the right to return to a specific room or unit after the conclusion of his or her stay; and

(B) Provides guest rooms under conditions and with amenities similar to a hotel, motel, or inn, including the following—

(*1*) On- or off-site management and reservations service;

(*2*) Rooms available on a walk-up or call-in basis;

(*3*) Availability of housekeeping or linen service; and

(*4*) Acceptance of reservations for a guest room type without guaranteeing a particular unit or room until check-in, and without a prior lease or security deposit.

* * * * *

Qualified interpreter means an interpreter who, via a video remote interpreting (VRI) service or an on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators.

* * * * *

Qualified reader means a person who is able to read effectively, accurately, and impartially using any necessary specialized vocabulary.

* * * * *

Service animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the handler's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.

* * * * *

Video remote interpreting (VRI) service means an interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection that delivers high-quality video images as provided in § 36.303(f).

* * * * *

Wheelchair means a manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor or of both indoor and outdoor locomotion. This definition does not apply to Federal wilderness areas; wheelchairs in such areas are defined in section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2).

Subpart B—General Requirements

■ 3. Amend § 36.208 by removing paragraph (b) and redesignating paragraph (c) as paragraph (b) and by revising redesignated paragraph (b) to read as follows:

§ 36.208 Direct threat.

* * * * *

(b) In determining whether an individual poses a direct threat to the health or safety of others, a public accommodation must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: The nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

■ 4. Amend § 36.211 by adding paragraph (c) to read as follows:

§ 36.211 Maintenance of accessible features.

* * * * *

(c) If the 2010 Standards reduce the technical requirements or the number of required accessible elements below the number required by the 1991 Standards, the technical requirements or the number of accessible elements in a facility subject to this part may be reduced in accordance with the requirements of the 2010 Standards.

Subpart C—Specific Requirements

■ 5. Amend § 36.302 as follows:

■ a. Revise paragraph (c)(2); and

■ b. Add paragraphs (c)(3) through (c)(9) and paragraphs (e) and (f) to read as follows:

§ 36.302 Modifications in policies, practices, or procedures.

(c) * * *

(2) *Exceptions.* A public accommodation may ask an individual with a disability to remove a service animal from the premises if:

(i) The animal is out of control and the animal's handler does not take effective action to control it; or

(ii) The animal is not housebroken.

(3) *If an animal is properly excluded.* If a public accommodation properly excludes a service animal under § 36.302(c)(2), it shall give the individual with a disability the opportunity to obtain goods, services, and accommodations without having the service animal on the premises.

(4) *Animal under handler's control.* A service animal shall be under the control of its handler. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (*e.g.,* voice control, signals, or other effective means).

(5) *Care or supervision.* A public accommodation is not responsible for the care or supervision of a service animal.

(6) *Inquiries.* A public accommodation shall not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal. A public accommodation may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A public accommodation shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. Generally, a public accommodation may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (*e.g.,* the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).

(7) *Access to areas of a public accommodation.* Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a place of public accommodation where members of the public, program participants, clients, customers, patrons, or invitees, as relevant, are allowed to go.

(8) *Surcharges.* A public accommodation shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets. If a public accommodation normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal.

(9) *Miniature horses.* (i) A public accommodation shall make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability.

(ii) *Assessment factors.* In determining whether reasonable modifications in policies, practices, or procedures can be made to allow a miniature horse into a specific facility, a public accommodation shall consider—

(A) The type, size, and weight of the miniature horse and whether the facility can accommodate these features;

(B) Whether the handler has sufficient control of the miniature horse;

(C) Whether the miniature horse is housebroken; and

(D) Whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation.

(iii) *Other requirements.* Sections 36.302(c)(3) through (c)(8), which apply to service animals, shall also apply to miniature horses.

* * * * *

(e)(1) *Reservations made by places of lodging.* A public accommodation that owns, leases (or leases to), or operates a place of lodging shall, with respect to reservations made by telephone, in-person, or through a third party—

(i) Modify its policies, practices, or procedures to ensure that individuals with disabilities can make reservations for accessible guest rooms during the same hours and in the same manner as individuals who do not need accessible rooms;

(ii) Identify and describe accessible features in the hotels and guest rooms offered through its reservations service in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs;

(iii) Ensure that accessible guest rooms are held for use by individuals with disabilities until all other guest rooms of that type have been rented and the accessible room requested is the only remaining room of that type;

(iv) Reserve, upon request, accessible guest rooms or specific types of guest rooms and ensure that the guest rooms requested are blocked and removed from all reservations systems; and

(v) Guarantee that the specific accessible guest room reserved through its reservations service is held for the reserving customer, regardless of whether a specific room is held in response to reservations made by others.

(2) *Exception.* The requirements in paragraphs (iii), (iv), and (v) of this section do not apply to reservations for individual guest rooms or other units not owned or substantially controlled by the entity that owns, leases, or operates the overall facility.

(3) *Compliance date.* The requirements in this section will apply to reservations made on or after March 15, 2012.

(f) *Ticketing.* (1)(i) For the purposes of this section, "accessible seating" is defined as wheelchair spaces and companion seats that comply with sections 221 and 802 of the 2010 Standards along with any other seats required to be offered for sale to the individual with a disability pursuant to paragraph (4) of this section.

(ii) *Ticket sales.* A public accommodation that sells tickets for a single event or series of events shall modify its policies, practices, or procedures to ensure that individuals with disabilities have an equal opportunity to purchase tickets for accessible seating—

(A) During the same hours;

(B) During the same stages of ticket sales, including, but not limited to, pre-sales, promotions, lotteries, wait-lists, and general sales;

(C) Through the same methods of distribution;

(D) In the same types and numbers of ticketing sales outlets, including telephone service, in-person ticket sales at the facility, or third-party ticketing services, as other patrons; and

(E) Under the same terms and conditions as other tickets sold for the same event or series of events.

(2) *Identification of available accessible seating.* A public accommodation that sells or distributes tickets for a single event or series of events shall, upon inquiry—

(i) Inform individuals with disabilities, their companions, and third parties purchasing tickets for accessible seating on behalf of individuals with disabilities of the locations of all unsold or otherwise available accessible seating for any ticketed event or events at the facility;

(ii) Identify and describe the features of available accessible seating in enough detail to reasonably permit an individual with a disability to assess independently whether a given accessible seating location meets his or her accessibility needs; and

(iii) Provide materials, such as seating maps, plans, brochures, pricing charts, or other information, that identify accessible seating and information relevant thereto with the same text or visual representations as other seats, if such materials are provided to the general public.

(3) *Ticket prices.* The price of tickets for accessible seating for a single event or series of events shall not be set higher than the price for other tickets in the same seating section for the same event or series of events. Tickets for accessible seating must be made available at all price levels for every event or series of events. If tickets for accessible seating at a particular price level cannot be provided because barrier removal in an existing facility is not readily achievable, then the percentage of tickets for accessible seating that should have been available at that price level but for the barriers (determined by the ratio of the total number of tickets at that price level to the total number of tickets in the assembly area) shall be offered for purchase, at that price level, in a nearby or similar accessible location.

(4) *Purchasing multiple tickets.* (i) *General.* For each ticket for a wheelchair space purchased by an individual with a disability or a third-party purchasing such a ticket at his or her request, a public accommodation shall make available for purchase three additional tickets for seats in the same row that are contiguous with the wheelchair space, provided that at the time of purchase there are three such seats available. A public accommodation is not required to provide more than three contiguous seats for each wheelchair space. Such seats may include wheelchair spaces.

(ii) *Insufficient additional contiguous seats available.* If patrons are allowed to purchase at least four tickets, and there are fewer than three such additional contiguous seat tickets available for purchase, a public accommodation shall offer the next highest number of such seat tickets available for purchase and shall make up the difference by offering tickets for sale for seats that are as close as possible to the accessible seats.

(iii) *Sales limited to fewer than four tickets.* If a public accommodation limits sales of tickets to fewer than four seats per patron, then the public accommodation is only obligated to offer as many seats to patrons with disabilities, including the ticket for the wheelchair space, as it would offer to patrons without disabilities.

(iv) *Maximum number of tickets patrons may purchase exceeds four.* If patrons are allowed to purchase more than four tickets, a public accommodation shall allow patrons with disabilities to purchase up to the same number of tickets, including the ticket for the wheelchair space.

(v) *Group sales.* If a group includes one or more individuals who need to use accessible seating because of a mobility disability or because their disability requires the use of the accessible features that are provided in accessible seating, the group shall be placed in a seating area with accessible seating so that, if possible, the group can sit together. If it is necessary to divide the group, it should be divided so that the individuals in the group who use wheelchairs are not isolated from their group.

(5) *Hold and release of tickets for accessible seating.* (i) *Tickets for accessible seating may be released for sale in certain limited circumstances.* A public accommodation may release unsold tickets for accessible seating for sale to individuals without disabilities for their own use for a single event or series of events only under the following circumstances—

(A) When all non-accessible tickets (excluding luxury boxes, club boxes, or suites) have been sold;

(B) When all non-accessible tickets in a designated seating area have been sold and the tickets for accessible seating are being released in the same designated area; or

(C) When all non-accessible tickets in a designated price category have been sold and the tickets for accessible seating are being released within the same designated price category.

(ii) *No requirement to release accessible tickets.* Nothing in this paragraph requires a facility to release tickets for accessible seating to individuals without disabilities for their own use.

(iii) *Release of series-of-events tickets on a series-of-events basis.* (A) *Series-of-events tickets sell-out when no ownership rights are attached.* When series-of-events tickets are sold out and a public accommodation releases and sells accessible seating to individuals without disabilities for a series of events, the public accommodation shall establish a process that prevents the automatic reassignment of the accessible

seating to such ticket holders for future seasons, future years, or future series, so that individuals with disabilities who require the features of accessible seating and who become newly eligible to purchase tickets when these series-of-events tickets are available for purchase have an opportunity to do so.

(B) *Series-of-events tickets when ownership rights are attached.* When series-of-events tickets with an ownership right in accessible seating areas are forfeited or otherwise returned to a public accommodation, the public accommodation shall make reasonable modifications in its policies, practices, or procedures to afford individuals with mobility disabilities or individuals with disabilities that require the features of accessible seating an opportunity to purchase such tickets in accessible seating areas.

(6) *Ticket transfer.* Individuals with disabilities who hold tickets for accessible seating shall be permitted to transfer tickets to third parties under the same terms and conditions and to the same extent as other spectators holding the same type of tickets, whether they are for a single event or series of events.

(7) *Secondary ticket market.* (i) A public accommodation shall modify its policies, practices, or procedures to ensure that an individual with a disability may use a ticket acquired in the secondary ticket market under the same terms and conditions as other individuals who hold a ticket acquired in the secondary ticket market for the same event or series of events.

(ii) If an individual with a disability acquires a ticket or series of tickets to an inaccessible seat through the secondary market, a public accommodation shall make reasonable modifications to its policies, practices, or procedures to allow the individual to exchange his ticket for one to an accessible seat in a comparable location if accessible seating is vacant at the time the individual presents the ticket to the public accommodation.

(8) *Prevention of fraud in purchase of tickets for accessible seating.* A public accommodation may not require proof of disability, including, for example, a doctor's note, before selling tickets for accessible seating.

(i) *Single-event tickets.* For the sale of single-event tickets, it is permissible to inquire whether the individual purchasing the tickets for accessible seating has a mobility disability or a disability that requires the use of the accessible features that are provided in accessible seating, or is purchasing the tickets for an individual who has a mobility disability or a disability that requires the use of the accessible features that are provided in the accessible seating.

(ii) *Series-of-events tickets.* For series-of-events tickets, it is permissible to ask the individual purchasing the tickets for accessible seating to attest in writing that the accessible seating is for a person who has a mobility disability or a disability that requires the use of the accessible features that are provided in the accessible seating.

(iii) *Investigation of fraud.* A public accommodation may investigate the potential misuse of accessible seating where there is good cause to believe that such seating has been purchased fraudulently.

■ 6. Amend § 36.303 as follows:

■ a. Revise paragraphs (b)(1), (b)(2), (c), and (d);

■ b. Redesignate paragraph (f) as paragraph (g); and

■ c. Add paragraph (f) to read as follows:

§ 36.303 Auxiliary aids and services.

* * * * *

(b) * * *

(1) Qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

(2) Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

* * * * *

(c) *Effective communication.*

(1) A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities. This includes an obligation to provide effective communication to companions who are individuals with disabilities.

(i) For purposes of this section, "companion" means a family member, friend, or associate of an individual seeking access to, or participating in, the goods, services, facilities, privileges, advantages, or accommodations of a public accommodation, who, along with such individual, is an appropriate person with whom the public accommodation should communicate.

(ii) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. A public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

(2) A public accommodation shall not require an individual with a disability to bring another individual to interpret for him or her.

(3) A public accommodation shall not rely on an adult accompanying an individual with a disability to interpret or facilitate communication, except—

(i) In an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available; or

(ii) Where the individual with a disability specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.

(4) A public accommodation shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.

(d) *Telecommunications.* (1) When a public accommodation uses an automated-attendant system, including, but not limited to, voicemail and messaging, or an interactive voice

response system, for receiving and directing incoming telephone calls, that system must provide effective real-time communication with individuals using auxiliary aids and services, including text telephones (TTYs) and all forms of FCC-approved telecommunications relay systems, including Internet-based relay systems.

(2) A public accommodation that offers a customer, client, patient, or participant the opportunity to make outgoing telephone calls using the public accommodation's equipment on more than an incidental convenience basis shall make available accessible public telephones, TTYs, or other telecommunications products and systems for use by an individual who is deaf or hard of hearing, or has a speech impairment.

(3) A public accommodation may use relay services in place of direct telephone communication for receiving or making telephone calls incident to its operations.

(4) A public accommodation shall respond to telephone calls from a telecommunications relay service established under title IV of the ADA in the same manner that it responds to other telephone calls.

(5) This part does not require a public accommodation to use a TTY for receiving or making telephone calls incident to its operations.

* * * * *

(f) *Video remote interpreting (VRI) services.* A public accommodation that chooses to provide qualified interpreters via VRI service shall ensure that it provides—

(1) Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;

(2) A sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers, and the participating individual's face, arms, hands, and fingers, regardless of his or her body position;

(3) A clear, audible transmission of voices; and

(4) Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI.

* * * * *

■ 7. Amend § 36.304 as follows:

■ a. Revise paragraph (d)(1);

■ b. Redesignate paragraph (d)(2) as (d)(3);

■ c. Amend newly redesignated paragraph (d)(3) by removing the reference to "(d)(1)" and adding "(d)(1) and (d)(2)" in its place;

■ d. Add paragraphs (d)(2) and (g)(4); and

■ e. Add an Appendix to paragraph (d) to read as follows:

§ 36.304 Removal of barriers.

* * * * *

(d) * * * (1) Except as provided in paragraph (d)(3) of this section, measures taken to comply with the barrier removal requirements of this section shall comply with the applicable requirements for alterations in § 36.402 and §§ 36.404 through 36.406 of this part for the element being altered. The path of travel requirements of § 36.403 shall not apply to measures taken solely to comply with the barrier removal requirements of this section.

(d)(2)(i) *Safe harbor.* Elements that have not been altered in existing facilities on or after March 15, 2012 and that comply with the corresponding technical and scoping specifications for those elements in the 1991 Standards are not required to be modified in order to comply with the requirements set forth in the 2010 Standards.

(ii)(A) Before March 15, 2012, elements in existing facilities that do not comply with the corresponding technical and scoping specifications for those elements in the 1991 Standards must be modified to the extent readily achievable to comply with either the 1991 Standards or the 2010 Standards. Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406(a)(5).

(B) On or after March 15, 2012, elements in existing facilities that do not comply with the corresponding technical and scoping specifications for those elements in the 1991 Standards must be modified to the extent readily achievable to comply with the requirements set forth in the 2010 Standards. Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406(a)(5).

(iii) The safe harbor provided in § 36.304(d)(2)(i) does not apply to those elements in existing facilities that are subject to supplemental requirements (*i.e.,* elements for which there are neither technical nor scoping specifications in the 1991 Standards), and therefore those elements must be modified to the extent readily achievable to comply with the 2010 Standards. Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406(a)(5). Elements in the 2010 Standards not eligible for the element-by-element safe harbor are identified as follows—

(A) *Residential facilities and dwelling units,* sections 233 and 809.

(B) *Amusement rides,* sections 234 and 1002; 206.2.9; 216.12.

(C) *Recreational boating facilities,* sections 235 and 1003; 206.2.10.

(D) *Exercise machines and equipment,* sections 236 and 1004; 206.2.13.

(E) *Fishing piers and platforms,* sections 237 and 1005; 206.2.14.

(F) *Golf facilities,* sections 238 and 1006; 206.2.15.

(G) *Miniature golf facilities,* sections 239 and 1007; 206.2.16.

(H) *Play areas,* sections 240 and 1008; 206.2.17.

(I) *Saunas and steam rooms,* sections 241 and 612.

(J) *Swimming pools, wading pools, and spas,* sections 242 and 1009.

(K) *Shooting facilities with firing positions,* sections 243 and 1010.

(L) *Miscellaneous.*

(*1*) Team or player seating, section 221.2.1.4.

(*2*) Accessible route to bowling lanes, section 206.2.11.

(*3*) Accessible route in court sports facilities, section 206.2.12.

* * * * *

Appendix to § 36.304(d)

COMPLIANCE DATES AND APPLICABLE STANDARDS FOR BARRIER REMOVAL AND SAFE HARBOR

Date	Requirement	Applicable standards
Before March 15, 2012	Elements that do not comply with the requirements for those elements in the 1991 Standards must be modified to the extent readily achievable.	1991 Standards or 2010 Standards.

COMPLIANCE DATES AND APPLICABLE STANDARDS FOR BARRIER REMOVAL AND SAFE HARBOR—Continued

Date	Requirement	Applicable standards
	Note: Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406(a)(5).	
On or after March 15, 2012	Elements that do not comply with the requirements for those elements in the 1991 Standards or that do not comply with the supplemental requirements (*i.e.,* elements for which there are neither technical nor scoping specifications in the 1991 Standards) must be modified to the extent readily achievable.	2010 Standards.
	Note: Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406(a)(5).	
Elements not altered after March 15, 2012	Elements that comply with the requirements for those elements in the 1991 Standards do not need to be modified.	Safe Harbor.

* * * * *

(g) * * *

(4) This requirement does not apply to guest rooms in existing facilities that are places of lodging where the guest rooms are not owned by the entity that owns, leases, or operates the overall facility and the physical features of the guest room interiors are controlled by their individual owners.

■ 8. Revise § 36.308 to read as follows:

§ 36.308 Seating in assembly areas.

A public accommodation shall ensure that wheelchair spaces and companion seats are provided in each specialty seating area that provides spectators with distinct services or amenities that generally are not available to other spectators. If it is not readily achievable for a public accommodation to place wheelchair spaces and companion seats in each such specialty seating area, it shall provide those services or amenities to individuals with disabilities and their companions at other designated accessible locations at no additional cost. The number of wheelchair spaces and companion seats provided in specialty seating areas shall be included in, rather than in addition to, wheelchair space requirements set forth in table 221.2.1.1 in the 2010 Standards.

■ 9. Amend § 36.309 by adding paragraphs (b)(1)(iv) through (vi) to read as follows:

§ 36.309 Examinations and courses.

* * * * *

(b)(1)* * *

(iv) Any request for documentation, if such documentation is required, is reasonable and limited to the need for the modification, accommodation, or auxiliary aid or service requested.

(v) When considering requests for modifications, accommodations, or auxiliary aids or services, the entity gives considerable weight to documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations, as well as such modifications, accommodations, or related aids and services provided in response to an Individualized Education Program (IEP) provided under the Individuals with Disabilities Education Act or a plan describing services provided pursuant to section 504 of the Rehabilitation Act of 1973, as amended (often referred to as a Section 504 Plan).

(vi) The entity responds in a timely manner to requests for modifications, accommodations, or aids to ensure equal opportunity for individuals with disabilities.

* * * * *

10. Add § 36.311 to read as follows:

§ 36.311 Mobility devices.

(a) *Use of wheelchairs and manually-powered mobility aids.* A public accommodation shall permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids, such as walkers, crutches, canes, braces, or other similar devices designed for use by individuals with mobility disabilities in any areas open to pedestrian use.

(b)(1) *Use of other power-driven mobility devices.* A public accommodation shall make reasonable modifications in its policies, practices, or procedures to permit the use of other power-driven mobility devices by individuals with mobility disabilities, unless the public accommodation can demonstrate that the class of other power-driven mobility devices cannot be operated in accordance with legitimate safety requirements that the public accommodation has adopted pursuant to § 36.301(b).

(2) *Assessment factors.* In determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification under paragraph (b)(1) of this section, a public accommodation shall consider—

(i) The type, size, weight, dimensions, and speed of the device;

(ii) The facility's volume of pedestrian traffic (which may vary at different times of the day, week, month, or year);

(iii) The facility's design and operational characteristics (*e.g.,* whether its business is conducted indoors, its square footage, the density and placement of stationary devices, and the availability of storage for the device, if requested by the user);

(iv) Whether legitimate safety requirements can be established to permit the safe operation of the other power-driven mobility device in the specific facility; and

(v) Whether the use of the other power-driven mobility device creates a substantial risk of serious harm to the immediate environment or natural or cultural resources, or poses a conflict with Federal land management laws and regulations.

(c)(1) *Inquiry about disability.* A public accommodation shall not ask an individual using a wheelchair or other power-driven mobility device questions about the nature and extent of the individual's disability.

(2) *Inquiry into use of other power-driven mobility device.* A public accommodation may ask a person using an other power-driven mobility device to provide a credible assurance that the mobility device is required because of the person's disability. A public accommodation that permits the use of an other power-driven mobility device by an individual with a mobility disability shall accept the presentation

of a valid, State-issued disability parking placard or card, or State-issued proof of disability, as a credible assurance that the use of the other power-driven mobility device is for the individual's mobility disability. In lieu of a valid, State-issued disability parking placard or card, or State-issued proof of disability, a public accommodation shall accept as a credible assurance a verbal representation, not contradicted by observable fact, that the other power-driven mobility device is being used for a mobility disability. A "valid" disability placard or card is one that is presented by the individual to whom it was issued and is otherwise in compliance with the State of issuance's requirements for disability placards or cards.

Subpart D—New Construction and Alterations

■ 11. Amend § 36.403 by retaining the heading of paragraph (a), designating the text of paragraph (a) as paragraph (a)(1), adding paragraph (a)(2), and revising paragraph (f)(2)(iii) to read as follows:

§ 36.403 Alterations: Path of travel.

(a) *General.* (1) * * *

(2) If a private entity has constructed or altered required elements of a path of travel at a place of public accommodation or commercial facility in accordance with the specifications in the 1991 Standards, the private entity is not required to retrofit such elements to reflect the incremental changes in the 2010 Standards solely because of an alteration to a primary function area served by that path of travel.

* * * * *

(f) * * *

(2) * * *

(iii) Costs associated with providing accessible telephones, such a relocating the telephone to an accessible height, installing amplification devices, or installing a text telephone (TTY);

* * * * *

■ 12. Revise § 36.405 to read as follows:

§ 36.405 Alterations: Historic preservation.

(a) Alterations to buildings or facilities that are eligible for listing in the National Register of Historic Places under the National Historic Preservation Act, 16 U.S.C. 470 *et seq.,* or are designated as historic under State or local law, shall comply to the maximum extent feasible with this part.

(b) If it is determined that it is not feasible to provide physical access to an historic property that is a place of public accommodation in a manner that will not threaten or destroy the historic significance of the building or the facility, alternative methods of access shall be provided pursuant to the requirements of subpart C of this part.

■ 13. Revise § 36.406 to read as follows:

§ 36.406 Standards for new construction and alterations.

(a) *Accessibility standards and compliance date.* (1) New construction and alterations subject to §§ 36.401 or 36.402 shall comply with the 1991 Standards if the date when the last application for a building permit or permit extension is certified to be complete by a State, county, or local government (or, in those jurisdictions where the government does not certify completion of applications, if the date when the last application for a building permit or permit extension is received by the State, county, or local government) is before September 15, 2010, or if no permit is required, if the start of physical construction or alterations occurs before September 15, 2010.

(2) New construction and alterations subject to §§ 36.401 or 36.402 shall comply either with the 1991 Standards or with the 2010 Standards if the date when the last application for a building permit or permit extension is certified to be complete by a State, county, or local government (or, in those jurisdictions where the government does not certify completion of applications, if the date when the last application for a building permit or permit extension is received by the State, county, or local government) is on or after September 15, 2010 and before March 15, 2012, or if no permit is required, if the start of physical construction or alterations occurs on or after September 15, 2010 and before March 15, 2012.

(3) New construction and alterations subject to §§ 36.401 or 36.402 shall comply with the 2010 Standards if the date when the last application for a building permit or permit extension is certified to be complete by a State, county, or local government (or, in those jurisdictions where the government does not certify completion of applications, if the date when the last application for a building permit or permit extension is received by the State, county, or local government) is on or after March 15, 2012, or if no permit is required, if the start of physical construction or alterations occurs on or after March 15, 2012.

(4) For the purposes of this section, "start of physical construction or alterations" does not mean ceremonial groundbreaking or razing of structures prior to site preparation.

(5) *Noncomplying new construction and alterations.* (i) Newly constructed or altered facilities or elements covered by §§ 36.401 or 36.402 that were constructed or altered before March 15, 2012 and that do not comply with the 1991 Standards shall, before March 15, 2012, be made accessible in accordance with either the 1991 Standards or the 2010 Standards.

(ii) Newly constructed or altered facilities or elements covered by §§ 36.401 or 36.402 that were constructed or altered before March 15, 2012 and that do not comply with the 1991 Standards shall, on or after March 15, 2012, be made accessible in accordance with the 2010 Standards.

Appendix to § 36.406(a)

Compliance dates for new construction and alterations	Applicable standards
On or after January 26, 1993 and before September 15, 2010	1991 Standards.
On or after September 15, 2010 and before March 15, 2012	1991 Standards or 2010 Standards.
On or after March 15, 2012	2010 Standards.

(b) *Scope of coverage.* The 1991 Standards and the 2010 Standards apply to fixed or built-in elements of buildings, structures, site improvements, and pedestrian routes or vehicular ways located on a site. Unless specifically stated otherwise, the advisory notes, appendix notes, and figures contained in the 1991 Standards and 2010 Standards explain or illustrate the requirements of the rule; they do not establish enforceable requirements.

(c) *Places of lodging.* Places of lodging subject to this part shall comply with the provisions of the 2010 Standards applicable to transient lodging, including, but not limited to, the requirements for transient lodging guest rooms in sections 224 and 806 of the 2010 Standards.

(1) *Guest rooms.* Guest rooms with mobility features in places of lodging subject to the transient lodging

requirements of 2010 Standards shall be provided as follows—

(i) Facilities that are subject to the same permit application on a common site that each have 50 or fewer guest rooms may be combined for the purposes of determining the required number of accessible rooms and type of accessible bathing facility in accordance with table 224.2 to section 224.2 of the 2010 Standards.

(ii) Facilities with more than 50 guest rooms shall be treated separately for the purposes of determining the required number of accessible rooms and type of accessible bathing facility in accordance with table 224.2 to section 224.2 of the 2010 Standards.

(2) *Exception.* Alterations to guest rooms in places of lodging where the guest rooms are not owned or substantially controlled by the entity that owns, leases, or operates the overall facility and the physical features of the guest room interiors are controlled by their individual owners are not required to comply with § 36.402 or the alterations requirements in section 224.1.1 of the 2010 Standards.

(3) *Facilities with residential dwelling units and transient lodging units.* Residential dwelling units that are designed and constructed for residential use exclusively are not subject to the transient lodging standards.

(d) *Social service center establishments.* Group homes, halfway houses, shelters, or similar social service center establishments that provide either temporary sleeping accommodations or residential dwelling units that are subject to this part shall comply with the provisions of the 2010 Standards applicable to residential facilities, including, but not limited to, the provisions in sections 233 and 809.

(1) In sleeping rooms with more than 25 beds covered by this part, a minimum of 5% of the beds shall have clear floor space complying with section 806.2.3 of the 2010 Standards.

(2) Facilities with more than 50 beds covered by this part that provide common use bathing facilities shall provide at least one roll-in shower with a seat that complies with the relevant provisions of section 608 of the 2010 Standards. Transfer-type showers are not permitted in lieu of a roll-in shower with a seat, and the exceptions in sections 608.3 and 608.4 for residential dwelling units are not permitted. When separate shower facilities are provided for men and for women, at least one roll-in shower shall be provided for each group.

(e) *Housing at a place of education.* Housing at a place of education that is subject to this part shall comply with the provisions of the 2010 Standards applicable to transient lodging, including, but not limited to, the requirements for transient lodging guest rooms in sections 224 and 806, subject to the following exceptions. For the purposes of the application of this section, the term "sleeping room" is intended to be used interchangeably with the term "guest room" as it is used in the transient lodging standards.

(1) Kitchens within housing units containing accessible sleeping rooms with mobility features (including suites and clustered sleeping rooms) or on floors containing accessible sleeping rooms with mobility features shall provide turning spaces that comply with section 809.2.2 of the 2010 Standards and kitchen work surfaces that comply with section 804.3 of the 2010 Standards.

(2) Multi-bedroom housing units containing accessible sleeping rooms with mobility features shall have an accessible route throughout the unit in accordance with section 809.2 of the 2010 Standards.

(3) Apartments or townhouse facilities that are provided by or on behalf of a place of education, which are leased on a year-round basis exclusively to graduate students or faculty and do not contain any public use or common use areas available for educational programming, are not subject to the transient lodging standards and shall comply with the requirements for residential facilities in sections 233 and 809 of the 2010 Standards.

(f) *Assembly areas.* Assembly areas that are subject to this part shall comply with the provisions of the 2010 Standards applicable to assembly areas, including, but not limited to, sections 221 and 802. In addition, assembly areas shall ensure that—

(1) In stadiums, arenas, and grandstands, wheelchair spaces and companion seats are dispersed to all levels that include seating served by an accessible route;

(2) In assembly areas that are required to horizontally disperse wheelchair spaces and companion seats by section 221.2.3.1 of the 2010 Standards and that have seating encircling, in whole or in part, a field of play or performance, wheelchair spaces and companion seats are dispersed around that field of play or performance area;

(3) Wheelchair spaces and companion seats are not located on (or obstructed by) temporary platforms or other movable structures, except that when an entire seating section is placed on temporary platforms or other movable structures in an area where fixed seating is not provided, in order to increase seating for an event, wheelchair spaces and companion seats may be placed in that section. When wheelchair spaces and companion seats are not required to accommodate persons eligible for those spaces and seats, individual, removable seats may be placed in those spaces and seats;

(4) In stadium-style movie theaters, wheelchair spaces and companion seats are located on a riser or cross-aisle in the stadium section that satisfies at least one of the following criteria—

(i) It is located within the rear 60% of the seats provided in an auditorium; or

(ii) It is located within the area of an auditorium in which the vertical viewing angles (as measured to the top of the screen) are from the 40th to the 100th percentile of vertical viewing angles for all seats as ranked from the seats in the first row (1st percentile) to seats in the back row (100th percentile).

(g) *Medical care facilities.* Medical care facilities that are subject to this part shall comply with the provisions of the 2010 Standards applicable to medical care facilities, including, but not limited to, sections 223 and 805. In addition, medical care facilities that do not specialize in the treatment of conditions that affect mobility shall disperse the accessible patient bedrooms required by section 223.2.1 of the 2010 Standards in a manner that is proportionate by type of medical specialty.

§ 36.407 [Removed and Reserved]

■ 14. Remove and reserve § 36.407.

Subpart F—Certification of State Laws or Local Building Codes

§ 36.603 [Removed]

■ 15. Remove § 36.603.

■ 16. Redesignate § 36.604 as § 36.603 and revise it to read as follows:

§ 36.603 Preliminary determination.

Upon receipt and review of all information relevant to a request filed by a submitting official for certification of a code, and after consultation with the Architectural and Transportation Barriers Compliance Board, the Assistant Attorney General shall make a preliminary determination of equivalency or a preliminary determination to deny certification.

■ 17. Redesignate § 36.605 as § 36.604, revise the introductory text to paragraph (a), and revise paragraphs (a)(2) and (b) to read as follows:

§ 36.604 Procedure following preliminary determination of equivalency.

(a) If the Assistant Attorney General makes a preliminary determination of equivalency under § 36.603, he or she

shall inform the submitting official, in writing, of that preliminary determination. The Assistant Attorney General also shall—

* * * * *

(2) After considering the information received in response to the notice described in paragraph (a) of this section, and after publishing a separate notice in the **Federal Register**, hold an informal hearing, in the State or local jurisdiction charged with administration and enforcement of the code, at which interested individuals, including individuals with disabilities, are provided an opportunity to express their views with respect to the preliminary determination of equivalency; and

(b) The Assistant Attorney General, after consultation with the Architectural and Transportation Barriers Compliance Board and consideration of the materials and information submitted pursuant to this section, as well as information provided previously by the submitting official, shall issue either a certification of equivalency or a final determination to deny the request for certification. The Assistant Attorney General shall publish notice of the certification of equivalency or denial of certification in the **Federal Register**.

■ 18. Redesignate § 36.606 as § 36.605 and revise the first sentence of paragraph (a) to read as follows:

§ 36.605 Procedure following preliminary denial of certification.

(a) If the Assistant Attorney General makes a preliminary determination to deny certification of a code under § 36.603, he or she shall notify the submitting official of the determination. * * *

* * * * *

■ 19. Redesignate § 36.607 as § 36.606 and add paragraph (d) to read as follows:

§ 36.606 Effect of certification.

* * * * *

(d) When the standards of the Act against which a code is deemed equivalent are revised or amended substantially, a certification of equivalency issued under the preexisting standards is no longer effective, as of the date the revised standards take effect. However, construction in compliance with a certified code during the period when a certification of equivalency was effective shall be considered rebuttable evidence of compliance with the Standards then in effect as to those elements of buildings and facilities that comply with the certified code. A submitting official may reapply for certification pursuant to the Act's revised standards, and, to the extent possible, priority will be afforded the request in the review process.

§ 36.608 [Redesignated as § 36.607]

■ 20. Redesignate § 36.608 as § 36.607.

■ 21. Redesignate Appendix A to part 36 as Appendix D to part 36 and add Appendix A to part 36 to read as follows:

Appendix A to Part 36—Guidance on Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and Commercial Facilities

Note: This Appendix contains guidance providing a section-by-section analysis of the revisions to 28 CFR part 36 published on September 15, 2010.

Section-By-Section Analysis and Response to Public Comments

This section provides a detailed description of the Department's changes to the title III regulation, the reasoning behind those changes, and responses to public comments received on these topics. The Section-by-Section Analysis follows the order of the title III regulation itself, except that if the Department has not changed a regulatory section, the unchanged section has not been mentioned.

Subpart A—General

Section 36.104 Definitions

"1991 Standards" and "2004 ADAAG"

The Department has included in the final rule new definitions of both the "1991 Standards" and the "2004 ADAAG." The term "1991 Standards" refers to the ADA Standards for Accessible Design, originally published on July 26, 1991, and republished as Appendix D to 28 CFR part 36. The term "2004 ADAAG" refers to ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the Americans with Disabilities Act and the Architectural Barriers Act Accessibility Guidelines, which were issued by the Access Board on July 23, 2004, codified at 36 CFR 1191, app. B and D (2009), and which the Department has adopted in this final rule. These terms are included in the definitions section for ease of reference.

"2010 Standards"

The Department has added to the final rule a definition of the term "2010 Standards." The term "2010 Standards" refers to the 2010 ADA Standards for Accessible Design, which consist of the 2004 ADAAG and the requirements contained in subpart D of 28 CFR part 36.

"Direct Threat"

The final rule moves the definition of direct threat from § 36.208(b) to the definitions section at § 36.104. This is an editorial change. Consequently, § 36.208(c) becomes § 36.208(b) in the final rule.

"Existing Facility"

The 1991 title III regulation provided definitions for "new construction" at § 36.401(a) and "alterations" at § 36.402(b). In contrast, the term "existing facility" was not explicitly defined, although it is used in the statute and regulations for titles II and III. *See, e.g.,* 42 U.S.C. 12182(b)(2)(A)(iv); 28 CFR 35.150. It has been the Department's view that newly constructed or altered facilities are also existing facilities subject to title III's continuing barrier removal obligation, and that view is made explicit in this rule.

The classification of facilities under the ADA is neither static nor mutually exclusive. Newly constructed or altered facilities are also existing facilities. A newly constructed facility remains subject to the accessibility standards in effect at the time of design and construction, with respect to those elements for which, at that time, there were applicable ADA Standards. That same facility, however, after construction, is *also* an existing facility, and subject to the public accommodation's continuing obligation to remove barriers where it is readily achievable to do so. The fact that the facility is also an existing facility does not relieve the public accommodation of its obligations under the new construction requirements of this part. Rather, it means that in addition to the new construction requirements, the public accommodation has a continuing obligation to remove barriers that arise, or are deemed barriers, only after construction. Such barriers include but are not limited to the elements that are first covered in the 2010 Standards, as that term is defined in § 36.104.

At some point, the same facility may undergo alterations, which are subject to the alterations requirements in effect at that time. This facility remains subject to its original new construction standards for elements and spaces not affected by the alterations; the facility is subject to the alterations requirements and standards in effect at the time of the alteration for the elements and spaces affected by the alteration; *and,* throughout, the facility remains subject to the continuing barrier removal obligation.

The Department's enforcement of the ADA is premised on a broad understanding of "existing facility." The ADA contemplates that as the Department's knowledge and understanding of accessibility advances and evolves, this knowledge will be incorporated into and result in increased accessibility in the built environment. Title III's barrier removal provisions strike the appropriate balance between ensuring that accessibility advances are reflected in the built environment and mitigating the costs of those advances to public accommodations. With adoption of the final rule, public accommodations engaged in barrier removal measures will now be guided by the 2010 Standards, defined in § 36.104, and the safe harbor in § 36.304(d)(2).

The NPRM included the following proposed definition of "existing facility": "[A] facility that has been constructed and remains in existence on any given date." 73 FR 34508, 34552 (June 17, 2008). While the Department intended the proposed definition to provide clarity with respect to public accommodations' continuing obligation to remove barriers where it is readily achievable to do so, some commenters pointed out arguable ambiguity in the language and the potential for misapplication of the rule in practice.

The Department received a number of comments on this issue. The commenters urged the Department to clarify that all buildings remain subject to the standards in effect at the time of their construction, that is, that a facility designed and constructed for first occupancy between January 26, 1993, and the effective date of the final rule is still considered "new construction" and that alterations occurring between January 26, 1993, and the effective date of the final rule are still considered "alterations."

The final rule includes clarifying language to ensure that the Department's interpretation is accurately reflected. As established by this rule, existing facility means a facility in existence on any given date, without regard to whether the facility may also be considered newly constructed or altered under this part. Thus, this definition reflects the Department's longstanding interpretation that public accommodations have obligations in existing facilities that are independent of but may coexist with requirements imposed by new construction or alteration requirements in those same facilities.

"Housing at a Place of Education"

The Department has added a new definition to § 36.104, "housing at a place of education," to clarify the types of educational housing programs that are covered by this title. This section defines "housing at a place of education" as "housing operated by or on behalf of an elementary, secondary, undergraduate, or postgraduate school, or other place of education, including dormitories, suites, apartments, or other places of residence." This definition does not apply to social service programs that combine residential housing with social services, such as a residential job training program.

"Other Power-Driven Mobility Device" and "Wheelchair"

Because relatively few individuals with disabilities were using nontraditional mobility devices in 1991, there was no pressing need for the 1991 title III regulation to define the terms "wheelchair" or "other power-driven mobility device," to expound on what would constitute a reasonable modification in policies, practices, or procedures under § 36.302, or to set forth within that section specific requirements for the accommodation of mobility devices. Since the issuance of the 1991 title III regulation, however, the choices of mobility devices available to individuals with disabilities have increased dramatically. The Department has received complaints about and has become aware of situations where individuals with mobility disabilities have utilized devices that are not designed primarily for use by an individual with a mobility disability, including the Segway® Personal Transporter (Segway® PT), golf cars, all-terrain vehicles (ATVs), and other locomotion devices.

The Department also has received questions from public accommodations and individuals with mobility disabilities concerning which mobility devices must be accommodated and under what circumstances. Indeed, there has been litigation concerning the legal obligations of covered entities to accommodate individuals with mobility disabilities who wish to use an electronic personal assistance mobility device (EPAMD), such as the Segway® PT, as a mobility device. The Department has participated in such litigation as amicus curiae. *See Ault* v. *Walt Disney World Co.,* No. 6:07–cv–1785–Orl–31KRS, 2009 WL

3242028 (M.D. Fla. Oct. 6, 2009). Much of the litigation has involved shopping malls where businesses have refused to allow persons with disabilities to use EPAMDs. *See, e.g., McElroy* v. *Simon Property Group,* No. 08–404 RDR, 2008 WL 4277716 (D. Kan. Sept. 15, 2008) (enjoining mall from prohibiting the use of a Segway® PT as a mobility device where an individual agrees to all of a mall's policies for use of the device, except indemnification); Shasta Clark, *Local Man Fighting Mall Over Right to Use Segway,* WATE 6 News, July 26, 2005, available at *http://www.wate.com/Global/story.asp?s=3643674* (last visited June 24, 2010).

In response to questions and complaints from individuals with disabilities and covered entities concerning which mobility devices must be accommodated and under what circumstances, the Department began developing a framework to address the use of unique mobility devices, concerns about their safety, and the parameters for the circumstances under which these devices must be accommodated. As a result, the Department's NPRM proposed two new approaches to mobility devices. First, the Department proposed a two-tiered mobility device definition that defined the term "wheelchair" separately from "other power-driven mobility device." Second, the Department proposed requirements to allow the use of devices in each definitional category. In § 36.311(a), the NPRM proposed that wheelchairs and manually-powered mobility aids used by individuals with mobility disabilities shall be permitted in any areas open to pedestrian use. Section 36.311(b) of the NPRM proposed that a public accommodation "shall make reasonable modifications in its policies, practices, and procedures to permit the use of other power-driven mobility devices by individuals with disabilities, unless the public accommodation can demonstrate that the use of the device is not reasonable or that its use will result in a fundamental alteration in the nature of the public accommodation's goods, services, facilities, privileges, advantages, or accommodations." 73 FR 34508, 34556 (June 17, 2008).

The Department sought public comment with regard to whether these steps would, in fact, achieve clarity on these issues. Toward this end, the Department's NPRM asked several questions relating to the definitions of "wheelchair," "other power-driven mobility device," and "manually-powered mobility aids"; the best way to categorize different classes of mobility devices, the types of devices that should be included in each category; and the circumstances under which certain types of mobility devices must be accommodated or may be excluded pursuant to the policy adopted by the public accommodation.

Because the questions in the NPRM that concerned mobility devices and their accommodation were interrelated, many of the commenters' responses did not identify the specific question to which they were responding. Instead, commenters grouped the questions together and provided comments accordingly. Most commenters spoke to the issues addressed in the Department's questions in broad terms and using general concepts. As a result, the responses to the questions posed are discussed below in broadly grouped issue categories rather than on a question-by-question basis.

Two-tiered definitional approach. Commenters supported the Department's proposal to use a two-tiered definition of mobility device. Commenters nearly universally said that wheelchairs always should be accommodated and that they should never be subject to an assessment with regard to their admission to a particular public accommodation. In contrast, the vast majority of commenters indicated they were in favor of allowing public accommodations to conduct an assessment as to whether, and under which circumstances, other power-driven mobility devices will be allowed on-site.

Many commenters also indicated their support for the two-tiered approach in responding to questions concerning the definition of "wheelchair" and "other power-driven mobility device." Nearly every disability advocacy group said that the Department's two-tiered approach strikes the proper balance between ensuring access for individuals with disabilities and addressing fundamental alteration and safety concerns held by public accommodations; however, a minority of disability advocacy groups wanted other power-driven mobility devices to be included in the definition of "wheelchair." Most advocacy, nonprofit, and individual commenters supported the concept of a separate definition for "other power-driven mobility device" because a separate definition would maintain existing legal protections for wheelchairs while recognizing that some devices that are not designed primarily for individuals with mobility disabilities have beneficial uses for individuals with mobility disabilities. They also favored this concept because it recognizes technological developments and that innovative uses of varying devices may provide increased access to individuals with mobility disabilities.

While two business associations indicated that they opposed the concept of "other power-driven mobility device" in its entirety, other business commenters expressed general and industry-specific concerns about permitting their use. They indicated that such devices create a host of safety, cost, and fraud issues that do not exist with wheelchairs. On balance, however, business commenters indicated that they support the establishment of a two-tiered regulatory approach because defining "other power-driven mobility device" separately from "wheelchair" means that businesses will be able to maintain some measure of control over the admission of the former. Virtually all of these commenters indicated that their support for the dual approach and the concept of other power-driven mobility devices was, in large measure, due to the other power-driven mobility device assessment factors in § 36.311(c) of the NPRM.

By maintaining the two-tiered approach to mobility devices and defining "wheelchair" separately from "other power-driven mobility device," the Department is able to preserve the protection users of traditional wheelchairs and other manually-powered mobility aids have had since the ADA was enacted, while also recognizing that human ingenuity, personal choice, and new technologies have led to the use of devices that may be more beneficial for individuals with certain mobility disabilities.

Moreover, the Department believes the two-tiered approach gives public accommodations guidance to follow in assessing whether reasonable modifications can be made to permit the use of other power-driven mobility devices on-site and to aid in the development of policies describing the circumstances under which persons with disabilities may use such devices. The two-tiered approach neither mandates that all other power-driven mobility devices be accommodated in every circumstance, nor excludes these devices from all protection. This approach, in conjunction with the factor assessment provisions in § 36.311(b)(2), will serve as a mechanism by which public accommodations can evaluate their ability to accommodate other power-driven mobility devices. As will be discussed in more detail below, the assessment factors in § 36.311(b)(2) are specifically designed to provide guidance to public accommodations regarding whether it is permissible to bar the use of a specific other power-driven mobility device in a specific facility. In making such a determination, a public accommodation must consider the device's type, size, weight dimensions, and speed; the facility's volume of pedestrian traffic; the facility's design and operational characteristics; whether the device conflicts with legitimate safety requirements; and whether the device poses a substantial risk of serious harm to the immediate environment or natural or cultural resources, or conflicts with Federal land management laws or regulations. In addition, under § 36.311(b)(i) if the public accommodation claims that it cannot make reasonable modifications to its policies, practices, or procedures to permit the use of other power-driven mobility devices by individuals with disabilities, the burden of proof to demonstrate that such devices cannot be operated in accordance with legitimate safety requirements rests upon the public accommodation.

Categorization of wheelchair versus other power-driven mobility devices. Implicit in the creation of the two-tiered mobility device concept is the question of how to categorize which devices are wheelchairs and which are other power-driven mobility devices. Finding weight and size to be too restrictive, the vast majority of advocacy, nonprofit, and individual commenters opposed using the Department of Transportation's definition of "common wheelchair" to designate the mobility device's appropriate category. Business commenters who generally supported using weight and size as the method of categorization did so because of their concerns about having to make physical changes to their facilities to accommodate oversized devices. The vast majority of business commenters also favored using the device's intended use to categorize which devices constitute wheelchairs and which are other power-driven mobility devices.

Furthermore, the intended-use determinant received a fair amount of support from advocacy, nonprofit, and individual commenters, either because they sought to preserve the broad accommodation of wheelchairs or because they sympathized with concerns about individuals without mobility disabilities fraudulently bringing other power-driven mobility devices into places of public accommodation.

Commenters seeking to have the Segway® PT included in the definition of "wheelchair" objected to classifying mobility devices on the basis of their intended use because they felt that such a classification would be unfair and prejudicial to Segway® PT users and would stifle personal choice, creativity, and innovation. Other advocacy and nonprofit commenters objected to employing an intended-use approach because of concerns that the focus would shift to an assessment of the device, rather than the needs or benefits to the individual with the mobility disability. They were of the view that the mobility-device classification should be based on its function—whether it is used to address a mobility disability. A few commenters raised the concern that an intended-use approach might embolden public accommodations to assess whether an individual with a mobility disability really needs to use the other power-driven mobility device at issue or to question why a wheelchair would not provide sufficient mobility. Those citing objections to the intended-use determinant indicated it would be more appropriate to make the categorization determination based on whether the device is being used for a mobility disability in the context of the impact of its use in a specific environment. Some of these commenters preferred this approach because it would allow the Segway® PT to be included in the definition of "wheelchair."

Some commenters were inclined to categorize mobility devices by the way in which they are powered, such as battery-powered engines versus fuel or combustion engines. One commenter suggested using exhaust level as the determinant. Although there were only a few commenters who would make the determination based on indoor or outdoor use, there was nearly universal support for banning from indoor use devices that are powered by fuel or combustion engines.

A few commenters thought it would be appropriate to categorize the devices based on their maximum speed. Others objected to this approach, stating that circumstances should dictate the appropriate speed at which mobility devices should be operated—for example, a faster speed may be safer when crossing streets than it would be for sidewalk use—and merely because a device can go a certain speed does not mean it will be operated at that speed.

The Department has decided to maintain the device's intended use as the appropriate determinant for which devices are categorized as "wheelchairs." However, because wheelchairs may be intended for use by individuals who have temporary conditions affecting mobility, the Department has decided that it is more appropriate to use the phrase "primarily designed" rather than "solely designed" in making such categorizations. The Department will not foreclose any future technological developments by identifying or banning specific devices or setting restrictions on size, weight, or dimensions. Moreover, devices designed primarily for use by individuals with mobility disabilities often are considered to be medical devices and are generally eligible for insurance reimbursement on this basis. Finally, devices designed primarily for use by individuals with mobility disabilities are less subject to fraud concerns because they were not designed to have a recreational component. Consequently, rarely, if ever, is any inquiry or assessment as to their appropriateness for use in a public accommodation necessary.

Definition of "wheelchair." In seeking public feedback on the NPRM's definition of "wheelchair," the Department explained its concern that the definition of "wheelchair" in section 508(c)(2) of the ADA (formerly section 507(c)(2), July 26, 1990, 104 Stat. 372, 42 U.S.C. 12207, renumbered section 508(c)(2), Public Law 110–325 section 6(a)(2), Sept. 25, 2008, 122 Stat. 3558), which pertains to Federal wilderness areas, is not specific enough to provide clear guidance in the array of settings covered by title III and that the stringent size and weight requirements for the Department of Transportation's definition of "common wheelchair" are not a good fit in the context of most public accommodations. The Department noted in the NPRM that it sought a definition of "wheelchair" that would include manually-operated and power-driven wheelchairs and mobility scooters (*i.e.,* those that typically are single-user, have three to four wheels, and are appropriate for both indoor and outdoor pedestrian areas), as well as a variety of types of wheelchairs and mobility scooters with individualized or unique features or models with different numbers of wheels. The NPRM defined a wheelchair as "a device designed solely for use by an individual with a mobility impairment for the primary purpose of locomotion in typical indoor and outdoor pedestrian areas. A wheelchair may be manually-operated or power-driven." 73 FR 34508, 34553 (June 17, 2008). Although the NPRM's definition of "wheelchair" excluded mobility devices that are not designed solely for use by individuals with mobility disabilities, the Department, noting that the use of the Segway® PT by individuals with mobility disabilities is on the upswing, inquired as to whether this device should be included in the definition of "wheelchair."

Most business commenters wished the definition of "wheelchair" had included size, weight, and dimension maximums. Ultimately, however, they supported the definition because it excludes other power-driven mobility devices and enables them to engage in an assessment to determine whether a particular device can be allowed as a reasonable modification. These commenters felt this approach gave them some measure of control over whether, and under what circumstances, other power-driven mobility devices may be used in their facilities by individuals with mobility disabilities. Two commenters noted that because many mobility scooters are oversized, they are misplaced in the definition of "wheelchair" and belong with other power-driven mobility devices. Another commenter suggested using maximum size and weight requirements to allocate which mobility scooters should be categorized as wheelchairs, and which should be categorized as other power-driven mobility devices.

Many advocacy, nonprofit, and individual commenters indicated that as long as the Department intends the scope of the term "mobility impairments" to include other disabilities that cause mobility impairments (*e.g.,* respiratory, circulatory, stamina, etc.), they were in support of the language. Several commenters indicated a preference for the definition of "wheelchair" in section 508(c)(2) of the ADA. One commenter indicated a preference for the term "assistive device," as it is defined in the Rehabilitation Act of 1973, over the term "wheelchair." A few commenters indicated that strollers should be added to the preamble's list of examples of wheelchairs because parents of children with disabilities frequently use strollers as mobility devices until their children get older.

In the final rule, the Department has rearranged some wording and has made some changes in the terminology used in the definition of "wheelchair," but essentially has retained the definition, and therefore the rationale, that was set forth in the NPRM. Again, the text of the ADA makes the definition of "wheelchair" contained in section 508(c)(2) applicable only to the specific context of uses in designated wilderness areas, and therefore does not compel the use of that definition for any other purpose. Moreover, the Department maintains that limiting the definition to devices suitable for use in an "indoor pedestrian area" as provided for in section 508(c)(2) of the ADA would ignore the technological advances in wheelchair design that have occurred since the ADA went into effect and that the inclusion of the phrase "indoor pedestrian area" in the definition of "wheelchair" would set back progress made by individuals with mobility disabilities who, for many years now, have been using devices designed for locomotion in indoor *and* outdoor settings. The Department has concluded that same rationale applies to placing limits on the size, weight, and dimensions of wheelchairs.

With regard to the term "mobility impairments," the Department intended a broad reading so that a wide range of disabilities, including circulatory and respiratory disabilities, that make walking difficult or impossible, would be included. In response to comments on this issue, the Department has revisited the issue and has concluded that the most apt term to achieve this intent is "mobility disability."

In addition, the Department has decided that it is more appropriate to use the phrase, "primarily" designed for use by individuals with disabilities in the final rule, rather than, "solely" designed for use by individuals with disabilities—the phrase, proposed in the NPRM. The Department believes that this

phrase more accurately covers the range of devices the Department intends to fall within the definition of "wheelchair."

After receiving comments that the word "typical" is vague and the phrase "pedestrian areas" is confusing to apply, particularly in the context of similar, but not identical, terms used in the proposed Standards, the Department decided to delete the term "typical indoor and outdoor pedestrian areas" from the final rule. Instead, the final rule references "indoor or * * * both indoor and outdoor locomotion," to make clear that the devices that fall within the definition of "wheelchair" are those that are used for locomotion on indoor and outdoor pedestrian paths or routes and not those that are intended exclusively for traversing undefined, unprepared, or unimproved paths or routes. Thus, the final rule defines the term "wheelchair" to mean "a manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor or of both indoor and outdoor locomotion."

Whether the definition of "wheelchair" includes the Segway® PT. As discussed above, because individuals with mobility disabilities are using the Segway® PT as a mobility device, the Department asked whether it should be included in the definition of "wheelchair." The basic Segway® PT model is a two-wheeled, gyroscopically-stabilized, battery-powered personal transportation device. The user stands on a platform suspended three inches off the ground by wheels on each side, grasps a T-shaped handle, and steers the device similarly to a bicycle. Most Segway® PTs can travel up to 12½ miles per hour, compared to the average pedestrian walking speed of 3 to 4 miles per hour and the approximate maximum speed for power-operated wheelchairs of 6 miles per hour. In a study of trail and other non-motorized transportation users including EPAMDs, the Federal Highway Administration (FHWA) found that the eye height of individuals using EPAMDs ranged from approximately 69 to 80 inches. *See* Federal Highway Administration, *Characteristics of Emerging Road and Trail Users and Their Safety* (Oct. 14, 2004), available at *http://www.tfhrc.gov/safety/pubs/04103* (last visited June 24, 2010). Thus, the Segway® PT can operate at much greater speeds than wheelchairs, and the average user stands much taller than most wheelchair users.

The Segway® PT has been the subject of debate among users, pedestrians, disability advocates, State and local governments, businesses, and bicyclists. The fact that the Segway® PT is not designed primarily for use by individuals with disabilities, nor used primarily by persons with disabilities, complicates the question of to what extent individuals with disabilities should be allowed to operate them in areas and facilities where other power-driven mobility devices are not allowed. Those who question the use of the Segway® PT in pedestrian areas argue that the speed, size, and operating features of the devices make them too dangerous to operate alongside pedestrians and wheelchair users.

Comments regarding whether to include the Segway® PT in the definition of "wheelchair" were, by far, the most numerous received in the category of comments regarding wheelchairs and other power-driven mobility devices. Significant numbers of veterans with disabilities, individuals with multiple sclerosis, and those advocating on their behalf made concise statements of general support for the inclusion of the Segway® PT in the definition of "wheelchair." Two veterans offered extensive comments on the topic, along with a few advocacy and nonprofit groups and individuals with disabilities for whom sitting is uncomfortable or impossible.

While there may be legitimate safety issues for EPAMD users and bystanders in some circumstances, EPAMDs and other non-traditional mobility devices can deliver real benefits to individuals with disabilities. Among the reasons given by commenters to include the Segway® PT in the definition of "wheelchair" were that the Segway® PT is well-suited for individuals with particular conditions that affect mobility including multiple sclerosis, Parkinson's disease, chronic obstructive pulmonary disease, amputations, spinal cord injuries, and other neurological disabilities, as well as functional limitations, such as gait limitation, inability to sit or discomfort in sitting, and diminished stamina issues. Such individuals often find that EPAMDs are more comfortable and easier to use than more traditional mobility devices and assist with balance, circulation, and digestion in ways that wheelchairs do not. *See* Rachel Metz, *Disabled Embrace Segway,* New York Times, Oct. 14, 2004. Commenters specifically cited pressure relief, reduced spasticity, increased stamina, and improved respiratory, neurologic, and muscular health as secondary medical benefits from being able to stand.

Other arguments for including the Segway® PT in the definition of "wheelchair" were based on commenters' views that the Segway® PT offers benefits not provided by wheelchairs and mobility scooters, including its intuitive response to body movement, ability to operate with less coordination and dexterity than is required for many wheelchairs and mobility scooters, and smaller footprint and turning radius as compared to most wheelchairs and mobility scooters. Several commenters mentioned improved visibility, either due to the Segway® PT's raised platform or simply by virtue of being in a standing position. And finally, some commenters advocated for the inclusion of the Segway® PT simply based on civil rights arguments and the empowerment and self-esteem obtained from having the power to select the mobility device of choice.

Many commenters, regardless of their position on whether to include the Segway® PT in the definition of "wheelchair," noted that the Segway® PT's safety record is as good as, if not better, than the record for wheelchairs and mobility scooters.

Most business commenters were opposed to the inclusion of the Segway® PT in the definition of "wheelchair" but were supportive of its inclusion as an "other power-driven mobility device." They raised industry- or venue-specific concerns about including the Segway® PT in the definition of "wheelchair." For example, civic centers, arenas, and theaters were concerned about the impact on sight-line requirements if Segway® PT users remain on their devices in a designated wheelchair seating area; amusement parks expressed concern that rides have been designed, purchased, and installed to enable wheelchair users to transfer easily or to accommodate wheelchairs on the ride itself; and retail stores mentioned size constraints in some stores. Nearly all business commenters expressed concern—and perceived liability issues—related to having to store or stow the Segway® PT, particularly if it could not be stored in an upright position. These commenters cited concerns about possible damage to the device, injury to customers who may trip over it, and theft of the device as a result of not being able to stow the Segway® PT securely.

Virtually every business commenter mentioned concerns about rider safety, as well as concerns for pedestrians unexpectedly encountering these devices or being hit or run over by these devices in crowded venues where maneuvering space is limited. Their main safety objection to the inclusion of the Segway® PT in the definition of "wheelchair" was that the maximum speed at which the Segway® PT can operate is far faster than that of motorized wheelchairs. There was a universal unease among these commenters with regard to relying on the judgment of the Segway® PT user to exercise caution because its top speed is far in excess of a wheelchair's top speed. Many other safety concerns were industry-specific. For example, amusement parks were concerned that the Segway® PT is much taller than children; that it is too quiet to warn pedestrians, particularly those with low vision or who are blind, of their presence; that it may keep moving after a rider has fallen off or power system fails; and that it has a full-power override which automatically engages when an obstacle is encountered. Hotels and retail stores mentioned that maneuvering the Segway® PT through their tight quarters would create safety hazards.

Business commenters also expressed concern that if the Segway® PT were included in the definition of "wheelchair" they would have to make physical changes to their facilities to accommodate Segway® PT riders who stand much taller in these devices than do users of wheelchairs. They also were concerned that if the Segway®7 PT was included in the definition of "wheelchair," they would have no ability to assess whether it is appropriate to allow the entry of the Segway® PT into their facilities the way they would have if the device is categorized as an "other power-driven mobility device."

Many disability advocacy and nonprofit commenters did not support the inclusion of the Segway® PT in the definition of "wheelchair." Paramount to these commenters was the maintenance of existing protections for wheelchair users. Because there was unanimous agreement that wheelchair use rarely, if ever, may be restricted, these commenters strongly favored

categorizing wheelchairs separately from the Segway® PT and other power-driven mobility devices and applying the intended-use determinant to assign the devices to either category. They indicated that while they support the greatest degree of access in public accommodations for all persons with disabilities who require the use of mobility devices, they recognize that under certain circumstances allowing the use of other power-driven mobility devices would result in a fundamental alteration or run counter to legitimate safety requirements necessary for the safe operation of a public accommodation. While these groups supported categorizing the Segway® PT as an "other power-driven mobility device," they universally noted that because the Segway® PT does not present environmental concerns and is as safe to use as, if not safer than, a wheelchair, it should be accommodated in most circumstances.

The Department has considered all the comments and has concluded that it should not include the Segway® PT in the definition of "wheelchair." The final rule provides that the test for categorizing a device as a wheelchair or an other power-driven mobility device is whether the device is designed primarily for use by individuals with mobility disabilities. Mobility scooters are included in the definition of "wheelchair" because they are designed primarily for users with mobility disabilities. However, because the current generation of EPAMDs, including the Segway® PT, was designed for recreational users and not primarily for use by individuals with mobility disabilities, the Department has decided to continue its approach of excluding EPAMDs from the definition of "wheelchair" and including them in the definition of "other power-driven mobility device." Although EPAMDs, such as the Segway® PT, are not included in the definition of a "wheelchair," public accommodations must assess whether they can make reasonable modifications to permit individuals with mobility disabilities to use such devices on their premises. The Department recognizes that the Segway® PT provides many benefits to those who use them as mobility devices, including a measure of privacy with regard to the nature of one's particular disability, and believes that in the vast majority of circumstances, the application of the factors described in § 36.311 for providing access to other-powered mobility devices will result in the admission of the Segway® PT.

Treatment of "manually-powered mobility aids." The Department's NPRM did not define the term "manually-powered mobility aids." Instead, the NPRM included a non-exhaustive list of examples in § 36.311(a). The NPRM queried whether the Department should maintain this approach to manually-powered mobility aids or whether it should adopt a more formal definition.

Only a few commenters addressed "manually-powered mobility aids." Virtually all commenters were in favor of maintaining a non-exhaustive list of examples of "manually-powered mobility aids" rather than adopting a definition of the term. Of those who commented, a couple sought clarification of the term "manually-powered." One commenter suggested that the term be changed to "human-powered." Other commenters requested that the Department include ordinary strollers in the non-exhaustive list of manually-powered mobility aids. Since strollers are not devices designed primarily for individuals with mobility disabilities, the Department does not consider them to be manually-powered mobility aids; however, strollers used in the context of transporting individuals with disabilities are subject to the same assessment required by the ADA's reasonable modification standards at § 36.302. The Department believes that because the existing approach is clear and understood easily by the public, no formal definition of the term "manually-powered mobility aids" is required.

Definition of "other power-driven mobility device." The Department's NPRM defined the term "other power-driven mobility device" in § 36.104 as "any of a large range of devices powered by batteries, fuel, or other engines—whether or not designed solely for use by individuals with mobility impairments—that are used by individuals with mobility impairments for the purpose of locomotion, including golf cars, bicycles, electronic personal assistance mobility devices (EPAMDs), or any mobility aid designed to operate in areas without defined pedestrian routes." 73 FR 34508, 34552 (June 17, 2008).

Business commenters mostly were supportive of the definition of "other power-driven mobility device" because it gave them the ability to develop policies pertaining to the admission of these devices, but they expressed concern that individuals will feign mobility disabilities so that they can use devices that are otherwise banned in public accommodations. Advocacy, nonprofit, and several individual commenters supported the definition of "other power-driven mobility device" because it allows new technologies to be added in the future, maintains the existing legal protections for wheelchairs, and recognizes that some devices, particularly the Segway® PT, which are not designed primarily for individuals with mobility disabilities, have beneficial uses for individuals with mobility disabilities.

Despite support for the definition of "other power-driven mobility device," however, most advocacy and nonprofit commenters expressed at least some hesitation about the inclusion of fuel-powered mobility devices in the definition. While virtually all of these commenters noted that a blanket exclusion of any device that falls under the definition of "other power-driven mobility device" would violate basic civil rights concepts, they also specifically stated that certain devices, particularly off-highway vehicles, cannot be permitted in certain circumstances. They also made a distinction between the Segway® PT and other power-driven mobility devices, noting that the Segway® PT should be accommodated in most circumstances because it satisfies the safety and environmental elements of the policy analysis. These commenters indicated that they agree that other power-driven mobility devices must be assessed, particularly as to their environmental impact, before they are accommodated.

Business commenters were even less supportive of the inclusion of fuel-powered devices in the other power-driven mobility devices category. They sought a complete ban on fuel-powered devices because they believe they are inherently dangerous and pose environmental and safety concerns.

Although many commenters had reservations about the inclusion of fuel-powered devices in the definition of other power-driven mobility devices, the Department does not want the definition to be so narrow that it would foreclose the inclusion of new technological developments, whether powered by fuel or by some other means. It is for this reason that the Department has maintained the phrase "any mobility device designed to operate in areas without defined pedestrian routes" in the final rule's definition of other power-driven mobility devices. The Department believes that the limitations provided by "fundamental alteration" and the ability to impose legitimate safety requirements will likely prevent the use of fuel and combustion engine-driven devices indoors, as well as in outdoor areas with heavy pedestrian traffic. The Department notes, however, that in the future technological developments may result in the production of safe fuel-powered mobility devices that do not pose environmental and safety concerns. The final rule allows consideration to be given as to whether the use of a fuel-powered device would create a substantial risk of serious harm to the environment or natural or cultural resources, and to whether the use of such a device conflicts with Federal land management laws or regulations; this aspect of the final rule will further limit the inclusion of fuel-powered devices where they are not appropriate. Consequently, the Department has maintained fuel-powered devices in the definition of "other power-driven mobility devices." The Department has also added language to the definition of "other power-driven mobility device" to reiterate that the definition does not apply to Federal wilderness areas, which are not covered by title II of the ADA; the use of wheelchairs in such areas is governed by section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2).

"Place of Public Accommodation"

Definition of "place of lodging." The NPRM stated that a covered "place of lodging" is a facility that provides guest rooms for sleeping for stays that are primarily short-term in nature (generally two weeks or less), to which the occupant does not have the right or intent to return to a specific room or unit after the conclusion of his or her stay, and which operates under conditions and with amenities similar to a hotel, motel, or inn, particularly including factors such as: (1) An on-site proprietor and reservations desk; (2) rooms available on a walk-up basis; (3) linen service; and (4) a policy of accepting reservations for a room type without guaranteeing a particular unit or room until check-in, without a prior lease or security deposit. The NPRM stated that timeshares and condominiums or corporate hotels that did not meet this definition would not be covered by § 36.406(c) of the proposed regulation, but may be covered by the

requirements of the Fair Housing Act (FHAct).

In the NPRM, the Department sought comment on its definition of "place of lodging," specifically seeking public input on whether the most appropriate time period for identifying facilities used for stays that primarily are short-term in nature should be set at 2 weeks or 30 days.

The vast majority of the comments received by the Department supported the use of a 30-day limitation on places of lodging as more consistent with building codes, local laws, and common real estate practices that treat stays of 30 days or less as transient rather than residential use. One commenter recommended using the phrase "fourteen days or less." Another commenter objected to any bright line standard, stating that the difference between two weeks and 30 days for purposes of title III is arbitrary, viewed in light of conflicting regulations by the States. This commenter argued the Department should continue its existing practice under title III of looking to State law as one factor in determining whether a facility is used for stays that primarily are short-term in nature.

The Department is persuaded by the majority of commenters to adopt a 30-day guideline for the purposes of identifying facilities that primarily are short-term in nature and has modified the section accordingly. The 30-day guideline is intended only to determine when the final rule's transient lodging provisions apply to a facility. It does not alter an entity's obligations under any other applicable statute. For example, the Department recognizes that the FHAct does not employ a bright line standard for determining which facilities qualify as residential facilities under that Act and that there are circumstances where units in facilities that meet the definition of places of lodging will be covered under both the ADA and the FHAct and will have to comply with the requirements of both laws.

The Department also received comments about the factors used in the NPRM's definition of "place of lodging." One commenter proposed modifications to the definition as follows: changing the words "guest rooms" to "accommodations for sleeping"; and adding a fifth factor that states that "the in-room decor, furnishings and equipment being specified by the owner or operator of the lodging operation rather than generally being determined by the owner of the individual unit or room." The Department does not believe that "guest room" should be changed to "accommodations for sleeping." Such a change would create confusion because the transient lodging provisions in the 2004 ADAAG use the term "guest rooms" and not "accommodations for sleeping." In addition, the Department believes that it would be confusing to add a factor relating to who dictates the in-room decor and furnishings in a unit or room, because there may be circumstances where particular rental programs require individual owners to use certain decor and furnishings as a condition of participating in that program.

One commenter stated that the factors the Department has included for determining whether a rental unit is a place of lodging for the purposes of title III, and therefore a "place of public accommodation" under the ADA, address only the way an establishment appears to the public. This commenter recommended that the Department also consider the economic relationships among the unit owners, rental managers, and homeowners' associations, noting that where revenues are not pooled (as they are in a hotel), the economic relationships do not make it possible to spread the cost of providing accessibility features over the entire business enterprise. Another commenter argued that private ownership of sleeping accommodations sets certain facilities apart from traditional hotels, motels, and inns, and that the Department should revise the definition of places of lodging to exempt existing places of lodging that have sleeping accommodations separately owned by individual owners (*e.g.,* condominiums) from the accessible transient lodging guest room requirements in sections 224 and 806 of the 2004 ADAAG, although the commenter agreed that newly constructed places of lodging should meet those standards.

One commenter argued that the Department's proposed definition of place of lodging does not reflect fully the nature of a timeshare facility and one single definition does not fit timeshares, condo hotels, and other types of rental accommodations. This commenter proposed that the Department adopt a separate definition for timeshare resorts as a subcategory of place of lodging. The commenter proposed defining timeshare resorts as facilities that provide the recurring right to occupancy for overnight accommodations for the owners of the accommodations, and other occupancy rights for owners exchanging their interests or members of the public for stays that primarily are short-term in nature (generally 30 consecutive days or less), where neither the owner nor any other occupant has the right or intent to use the unit or room on other than a temporary basis for vacation or leisure purposes. This proposed definition also would describe factors for determining when a timeshare resort is operating in a manner similar to a hotel, motel, or inn, including some or all of the following: rooms being available on a walk-in or call-in basis; housekeeping or linen services being available; on-site management; and reservations being accepted for a room type without guaranteeing any guest or owner use of a particular unit or room until check-in, without a prior lease or security deposit. Timeshares that do not meet this definition would not be subject to the transient lodging standards.

The Department has considered these comments and has revised the definition of "place of accommodation" in § 36.104 to include a revised subcategory (B), which more clearly defines the factors that must be present for a facility that is not an inn, motel, or hotel to qualify as a place of lodging. These factors include conditions and amenities similar to an inn, motel, or hotel, including on- or off-site management and reservations service, rooms available on a walk-up or call-in basis, availability of housekeeping or linen service, and accepting reservations for a room type without guaranteeing a particular unit or room until check-in without a prior lease or security deposit.

Although the Department understands some of the concerns about the application of the ADA requirements to places of lodging that have ownership structures that involve individually owned units, the Department does not believe that the definitional section of the regulation is the place to address these concerns and has addressed them in § 36.406(c)(2) and the accompanying discussion in Appendix A.

"Qualified Interpreter"

In the NPRM, the Department proposed adding language to the definition of "qualified interpreter" to clarify that the term includes, but is not limited to, sign language interpreters, oral interpreters, and cued-speech interpreters. As the Department explained, not all interpreters are qualified for all situations. For example, a qualified interpreter who uses American Sign Language (ASL) is not necessarily qualified to interpret orally. In addition, someone with only a rudimentary familiarity with sign language or finger spelling is not qualified, nor is someone who is fluent in sign language but unable to translate spoken communication into ASL or to translate signed communication into spoken words.

As further explained, different situations will require different types of interpreters. For example, an oral interpreter who has special skill and training to mouth a speaker's words silently for individuals who are deaf or hard of hearing may be necessary for an individual who was raised orally and taught to read lips or was diagnosed with hearing loss later in life and does not know sign language. An individual who is deaf or hard of hearing may need an oral interpreter if the speaker's voice is unclear, if there is a quick-paced exchange of communication (*e.g.,* in a meeting), or when the speaker does not directly face the individual who is deaf or hard of hearing. A cued-speech interpreter functions in the same manner as an oral interpreter except that he or she also uses a hand code or cue to represent each speech sound.

The Department received many comments regarding the proposed modifications to the definition of "qualified interpreter." Many commenters requested that the Department include within the definition a requirement that interpreters be certified, particularly if they reside in a State that licenses or certifies interpreters. Other commenters opposed a certification requirement as unduly limiting, noting that an interpreter may well be qualified even if that same interpreter is not certified. These commenters noted the absence of nationwide standards or universally accepted criteria for certification.

On review of this issue, the Department has decided against imposing a certification requirement under the ADA. It is sufficient under the ADA that the interpreter be qualified. With respect to the proposed additions to the rule, most commenters supported the expansion of the list of qualified interpreters, and some advocated for the inclusion of other types of interpreters

on the list as well, such as deaf-blind interpreters, certified deaf interpreters, and speech-to-speech interpreters. As these commenters explained, deaf-blind interpreters are interpreters who have specialized skills and training to interpret for individuals who are deaf and blind. Certified deaf interpreters are deaf or hard of hearing interpreters who work with hearing sign language interpreters to meet the specific communication needs of deaf individuals. Speech-to-speech interpreters have special skill and training to interpret for individuals who have speech disabilities.

The list of interpreters in the definition of "qualified interpreter" is illustrative, and the Department does not believe it is necessary or appropriate to attempt to provide an exhaustive list of qualified interpreters. Accordingly, the Department has decided not to expand the proposed list. However, if a deaf and blind individual needs interpreting services, an interpreter who is qualified to handle the interpreting needs of that individual may be required. The guiding criterion is that the public accommodation must provide appropriate auxiliary aids and services to ensure effective communication with the individual.

Commenters also suggested various definitions for the term "cued-speech interpreters," and different descriptions of the tasks they performed. After reviewing the various comments, the Department has determined that it is more accurate and appropriate to refer to such individuals as "cued-language transliterators." Likewise, the Department has changed the term "oral interpreters" to "oral transliterators." These two changes have been made to distinguish between sign language interpreters, who translate one language into another language (*e.g.,* ASL to English and English to ASL), from transliterators, who interpret within the same language between deaf and hearing individuals. A cued-language transliterator is an interpreter who has special skill and training in the use of the Cued Speech system of handshapes and placements, along with non-manual information, such as facial expression and body language, to show auditory information visually, including speech and environmental sounds. An oral transliterator is an interpreter who has special skill and training to mouth a speaker's words silently for individuals who are deaf or hard of hearing. While the Department included definitions for "cued-speech interpreter" and "oral interpreter" in the regulatory text proposed in the NPRM, the Department has decided that it is unnecessary to include such definitions in the text of the final rule.

Many commenters questioned the proposed deletion of the requirement that a qualified interpreter be able to interpret both receptively and expressively, noting the importance of both these skills. Commenters noted that this phrase was carefully crafted in the original regulation to make certain that interpreters both (1) are capable of understanding what a person with a disability is saying and (2) have the skills needed to convey information back to that individual. These are two very different skill sets and both are equally important to achieve effective communication. For example, in a medical setting, a sign language interpreter must have the necessary skills to understand the grammar and syntax used by an ASL user (receptive skills) and the ability to interpret complicated medical information—presented by medical staff in English—back to that individual in ASL (expressive skills). The Department agrees and has put the phrase "both receptively and expressively" back in the definition.

Several advocacy groups suggested that the Department make clear in the definition of qualified interpreter that the interpreter may appear either on-site or remotely using a video remote interpreting (VRI) service. Given that the Department has included in this rule both a definition of VRI services and standards that such services must satisfy, such an addition to the definition of qualified interpreter is appropriate.

After consideration of all relevant information submitted during the public comment period, the Department has modified the definition from that initially proposed in the NPRM. The final definition now states that "[q]ualified interpreter means an interpreter who, via a video remote interpreting (VRI) service or an on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators."

"Qualified Reader"

The 1991 title III regulation identified a qualified reader as an auxiliary aid, but did not define the term. Based upon the Department's investigation of complaints alleging that some entities have provided ineffective readers, the Department proposed in the NPRM to define "qualified reader" similarly to "qualified interpreter" to ensure that public accommodations select qualified individuals to read an examination or other written information in an effective, accurate, and impartial manner. This proposal was suggested in order to make clear to public accommodations that a failure to provide a qualified reader to a person with a disability may constitute a violation of the requirement to provide appropriate auxiliary aids and services.

The Department received comments supporting the inclusion in the regulation of a definition of a "qualified reader." Some commenters suggested the Department add to the definition a requirement prohibiting the use of a reader whose accent, diction, or pronunciation makes full comprehension of material being read difficult. Another commenter requested that the Department include a requirement that the reader "will follow the directions of the person for whom he or she is reading." Commenters also requested that the Department define "accurately" and "effectively" as used in this definition.

While the Department believes that the regulatory definition proposed in the NPRM adequately addresses these concerns, the Department emphasizes that a reader, in order to be "qualified," must be skilled in reading the language and subject matter and must be able to be easily understood by the individual with the disability. For example, if a reader is reading aloud the questions for a bar examination, that reader, in order to be qualified, must know the proper pronunciation of all legal terminology used and must be sufficiently articulate to be easily understood by the individual with a disability for whom he or she is reading. In addition, the terms "effectively" and "accurately" have been successfully used and understood in the Department's existing definition of "qualified interpreter" since 1991 without specific regulatory definitions. Instead, the Department has relied upon the common use and understanding of those terms from standard English dictionaries. Thus, the definition of "qualified reader" has not been changed from that contained in the NPRM. The final rule defines a "qualified reader" to mean "a person who is able to read effectively, accurately, and impartially using any necessary specialized vocabulary."

"Service Animal"

Section 36.104 of the 1991 title III regulation defines a "service animal" as "any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items." Section 36.302(c)(1) of the 1991 title III regulation requires that "[g]enerally, a public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability." Section 36.302(c)(2) of the 1991 title III regulation states that "a public accommodation [is not required] to supervise or care for a service animal."

The Department has issued guidance and provided technical assistance and publications concerning service animals since the 1991 regulations became effective. In the NPRM, the Department proposed to modify the definition of service animal and asked for public input on several issues related to the service animal provisions of the 1991 title III regulation: whether the Department should clarify the phrase "providing minimal protection" in the definition or remove it; whether there are any circumstances where a service animal "providing minimal protection" would be appropriate or expected; whether certain species should be eliminated from the definition of "service animal," and, if so, which types of animals should be excluded; whether "common domestic animal" should be part of the definition; and whether a size or weight limitation should be imposed for common domestic animals, even if the animal satisfies the "common domestic animal" part of the NPRM definition.

The Department received extensive comments on these issues, as well as requests to clarify the obligations of public accommodations to accommodate individuals with disabilities who use service animals, and has modified the final rule in response. In the interests of avoiding unnecessary repetition, the Department has

elected to discuss the issues raised in the NPRM questions about service animals and the corresponding public comments in the following discussion of the definition of "service animal."

The Department's final rule defines "service animal" as "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the handler's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition."

This definition has been designed to clarify a key provision of the ADA. Many covered entities indicated that they are confused regarding their obligations under the ADA with regard to individuals with disabilities who use service animals. Individuals with disabilities who use trained guide or service dogs are concerned that if untrained or unusual animals are termed "service animals," their own right to use guide or service dogs may become unnecessarily restricted or questioned. Some individuals who are not individuals with disabilities have claimed, whether fraudulently or sincerely (albeit mistakenly), that their animals are service animals covered by the ADA, in order to gain access to hotels, restaurants, and other places of public accommodation. The increasing use of wild, exotic, or unusual species, many of which are untrained, as service animals has also added to the confusion.

Finally, individuals with disabilities who have the legal right under the Fair Housing Act (FHAct) to use certain animals in their homes as a reasonable accommodation to their disabilities have assumed that their animals also qualify under the ADA. This is not necessarily the case, as discussed below.

The Department recognizes the diverse needs and preferences of individuals with disabilities protected under the ADA, and does not wish to unnecessarily impede individual choice. Service animals play an integral role in the lives of many individuals with disabilities, and with the clarification provided by the final rule, individuals with disabilities will continue to be able to use their service animals as they go about their daily activities. The clarification will also help to ensure that the fraudulent or mistaken use of other animals not qualified as service animals under the ADA will be deterred. A more detailed analysis of the elements of the definition and the comments responsive to the service animal provisions of the NPRM follows.

Providing minimal protection. The 1991 title III regulation included language stating that "minimal protection" was a task that could be performed by an individually trained service animal for the benefit of an individual with a disability. In the Department's "ADA Business Brief on Service Animals" (2002), the Department interpreted the "minimal protection" language within the context of a seizure (*i.e.,* alerting and protecting a person who is having a seizure). The Department received many comments in response to the question of whether the "minimal protection" language should be clarified. Many commenters urged the removal of the "minimal protection" language from the service animal definition for two reasons: (1) The phrase can be interpreted to allow any dog that is trained to be aggressive to qualify as a service animal simply by pairing the animal with a person with a disability; and (2) The phrase can be interpreted to allow any untrained pet dog to qualify as a service animal, since many consider the mere presence of a dog to be a crime deterrent, and thus sufficient to meet the minimal protection standard. These commenters argued, and the Department agrees, that these interpretations were not contemplated under the original title III regulation.

While many commenters stated that they believe that the "minimal protection" language should be eliminated, other commenters recommended that the language be clarified, but retained. Commenters favoring clarification of the term suggested that the Department explicitly exclude the function of attack or exclude those animals that are trained solely to be aggressive or protective. Other commenters identified non-violent behavioral tasks that could be construed as minimally protective, such as interrupting self-mutilation, providing safety checks and room searches, reminding the handler to take medications, and protecting the handler from injury resulting from seizures or unconsciousness.

Several commenters noted that the existing direct threat defense, which allows the exclusion of a service animal if the animal exhibits unwarranted or unprovoked violent behavior or poses a direct threat, prevents the use of "attack dogs" as service animals. One commenter noted that the use of a service animal trained to provide "minimal protection" may impede access to care in an emergency, for example, where the first responder is unable or reluctant to approach a person with a disability because the individual's service animal is in a protective posture suggestive of aggression.

Many organizations and individuals stated that in the general dog training community, "protection" is code for attack or aggression training and should be removed from the definition. Commenters stated that there appears to be a broadly held misconception that aggression-trained animals are appropriate service animals for persons with post traumatic stress disorder (PTSD). While many individuals with PTSD may benefit by using a service animal, the work or tasks performed appropriately by such an animal would not involve unprovoked aggression but could include actively cuing the handler by nudging or pawing the handler to alert to the onset of an episode and removing the individual from the anxiety-provoking environment.

The Department recognizes that despite its best efforts to provide clarification, the "minimal protection" language appears to have been misinterpreted. While the Department maintains that protection from danger is one of the key functions that service animals perform for the benefit of persons with disabilities, the Department recognizes that an animal individually trained to provide aggressive protection, such as an attack dog, is not appropriately considered a service animal. Therefore, the Department has decided to modify the "minimal protection" language to read "non-violent protection," thereby excluding so-called "attack dogs" or dogs with traditional "protection training" as service animals. The Department believes that this modification to the service animal definition will eliminate confusion, without restricting unnecessarily the type of work or tasks that service animals may perform. The Department's modification also clarifies that the crime-deterrent effect of a dog's presence, by itself, does not qualify as work or tasks for purposes of the service animal definition.

Alerting to intruders. The phrase "alerting to intruders" is related to the issues of minimal protection and the work or tasks an animal may perform to meet the definition of a service animal. In the original 1991 regulatory text, this phrase was intended to identify service animals that alert individuals who are deaf or hard of hearing to the presence of others. This language has been misinterpreted by some to apply to dogs that are trained specifically to provide aggressive protection, resulting in the assertion that such training qualifies a dog as a service animal under the ADA. The Department reiterates that public accommodations are not required to admit any animal whose use poses a direct threat. In addition, the Department has decided to remove the word "intruders" from the service animal definition and replace it with the phrase "the presence of people or sounds." The Department believes this clarifies that so-called "attack training" or other aggressive response types of training that cause a dog to provide an aggressive response do not qualify a dog as a service animal under the ADA.

Conversely, if an individual uses a breed of dog that is perceived to be aggressive because of breed reputation, stereotype, or the history or experience the observer may have with other dogs, but the dog is under the control of the individual with a disability and does not exhibit aggressive behavior, the public accommodation cannot exclude the individual or the animal from the place of public accommodation. The animal can only be removed if it engages in the behaviors

mentioned in § 36.302(c) (as revised in the final rule) or if the presence of the animal constitutes a fundamental alteration to the nature of the goods, services, facilities, and activities of the place of public accommodation.

"*Doing work*" *or* "*performing tasks.*" The NPRM proposed that the Department maintain the requirement first articulated in the 1991 title III regulation that in order to qualify as a service animal, the animal must "perform tasks" or "do work" for the individual with a disability. The phrases "perform tasks" and "do work" describe what an animal must do for the benefit of an individual with a disability in order to qualify as a service animal.

The Department received a number of comments in response to the NPRM proposal urging the removal of the term "do work" from the definition of a service animal. These commenters argued that the Department should emphasize the performance of tasks instead. The Department disagrees. Although the common definition of work includes the performance of tasks, the definition of work is somewhat broader, encompassing activities that do not appear to involve physical action.

One service dog user stated that, in some cases, "critical forms of assistance can't be construed as physical tasks," noting that the manifestations of "brain-based disabilities," such as psychiatric disorders and autism, are as varied as their physical counterparts. The Department agrees with this statement but cautions that unless the animal is individually trained to do something that qualifies as work or a task, the animal is a pet or support animal and does not qualify for coverage as a service animal. A pet or support animal may be able to discern that the handler is in distress, but it is what the animal is trained to do in response to this awareness that distinguishes a service animal from an observant pet or support animal.

The NPRM contained an example of "doing work" that stated "a psychiatric service dog can help some individuals with dissociative identity disorder to remain grounded in time or place." 73 FR 34508, 34521 (June 17, 2008). Several commenters objected to the use of this example, arguing that grounding was not a "task" and therefore the example inherently contradicted the basic premise that a service animal must perform a task in order to mitigate a disability. Other commenters stated that "grounding" should not be included as an example of "work" because it could lead to some individuals claiming that they should be able to use emotional support animals in public because the dog makes them feel calm or safe. By contrast, one commenter with experience in training service animals explained that grounding is a trained task based upon very specific behavioral indicators that can be observed and measured. These tasks are based upon input from mental health practitioners, dog trainers, and individuals with a history of working with psychiatric service dogs.

It is the Department's view that an animal that is trained to "ground" a person with a psychiatric disorder does work or performs a task that would qualify it as a service animal as compared to an untrained emotional support animal whose presence affects a person's disability. It is the fact that the animal is trained to respond to the individual's needs that distinguishes an animal as a service animal. The process must have two steps: Recognition and response. For example, if a service animal senses that a person is about to have a psychiatric episode and it is trained to respond, for example, by nudging, barking, or removing the individual to a safe location until the episode subsides, then the animal has indeed performed a task or done work on behalf of the individual with the disability, as opposed to merely sensing an event.

One commenter suggested defining the term "task," presumably to improve the understanding of the types of services performed by an animal that would be sufficient to qualify the animal for coverage. The Department believes that the common definition of the word "task" is sufficiently clear and that it is not necessary to add to the definitions section. However, the Department has added examples of other kinds of work or tasks to help illustrate and provide clarity to the definition. After careful evaluation of this issue, the Department has concluded that the phrases "do work" and "perform tasks" have been effective during the past two decades to illustrate the varied services provided by service animals for the benefit of individuals with all types of disabilities. Thus, the Department declines to depart from its longstanding approach at this time.

Species limitations. When the Department originally issued its title III regulation in the early 1990s, the Department did not define the parameters of acceptable animal species. At that time, few anticipated the variety of animals that would be promoted as service animals in the years to come, which ranged from pigs and miniature horses to snakes, iguanas, and parrots. The Department has followed this particular issue closely, keeping current with the many unusual species of animals represented to be service animals. Thus, the Department has decided to refine further this aspect of the service animal definition in the final rule.

The Department received many comments from individuals and organizations recommending species limitations. Several of these commenters asserted that limiting the number of allowable species would help stop erosion of the public's trust, which has resulted in reduced access for many individuals with disabilities who use trained service animals that adhere to high behavioral standards. Several commenters suggested that other species would be acceptable if those animals could meet nationally recognized behavioral standards for trained service dogs. Other commenters asserted that certain species of animals (*e.g.,* reptiles) cannot be trained to do work or perform tasks, so these animals would not be covered.

In the NPRM, the Department used the term "common domestic animal" in the service animal definition and excluded reptiles, rabbits, farm animals (including horses, miniature horses, ponies, pigs, and goats), ferrets, amphibians, and rodents from the service animal definition. 73 FR 34508, 34553 (June 17, 2008). However, the term "common domestic animal" is difficult to define with precision due to the increase in the number of domesticated species. Also, several State and local laws define a "domestic" animal as an animal that is not wild.

The Department is compelled to take into account the practical considerations of certain animals and to contemplate their suitability in a variety of public contexts, such as restaurants, grocery stores, hospitals, and performing arts venues, as well as suitability for urban environments. The Department agrees with commenters' views that limiting the number and types of species recognized as service animals will provide greater predictability for public accommodations as well as added assurance of access for individuals with disabilities who use dogs as service animals. As a consequence, the Department has decided to limit this rule's coverage of service animals to dogs, which are the most common service animals used by individuals with disabilities.

Wild animals, monkeys, and other nonhuman primates. Numerous business entities endorsed a narrow definition of acceptable service animal species, and asserted that there are certain animals (*e.g.,* reptiles) that cannot be trained to do work or perform tasks. Other commenters suggested that the Department should identify excluded animals, such as birds and llamas, in the final rule. Although one commenter noted that wild animals bred in captivity should be permitted to be service animals, the Department has decided to make clear that all wild animals, whether born or bred in captivity or in the wild, are eliminated from coverage as service animals. The Department believes that this approach reduces risks to health or safety attendant with wild animals. Some animals, such as certain nonhuman primates, including certain monkeys, pose a direct threat; their behavior can be unpredictably aggressive and violent without notice or provocation. The American Veterinary Medical Association (AVMA) issued a position statement advising against the use of monkeys as service animals, stating that "[t]he AVMA does not support the use of nonhuman primates as assistance animals because of animal welfare concerns, and the potential for serious injury and zoonotic [animal to human disease transmission] risks." AVMA Position Statement, *Nonhuman Primates as Assistance Animals* (2005), available at *http://www.avma.org/issues/policy/nonhuman_primates.asp* (last visited June 24, 2010).

An organization that trains capuchin monkeys to provide in-home services to individuals with paraplegia and quadriplegia was in substantial agreement with the AVMA's views but requested a limited recognition in the service animal definition for the capuchin monkeys it trains to provide assistance for persons with disabilities. The organization commented that its trained capuchin monkeys undergo scrupulous veterinary examinations to ensure that the animals pose no health risks, and are used by individuals with disabilities exclusively in their homes. The organization acknowledged

that the capuchin monkeys it trains are not necessarily suitable for use in a place of public accommodation but noted that the monkeys may need to be used in circumstances that implicate title III coverage, *e.g.,* in the event the handler had to leave home due to an emergency, to visit a veterinarian, or for the initial delivery of the monkey to the individual with a disability. The organization noted that several State and local government entities have local zoning, licensing, health, and safety laws that prohibit non-human primates, and that these prohibitions would prevent individuals with disabilities from using these animals even in their homes.

The organization argued that including capuchin monkeys under the service animal umbrella would make it easier for individuals with disabilities to obtain reasonable modifications of State and local licensing, health, and safety laws that would permit the use of these monkeys. The organization argued that this limited modification to the service animal definition was warranted in view of the services these monkeys perform, which enable many individuals with paraplegia and quadriplegia to live and function with increased independence.

The Department has carefully considered the potential risks associated with the use of nonhuman primates as service animals in places of public accommodation, as well as the information provided to the Department about the significant benefits that trained capuchin monkeys provide to certain individuals with disabilities in residential settings. The Department has determined, however, that nonhuman primates, including capuchin monkeys, will not be recognized as service animals for purposes of this rule because of their potential for disease transmission and unpredictable aggressive behavior. The Department believes that these characteristics make nonhuman primates unsuitable for use as service animals in the context of the wide variety of public settings subject to this rule. As the organization advocating the inclusion of capuchin monkeys acknowledges, capuchin monkeys are not suitable for use in public facilities.

The Department emphasizes that it has decided only that capuchin monkeys will not be included in the definition of service animals for purposes of its regulation implementing the ADA. This decision does not have any effect on the extent to which public accommodations are required to allow the use of such monkeys under other Federal statutes, like the FHAct or the Air Carrier Access Act (ACAA). For example, a public accommodation that also is considered to be a "dwelling" may be covered under both the ADA and the FHAct. While the ADA does not require such a public accommodation to admit people with service monkeys, the FHAct may. Under the FHAct an individual with a disability may have the right to have an animal other than a dog in his or her home if the animal qualifies as a "reasonable accommodation" that is necessary to afford the individual equal opportunity to use and enjoy a dwelling, assuming that the use of the animal does not pose a direct threat. In some cases, the right of an individual to have an animal under the FHAct may conflict with State or local laws that prohibit all individuals, with or without disabilities, from owning a particular species. However, in this circumstance, an individual who wishes to request a reasonable modification of the State or local law must do so under the FHAct, not the ADA.

Having considered all of the comments about which species should qualify as service animals under the ADA, the Department has determined the most reasonable approach is to limit acceptable species to dogs.

Size or weight limitations. The vast majority of commenters did not support a size or weight limitation. Commenters were typically opposed to a size or weight limit because many tasks performed by service animals require large, strong dogs. For instance, service animals may perform tasks such as providing balance and support or pulling a wheelchair. Small animals may not be suitable for large adults. The weight of the service animal user is often correlated with the size and weight of the service animal. Others were concerned that adding a size and weight limit would further complicate the difficult process of finding an appropriate service animal. One commenter noted that there is no need for a limit because "if, as a practical matter, the size or weight of an individual's service animal creates a direct threat or fundamental alteration to a particular public entity or accommodation, there are provisions that allow for the animal's exclusion or removal." Some common concerns among commenters in support of a size and weight limit were that a larger animal may be less able to fit in various areas with its handler, such as toilet rooms and public seating areas, and that larger animals are more difficult to control.

Balancing concerns expressed in favor of and against size and weight limitations, the Department has determined that such limitations would not be appropriate. Many individuals of larger stature require larger dogs. The Department believes it would be inappropriate to deprive these individuals of the option of using a service dog of the size required to provide the physical support and stability these individuals may need to function independently. Since large dogs have always served as service animals, continuing their use should not constitute fundamental alterations or impose undue burdens on public accommodations.

Breed limitations. A few commenters suggested that certain breeds of dogs should not be allowed to be used as service animals. Some suggested that the Department should defer to local laws restricting the breeds of dogs that individuals who reside in a community may own. Other commenters opposed breed restrictions, stating that the breed of a dog does not determine its propensity for aggression and that aggressive and non-aggressive dogs exist in all breeds.

The Department does not believe that it is either appropriate or consistent with the ADA to defer to local laws that prohibit certain breeds of dogs based on local concerns that these breeds may have a history of unprovoked aggression or attacks. Such deference would have the effect of limiting the rights of persons with disabilities under the ADA who use certain service animals based on where they live rather than on whether the use of a particular animal poses a direct threat to the health and safety of others. Breed restrictions differ significantly from jurisdiction to jurisdiction. Some jurisdictions have no breed restrictions. Others have restrictions that, while well-meaning, have the unintended effect of screening out the very breeds of dogs that have successfully served as service animals for decades without a history of the type of unprovoked aggression or attacks that would pose a direct threat, *e.g.,* German Shepherds. Other jurisdictions prohibit animals over a certain weight, thereby restricting breeds without invoking an express breed ban. In addition, deference to breed restrictions contained in local laws would have the unacceptable consequence of restricting travel by an individual with a disability who uses a breed that is acceptable and poses no safety hazards in the individual's home jurisdiction but is nonetheless banned by other jurisdictions. Public accommodations have the ability to determine, on a case-by-case basis, whether a particular service animal can be excluded based on that particular animal's actual behavior or history—not based on fears or generalizations about how an animal or breed might behave. This ability to exclude an animal whose behavior or history evidences a direct threat is sufficient to protect health and safety.

Recognition of psychiatric service animals, but not "emotional support animals." The definition of "service animal" in the NPRM stated the Department's longstanding position that emotional support animals are not included in the definition of "service animal." The proposed text provided that "[a]nimals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or to promote emotional well-being are not service animals." 73 FR 34508, 34553 (June 17, 2008).

Many advocacy organizations expressed concern and disagreed with the exclusion of comfort and emotional support animals. Others have been more specific, stating that individuals with disabilities may need their emotional support animals in order to have equal access. Some commenters noted that individuals with disabilities use animals that have not been trained to perform tasks directly related to their disability. These animals do not qualify as service animals under the ADA. These are emotional support or comfort animals.

Commenters asserted that excluding categories such as "comfort" and "emotional support" animals recognized by laws such as the FHAct or the ACAA is confusing and burdensome. Other commenters noted that emotional support and comfort animals perform an important function, asserting that animal companionship helps individuals who experience depression resulting from multiple sclerosis.

Some commenters explained the benefits emotional support animals provide, including emotional support, comfort, therapy, companionship, therapeutic benefits, and the promotion of emotional

well-being. They contended that without the presence of an emotional support animal in their lives they would be disadvantaged and unable to participate in society. These commenters were concerned that excluding this category of animals will lead to discrimination against and excessive questioning of individuals with non-visible or non-apparent disabilities. Other commenters expressing opposition to the exclusion of individually trained "comfort" or "emotional support" animals asserted that the ability to soothe or de-escalate and control emotion is "work" that benefits the individual with the disability.

Many commenters requested that the Department carve out an exception that permits current or former members of the military to use emotional support animals. They asserted that a significant number of service members returning from active combat duty have adjustment difficulties due to combat, sexual assault, or other traumatic experiences while on active duty. Commenters noted that some current or former members of the military service have been prescribed animals for conditions such as PTSD. One commenter stated that service women who were sexually assaulted while in the military use emotional support animals to help them feel safe enough to step outside their homes. The Department recognizes that many current and former members of the military have disabilities as a result of service-related injuries that may require emotional support and that such individuals can benefit from the use of an emotional support animal and could use such animal in their home under the FHAct. However, having carefully weighed the issues, the Department believes that its final rule appropriately addresses the balance of issues and concerns of both the individual with a disability and the public accommodation. The Department also notes that nothing in this part prohibits a public entity from allowing current or former military members or anyone else with disabilities to utilize emotional support animals if it wants to do so.

Commenters asserted the view that if an animal's "mere presence" legitimately provides such benefits to an individual with a disability and if those benefits are necessary to provide equal opportunity given the facts of the particular disability, then such an animal should qualify as a "service animal." Commenters noted that the focus should be on the nature of a person's disability, the difficulties the disability may impose and whether the requested accommodation would legitimately address those difficulties, not on evaluating the animal involved. The Department understands this approach has benefitted many individuals under the FHAct and analogous State law provisions, where the presence of animals poses fewer health and safety issues and where emotional support animals provide assistance that is unique to residential settings. The Department believes, however, that the presence of such animals is not required in the context of public accommodations, such as restaurants, hospitals, hotels, retail establishments, and assembly areas.

Under the Department's previous regulatory framework, some individuals and entities assumed that the requirement that service animals must be individually trained to do work or perform tasks excluded all individuals with mental disabilities from having service animals. Others assumed that any person with a psychiatric condition whose pet provided comfort to them was covered by the 1991 title III regulation. The Department reiterates that psychiatric service animals that are trained to do work or perform a task for individuals whose disability is covered by the ADA are protected by the Department's present regulatory approach. Psychiatric service animals can be trained to perform a variety of tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and ameliorate their effects. Tasks performed by psychiatric service animals may include reminding the handler to take medicine, providing safety checks or room searches for persons with PTSD, interrupting self-mutilation, and removing disoriented individuals from dangerous situations.

The difference between an emotional support animal and a psychiatric service animal is the work or tasks that the animal performs. Traditionally, service dogs worked as guides for individuals who were blind or had low vision. Since the original regulation was promulgated, service animals have been trained to assist individuals with many different types of disabilities.

In the final rule, the Department has retained its position on the exclusion of emotional support animals from the definition of "service animal." The definition states that "[t]he provision of emotional support, well-being, comfort, or companionship * * * do[es] not constitute work or tasks for the purposes of this definition." The Department notes, however, that the exclusion of emotional support animals from coverage in the final rule does not mean that individuals with psychiatric or mental disabilities cannot use service animals that meet the regulatory definition. The final rule defines service animal as follows: "Service animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability." This language simply clarifies the Department's longstanding position.

The Department's position is based on the fact that the title II and title III regulations govern a wider range of public settings than the housing and transportation settings for which the Department of Housing and Urban Development (HUD) and the DOT regulations allow emotional support animals or comfort animals. The Department recognizes that there are situations not governed by the title II and title III regulations, particularly in the context of residential settings and transportation, where there may be a legal obligation to permit the use of animals that do not qualify as service animals under the ADA, but whose presence nonetheless provides necessary emotional support to persons with disabilities. Accordingly, other Federal agency regulations, case law, and possibly State or local laws governing those situations may provide appropriately for increased access for animals other than service animals as defined under the ADA. Public officials, housing providers, and others who make decisions relating to animals in residential and transportation settings should consult the Federal, State, and local laws that apply in those areas (*e.g.,* the FHAct regulations of HUD and the ACAA) and not rely on the ADA as a basis for reducing those obligations.

Retain term "service animal." Some commenters asserted that the term "assistance animal" is a term of art and should replace the term "service animal"; however, the majority of commenters preferred the term "service animal" because it is more specific. The Department has decided to retain the term "service animal" in the final rule. While some agencies, like HUD, use the terms "assistance animal," "assistive animal," or "support animal," these terms are used to denote a broader category of animals than is covered by the ADA. The Department has decided that changing the term used in the final rule would create confusion, particularly in view of the broader parameters for coverage under the FHAct, *cf.* Preamble to HUD's Final Rule for Pet Ownership for the Elderly and Persons with Disabilities, 73 FR 63834–38 (Oct. 27, 2008); HUD Handbook No. 4350.3 Rev–1, Chapter 2, *Occupancy Requirements of Subsidized Multifamily Housing Programs* (June 2007), available at *http://www.hud.gov/offices/adm/hudclips/handbooks/hsgh/4350.3* (last visited June 24, 2010). Moreover, as discussed above, the Department's definition of "service animal" in the final rule does not affect the rights of individuals with disabilities who use assistance animals in their homes under the FHAct or who use "emotional support animals" that are covered under the ACAA and its implementing regulations. *See* 14 CFR 382.7 *et seq.; see also* Department of Transportation, *Guidance Concerning Service Animals in Air Transportation,* 68 FR 24874, 24877 (May 9, 2003) (discussing accommodation of service animals and emotional support animals on aircraft).

"Video Remote Interpreting (VRI) Services"

In the NPRM, the Department proposed adding "Video Interpreting Services (VIS)" to the list of auxiliary aids available to provide effective communication. In the preamble to the NPRM, VIS was defined as "a technology composed of a video phone, video monitors, cameras, a high-speed Internet connection, and an interpreter. The video phone provides video transmission to a video monitor that permits the individual who is deaf or hard of hearing to view and sign to a video interpreter (*i.e.,* a live interpreter in another location), who can see and sign to the individual through a camera located on or near the monitor, while others can communicate by speaking. The video monitor can display a split screen of two live images, with the interpreter in one image and the individual who is deaf or hard of hearing in the other image." 73 FR 34508, 34522 (June 17, 2008). Comments from advocacy organizations and individuals unanimously requested that the Department use the term "video remote interpreting (VRI)," instead of

VIS, for consistency with Federal Communications Commission (FCC) regulations, FCC Public Notice, DA–0502417 (Sept. 7, 2005), and with common usage by consumers. The Department has made that change throughout the regulation to avoid confusion and to make the regulation more consistent with existing regulations.

Many commenters also requested that the Department distinguish between VRI and "video relay service (VRS)." Both VRI and VRS use a remote interpreter who is able to see and communicate with a deaf person and a hearing person, and all three individuals may be connected by a video link. VRI is a fee-based interpreting service conveyed via videoconferencing where at least one person, typically the interpreter, is at a separate location. VRI can be provided as an on-demand service or by appointment. VRI normally involves a contract in advance for the interpreter who is usually paid by the covered entity.

VRS is a telephone service that enables persons with disabilities to use the telephone to communicate using video connections and is a more advanced form of relay service than the traditional voice to text telephones (TTY) relay systems that were recognized in the 1991 title III regulation. More specifically, VRS is a video relay service using interpreters connected to callers by video hook-up and is designed to provide telephone services to persons who are deaf and use American Sign Language that are functionally equivalent to those services provided to users who are hearing. VRS is funded through the Interstate Telecommunications Relay Services Fund and overseen by the FCC. *See* 47 CFR 64.601(a)(26). There are no fees for callers to use the VRS interpreters and the video connection, although there may be relatively inexpensive initial costs to the title III entities to purchase the videophone or camera for on-line video connection, or other equipment to connect to the VRS service. The FCC has made clear that VRS functions as a telephone service and is not intended to be used for interpreting services where both parties are in the same room; the latter is reserved for VRI. The Department agrees that VRS cannot be used as a substitute for in-person interpreters or for VRI in situations that would not, absent one party's disability, entail use of the telephone.

Many commenters strongly recommended limiting the use of VRI to circumstances where it will provide effective communication. Commenters from advocacy groups and persons with disabilities expressed concern that VRI may not always be appropriate to provide effective communication, especially in hospitals and emergency rooms. Examples were provided of patients who are unable to see the video monitor because they are semi-conscious or unable to focus on the video screen; other examples were given of cases where the video monitor is out of the sightline of the patient or the image is out of focus; still other examples were given of patients who could not see the image because the signal was interrupted, causing unnatural pauses in the communication, or the image was grainy or otherwise unclear. Many commenters requested more explicit guidelines on the use of VRI and some recommended requirements for equipment maintenance, high-speed, wide-bandwidth video links using dedicated lines or wireless systems, and training of staff using VRI, especially in hospital and health care situations. Several major organizations requested a requirement to include the interpreter's face, head, arms, hands, and eyes in all transmissions.

After consideration of the comments and the Department's own research and experience, the Department has determined that VRI can be an effective method of providing interpreting services in certain circumstances, but not in others. For example, VRI should be effective in many situations involving routine medical care, as well as in the emergency room where urgent care is important, but no in-person interpreter is available; however, VRI may not be effective in situations involving surgery or other medical procedures where the patient is limited in his or her ability to see the video screen. Similarly, VRI may not be effective in situations where there are multiple people in a room and the information exchanged is highly complex and fast paced. The Department recognizes that in these and other situations, such as where communication is needed for persons who are deaf-blind, it may be necessary to summon an in-person interpreter to assist certain individuals. To ensure that VRI is effective in situations where it is appropriate, the Department has established performance standards in § 36.303(f).

Subpart B—General Requirements

Section 36.208(b) Direct Threat

The Department has revised the language of § 36.208(b) (formerly § 36.208(c) in the 1991 title III regulation) to include consideration of whether the provision of auxiliary aids or services will mitigate the risk that an individual will pose a direct threat to the health or safety of others. Originally, the reference to auxiliary aids or services as a mitigating factor was part of § 36.208. However, that reference was removed from the section when, for editorial purposes, the Department removed the definition of "direct threat" from § 36.208 and placed it in § 36.104. The Department has put the reference to auxiliary aids or services as a mitigating factor back into § 36.208(b) in order to maintain consistency with the current regulation.

Section 36.211 Maintenance of Accessible Features

Section 36.211 of the 1991 title III regulation provides that a public accommodation must maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by individuals with disabilities. 28 CFR 36.211. In the NPRM, the Department clarified the application of this provision and proposed one change to the section to address the discrete situation in which the scoping requirements provided in the 2010 Standards reduce the number of required elements below the requirements of the 1991 Standards. In that discrete event, a public accommodation may reduce such accessible features in accordance with the requirements in the 2010 Standards.

The Department received only four comments on this proposed amendment. None of the commenters opposed the change. In the final rule, the Department has revised the section to make it clear that if the 2010 Standards reduce either the technical requirements or the number of required accessible elements below that required by the 1991 Standards, then the public accommodation may reduce the technical requirements or the number of accessible elements in a covered facility in accordance with the requirements of the 2010 Standards. One commenter, an association of convenience stores, urged the Department to expand the language of the section to include restocking of shelves as a permissible activity for isolated or temporary interruptions in service or access. It is the Department's position that a temporary interruption that blocks an accessible route, such as restocking of shelves, is already permitted by existing § 36.211(b), which clarifies that "isolated or temporary interruptions in service or access due to maintenance or repairs" are permitted. Therefore, the Department will not make any additional changes in the language of § 36.211 other than those discussed in the preceding paragraph.

Subpart C—Specific Requirements

Section 36.302 Modifications in Policies, Practices, or Procedures

Section 36.302(c) Service Animals

Section 36.302(c)(1) of the 1991 title III regulation states that "[g]enerally, a public accommodation shall modify [its] policies, practices, or procedures to permit the use of service animals by an individual with a disability." Section 36.302(c)(2) of the 1991 title III regulation states that "[n]othing in this part requires a public accommodation to supervise or care for a service animal." The Department has decided to retain the scope of the 1991 title III regulation while clarifying the Department's longstanding policies and interpretations. Toward that end, the final rule has been revised to include the Department's policy interpretations as outlined in published technical assistance, *Commonly Asked Questions about Service Animals in Places of Business* (1996), available at *http://www.ada.gov/qasrvc.htm,* and *ADA Guide for Small Businesses* (1999), available at *http://www.ada.gov/smbustxt.htm,* and to add that a public accommodation may exclude a service animal in certain circumstances where the service animal fails to meet certain behavioral standards. The Department received extensive comments in response to proposed § 36.302(c) from individuals, disability advocacy groups, organizations involved in training service animals, and public accommodations. Those comments and the Department's response are discussed below.

Exclusion of service animals. The 1991 regulatory provision in § 36.302(c) addresses reasonable modification and remains unchanged in the final rule. However, based

on comments received and the Department's analysis, the Department has decided to clarify those circumstances where otherwise eligible service animals may be excluded by public accommodations.

In the NPRM, in § 36.302(c)(2)(i), the Department proposed that a public accommodation may ask an individual with a disability to remove a service animal from the place of public accommodation if "[t]he animal is out of control and the animal's handler does not take effective action to control it." 73 FR 34508, 34553 (June 17, 2008). The Department has long held that a service animal must be under the control of the handler at all times. Commenters overwhelmingly were in favor of this language, but noted that there are occasions when service animals are provoked to disruptive or aggressive behavior by agitators or troublemakers, as in the case of a blind individual whose service dog is taunted or pinched. While all service animals are trained to ignore and overcome these types of incidents, misbehavior in response to provocation is not always unreasonable. In circumstances where a service animal misbehaves or responds reasonably to a provocation or injury, the public accommodation must give the handler a reasonable opportunity to gain control of the animal. Further, if the individual with a disability asserts that the animal was provoked or injured, or if the public accommodation otherwise has reason to suspect that provocation or injury has occurred, the public accommodation should seek to determine the facts and, if provocation or injury occurred, the public accommodation should take effective steps to prevent further provocation or injury, which may include asking the provocateur to leave the place of public accommodation. This language is unchanged in the final rule.

The NPRM also proposed language at § 36.302(c)(2)(ii) to permit a public accommodation to exclude a service animal if the animal is not housebroken (*i.e.,* trained so that, absent illness or accident, the animal controls its waste elimination) or the animal's presence or behavior fundamentally alters the nature of the service the public accommodation provides (*e.g.,* repeated barking during a live performance). Several commenters were supportive of this NPRM language, but cautioned against overreaction by the public accommodation in these instances. One commenter noted that animals get sick, too, and that accidents occasionally happen. In these circumstances, simple clean up typically addresses the incident. Commenters noted that the public accommodation must be careful when it excludes a service animal on the basis of "fundamental alteration," asserting for example, that a public accommodation should not exclude a service animal for barking in an environment where other types of noise, such as loud cheering or a child crying, is tolerated. The Department maintains that the appropriateness of an exclusion can be assessed by reviewing how a public accommodation addresses comparable situations that do not involve a service animal. The Department has retained in § 36.302(c)(2) of the final rule the exception requiring animals to be housebroken. The Department has not retained the specific NPRM language stating that animals can be excluded if their presence or behavior fundamentally alters the nature of the service provided by the public accommodation, because the Department believes that this exception is covered by the general reasonable modification requirement contained in § 36.302(c)(1).

The NPRM also proposed in § 36.302(c)(2)(iii) that a service animal can be excluded where "[t]he animal poses a direct threat to the health or safety of others that cannot be eliminated by reasonable modifications." 73 FR 34508, 34553 (June 17, 2008). Commenters were universally supportive of this provision as it makes express the discretion of a public accommodation to exclude a service animal that poses a direct threat. Several commenters cautioned against the overuse of this provision and suggested that the Department provide an example of the rule's application. The Department has decided not to include regulatory language specifically stating that a service animal can be excluded if it poses a direct threat. The Department believes that the direct threat provision in § 36.208 already provides this exception to public accommodations.

Access to a public accommodation following the proper exclusion of a service animal. The NPRM proposed that in the event a public accommodation properly excludes a service animal, the public accommodation must give the individual with a disability the opportunity to obtain the goods and services of the public accommodation without having the service animal on the premises. Most commenters welcomed this provision as a common sense approach. These commenters noted that they do not wish to preclude individuals with disabilities from the full and equal enjoyment of the goods and services simply because of an isolated problem with a service animal. The Department has elected to retain this provision in § 36.302(c)(2).

Other requirements. The NPRM also proposed that the regulation include the following requirements: that the work or tasks performed by the service animal must be directly related to the handler's disability; that a service animal must be individually trained to do work or perform a task, be housebroken, and be under the control of the handler; and that a service animal must have a harness, leash, or other tether. Most commenters addressed at least one of these issues in their responses. Most agreed that these provisions are important to clarify further the 1991 service animal regulation. The Department has moved the requirement that the work or tasks performed by the service animal must be related directly to the handler's disability to the definition of "service animal" in § 36.104. In addition, the Department has modified the proposed language relating to the handler's control of the animal with a harness, leash, or other tether to state that "[a] service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (*e.g.,* voice control, signals, or other effective means)." The Department has retained the requirement that the service animal must be individually trained, as well as the requirement that the service animal be housebroken.

Responsibility for supervision and care of a service animal. The 1991 title III regulation, in § 36.302(c)(2), states that "[n]othing in this part requires a public accommodation to supervise or care for a service animal." The NPRM modified this language to state that "[a] public accommodation is not responsible for caring for or supervising a service animal." 73 FR 34508, 34553 (June 17, 2008). Most commenters did not address this particular provision. The Department notes that there are occasions when a person with a disability is confined to bed in a hospital for a period of time. In such an instance, the individual may not be able to walk or feed the service animal. In such cases, if the individual has a family member, friend, or other person willing to take on these responsibilities in the place of the individual with a disability, the individual's obligation to be responsible for the care and supervision of the service animal would be satisfied. The language of this section is retained, with minor modifications, in § 36.302(c)(5) of the final rule.

Inquiries about service animals. The NPRM proposed language at § 36.302(c)(6) setting forth parameters about how a public accommodation may determine whether an animal qualifies as a service animal. The proposed section stated that a public accommodation may ask if the animal is required because of a disability and what task or work the animal has been trained to do but may not require proof of service animal certification or licensing. Such inquiries are limited to eliciting the information necessary to make a decision without requiring disclosure of confidential disability-related information that a public accommodation does not need.

This language is consistent with the policy guidance outlined in two Department publications, *Commonly Asked Questions about Service Animals in Places of Business* (1996), available at *http://www.ada.gov/qasrvc.htm,* and *ADA Guide for Small Businesses* (1999), available at *http://www.ada.gov/smbustxt.htm.*

Although some commenters contended that the NPRM service animal provisions leave unaddressed the issue of how a public accommodation can distinguish between a psychiatric service animal, which is covered under the final rule, and a comfort animal, which is not, other commenters noted that the Department's published guidance has helped public accommodations to distinguish between service animals and pets on the basis of an individual's response to these questions. Accordingly, the Department has retained the NPRM language incorporating its guidance concerning the permissible questions into the final rule.

Some commenters suggested that a title III entity be allowed to require current

documentation, no more than one year old, on letterhead from a mental health professional stating the following: (1) That the individual seeking to use the animal has a mental health-related disability; (2) that having the animal accompany the individual is necessary to the individual's mental health or treatment or to assist the person otherwise; and (3) that the person providing the assessment of the individual is a licensed mental health professional and the individual seeking to use the animal is under that individual's professional care. These commenters asserted that this will prevent abuse and ensure that individuals with legitimate needs for psychiatric service animals may use them. The Department believes that this proposal would treat persons with psychiatric, intellectual, and other mental disabilities less favorably than persons with physical or sensory disabilities. The proposal would also require persons with disabilities to obtain medical documentation and carry it with them any time they seek to engage in ordinary activities of daily life in their communities—something individuals without disabilities have not been required to do. Accordingly, the Department has concluded that a documentation requirement of this kind would be unnecessary, burdensome, and contrary to the spirit, intent, and mandates of the ADA.

Service animal access to areas of a public accommodation. The NPRM proposed at § 36.302(c)(7) that an individual with a disability who uses a service animal has the same right of access to areas of a public accommodation as members of the public, program participants, and invitees. Commenters indicated that allowing individuals with disabilities to go with their service animals into the same areas as members of the public, program participants, clients, customers, patrons, or invitees is accepted practice by most places of public accommodation. The Department has included a slightly modified version of this provision in § 36.302(c)(7) of the final rule.

The Department notes that under the final rule, a healthcare facility must also permit a person with a disability to be accompanied by a service animal in all areas of the facility in which that person would otherwise be allowed. There are some exceptions, however. The Department follows the guidance of the Centers for Disease Control and Prevention (CDC) on the use of service animals in a hospital setting. Zoonotic diseases can be transmitted to humans through bites, scratches, direct contact, arthropod vectors, or aerosols.

Consistent with CDC guidance, it is generally appropriate to exclude a service animal from limited-access areas that employ general infection-control measures, such as operating rooms and burn units. *See* Centers for Disease Control and Prevention, *Guidelines for Environmental Infection Control in Health-Care Facilities: Recommendations of CDC and the Healthcare Infection Control Practices Advisory Committee* (June 2003), available at *http://www.cdc.gov/hicpac/pdf/guidelines/eic_in_HCF_03.pdf* (last visited June 24, 2010). A service animal may accompany its handler to such areas as admissions and discharge offices, the emergency room, inpatient and outpatient rooms, examining and diagnostic rooms, clinics, rehabilitation therapy areas, the cafeteria and vending areas, the pharmacy, restrooms, and all other areas of the facility where healthcare personnel, patients, and visitors are permitted without taking added precautions.

Prohibition against surcharges for use of a service animal. In the NPRM, the Department proposed to incorporate the previously mentioned policy guidance, which prohibits the assessment of a surcharge for the use of a service animal, into proposed § 36.302(c)(8). Several commenters agreed that this provision makes clear the obligation of a place of public accommodation to admit an individual with a service animal without surcharges, and that any additional costs imposed should be factored into the overall cost of doing business and passed on as a charge to all participants, rather than an individualized surcharge to the service animal user. Commenters also noted that service animal users cannot be required to comply with other requirements that are not generally applicable to other persons. If a public accommodation normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animals. The Department has retained this language, with minor modifications, in the final rule at § 36.302(c)(8).

Training requirement. Certain commenters recommended the adoption of formal training requirements for service animals. The Department has rejected this approach and will not impose any type of formal training requirements or certification process, but will continue to require that service animals be individually trained to do work or perform tasks for the benefit of an individual with a disability. While some groups have urged the Department to modify this position, the Department has determined that such a modification would not serve the full array of individuals with disabilities who use service animals, since individuals with disabilities may be capable of training, and some have trained, their service animal to perform tasks or do work to accommodate their disability. A training and certification requirement would increase the expense of acquiring a service animal and might limit access to service animals for individuals with limited financial resources.

Some commenters proposed specific behavior or training standards for service animals, arguing that without such standards, the public has no way to differentiate between untrained pets and service animals. Many of the suggested behavior or training standards were lengthy and detailed. The Department believes that this rule addresses service animal behavior sufficiently by including provisions that address the obligations of the service animal user and the circumstances under which a service animal may be excluded, such as the requirements that an animal be housebroken and under the control of its handler.

Miniature horses. The Department has been persuaded by commenters and the available research to include a provision that would require public accommodations to make reasonable modifications to policies, practices, or procedures to permit the use of a miniature horse by a person with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability. The traditional service animal is a dog, which has a long history of guiding individuals who are blind or have low vision, and over time dogs have been trained to perform an even wider variety of services for individuals with all types of disabilities. However, an organization that developed a program to train miniature horses, modeled on the program used for guide dogs, began training miniature horses in 1991.

Although commenters generally supported the species limitations proposed in the NPRM, some were opposed to the exclusion of miniature horses from the definition of a service animal. These commenters noted that these animals have been providing assistance to persons with disabilities for many years. Miniature horses were suggested by some commenters as viable alternatives to dogs for individuals with allergies, or for those whose religious beliefs preclude the use of dogs. Another consideration mentioned in favor of the use of miniature horses is the longer life span and strength of miniature horses in comparison to dogs. Specifically, miniature horses can provide service for more than 25 years while dogs can provide service for approximately seven years, and, because of their strength, miniature horses can provide services that dogs cannot provide. Accordingly, use of miniature horses reduces the cost involved to retire, replace, and train replacement service animals.

The miniature horse is not one specific breed, but may be one of several breeds, with distinct characteristics that produce animals suited to service animal work. These animals generally range in height from 24 inches to 34 inches measured to the withers, or shoulders, and generally weigh between 70 and 100 pounds. These characteristics are similar to those of large breed dogs, such as Labrador Retrievers, Great Danes, and Mastiffs. Similar to dogs, miniature horses can be trained through behavioral reinforcement to be "housebroken." Most miniature service horse handlers and organizations recommend that when the animals are not doing work or performing tasks, the miniature horses should be kept outside in a designated area instead of indoors in a house.

According to information provided by an organization that trains service horses, these miniature horses are trained to provide a wide array of services to their handlers, primarily guiding individuals who are blind or have low vision, pulling wheelchairs, providing stability and balance for individuals with disabilities that impair the ability to walk, and supplying leverage that enables a person with a mobility disability to get up after a fall. According to the commenter, miniature horses are particularly effective for large stature individuals. The animal can be trained to stand (and in some cases, lie down) at the handler's feet in venues where space is at a premium, such as assembly areas or inside some vehicles that

provide public transportation. Some individuals with disabilities have traveled by train and have flown commercially with their miniature horses.

The miniature horse is not included in the definition of service animal, which is limited to dogs. However, the Department has added a specific provision at § 36.302(c)(9) of the final rule covering miniature horses. Under this provision, public accommodations must make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability. The public accommodation may take into account a series of assessment factors in determining whether to allow a miniature horse into a specific facility. These include the type, size, and weight of the miniature horse, whether the handler has sufficient control of the miniature horse, whether the miniature horse is housebroken, and whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation. In addition, paragraphs (c)(3)B–(8) of this section, which are applicable to dogs, also apply to miniature horses.

Ponies and full-size horses are not covered by § 36.302(c)(9). Also, because miniature horses can vary in size and can be larger and less flexible than dogs, covered entities may exclude this type of service animal if the presence of the miniature horse, because of its larger size and lower level of flexibility, results in a fundamental alteration to the nature of the services provided.

Section 36.302(e) Hotel Reservations

Section 36.302 of the 1991 title III regulation requires public accommodations to make reasonable modifications in policies, practices, or procedures when such modifications are necessary to afford access to any goods, services, facilities, privileges, advantages, or accommodations, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations. Hotels, timeshare resorts, and other places of lodging are subject to this requirement and must make reasonable modifications to reservations policies, practices, or procedures when necessary to ensure that individuals with disabilities are able to reserve accessible hotel rooms with the same efficiency, immediacy, and convenience as those who do not need accessible guest rooms.

Each year the Department receives many complaints concerning failed reservations. Most of these complaints involve individuals who have reserved an accessible hotel room only to discover upon arrival that the room they reserved is either not available or not accessible. Although problems with reservations services were not addressed in the ANPRM, commenters independently noted an ongoing problem with hotel reservations and urged the Department to provide regulatory guidance. In response, the Department proposed specific language in the NPRM to address hotel reservations. In addition, the Department posed several questions regarding the current practices of hotels and other reservations services including questions about room guarantees and the holding and release of accessible rooms. The Department also questioned whether public accommodations that provide reservations services for a place or places of lodging but do not own, lease (or lease to), or operate a place of lodging—referred to in this discussion as "third-party reservations services"—should also be subject to the NPRM's proposals concerning hotel reservations.

Although reservations issues were discussed primarily in the context of traditional hotels, the new rule modifies the definition of "places of lodging" to clarify the scope of the rule's coverage of rental accommodations in timeshare properties, condominium hotels, and mixed-use and corporate hotel facilities that operate as places of public accommodation (as that term is now defined in § 36.104), and the Department received detailed comments, discussed below, regarding the application of reservations requirements to this category of rental accommodations.

General rule on reservations. Section 36.302(e)(1) of the NPRM required a public accommodation that owns, leases (or leases to), or operates a place of lodging to:

Modify its policies, practices, or procedures to ensure that individuals with disabilities can make reservations, including reservations made by telephone, in-person, or through a third party, for accessible guest rooms during the same hours and in the same manner as individuals who do not need accessible rooms.

73 FR 34508, 34553 (June 17, 2008).

Most individual commenters and organizations that represent individuals with disabilities strongly supported the requirement that individuals with disabilities should be able to make reservations for accessible guest rooms during the same hours and in the same manner as individuals who do not need accessible rooms. In many cases individuals with disabilities expressed frustration because, while they are aware of improvements in architectural access brought about as a result of the ADA, they are unable to take advantage of these improvements because of shortcomings in current hotel reservations systems. A number of these commenters pointed out that it can be difficult or impossible to obtain information about accessible rooms and hotel features and that even when information is provided it often is found to be incorrect upon arrival. They also noted difficulty reserving accessible rooms and the inability to guarantee or otherwise ensure that the appropriate accessible room is available when the guest arrives. The ability to obtain information about accessible guest rooms, to make reservations for accessible guest rooms in the same manner as other guests, and to be assured of an accessible room upon arrival was of critical importance to these commenters.

Other commenters, primarily hotels, resort developers, travel agencies, and organizations commenting on their behalf, did not oppose the general rule on reservations, but recommended that the language requiring that reservations be made "in the same manner" be changed to require that reservations be made "in a substantially similar manner." These commenters argued that hotel reservations are made in many different ways and through a variety of systems. In general, they argued that current reservations database systems may not contain sufficient information to permit guests, travel agents, or other third-party reservations services to select the most appropriate room without consulting directly with the hotel, and that updating these systems might be expensive and time consuming. They also noted that in some cases, hotels do not always automatically book accessible rooms when requested to do so. Instead, guests may select from a menu of accessibility and other room options when making reservations. This information is transmitted to the hotel's reservations staff, who then contact the individual to verify the guest's accessibility needs. Only when such verification occurs will the accessible room be booked.

The Department is not persuaded that individuals who need to reserve accessible rooms cannot be served in the same manner as those who do not, and it appears that there are hotels of all types and sizes that already meet this requirement. Further, the Department has been able to accomplish this goal in settlement agreements resolving complaints about this issue. As stated in the preamble to the NPRM, basic nondiscrimination principles mandate that individuals with disabilities should be able to reserve hotel rooms with the same efficiency, immediacy, and convenience as those who do not need accessible guest rooms. The regulation does not require reservations services to create new methods for reserving hotel rooms or available timeshare units; instead, covered entities must make the modifications needed to ensure that individuals who need accessible rooms are able to reserve them in the same manner as other guests. If, for example, hotel reservations are not final until all hotel guests have been contacted by the hotel to discuss the guest's needs, a hotel may follow the same process when reserving accessible rooms. Therefore, the Department declines to change this language, which has been moved to § 36.302(e)(1)(i). However, in response to the commenters who recommended a transition period that would allow reservations services time to modify existing reservations systems to meet the requirements of this rule, § 36.302(e)(3) now provides a 18-month transition period before the requirements of § 36.302(e)(1) will be enforced.

Hotels and organizations commenting on their behalf also requested that the language be changed to eliminate any liability for reservations made through third parties, arguing that they are unable to control the actions of unrelated parties. The rule, both as proposed and as adopted, requires covered public accommodations to ensure that reservations made on their behalf by third parties are made in a manner that results in parity between those who need accessible rooms and those who do not.

Hotels and other places of lodging that use third-party reservations services must make reasonable efforts to make accessible rooms available through at least some of these services and must provide these third-party services with information concerning the accessible features of the hotel and the accessible rooms. To the extent a hotel or other place of lodging makes available such rooms and information to a third-party reservation provider, but the third party fails to provide the information or rooms to people with disabilities in accordance with this section, the hotel or other place of lodging will not be responsible.

Identification of accessible features in hotels and guest rooms. NPRM § 36.302(e)(2) required public accommodations that provide hotel reservations services to identify and describe the accessible features in the hotels and guest rooms offered through that service. This requirement is essential to ensure that individuals with disabilities receive the information they need to benefit from the services offered by the place of lodging. As a practical matter, a public accommodation's designation of a guest room as "accessible" will not ensure necessarily that the room complies with all of the 1991 Standards. In older facilities subject to barrier removal requirements, strict compliance with the 1991 Standards is not required. Instead, public accommodations must remove barriers to the extent that it is readily achievable to do so.

Further, hotel rooms that are in full compliance with current standards may differ, and individuals with disabilities must be able to ascertain which features—in new and existing facilities—are included in the hotel's accessible guest rooms. For example, under certain circumstances, an accessible hotel bathroom may meet accessibility requirements with either a bathtub or a roll-in shower. The presence or absence of particular accessible features such as these may be the difference between a room that is usable by a particular person with a disability and one that is not.

Individuals with disabilities strongly supported this requirement. In addition to the importance of information about specific access features, several commenters pointed out the importance of knowing the size and number of beds in a room. Many individuals with disabilities travel with family members, personal care assistants, or other companions and require rooms with at least two beds. Although most hotels provide this information when generally categorizing the type or class of room (*e.g.,* deluxe suite with king bed), as described below, all hotels should consider the size and number of beds to be part of the basic information they are required to provide.

Comments made on behalf of reservations services expressed concern that unless the word "hotels" is stricken from the text, § 36.302(e)(2) of the NPRM essentially would require reservations systems to include a full accessibility report on each hotel or resort property in its system. Along these lines, commenters also suggested that the Department identify the specific accessible features of hotel rooms that must be described in the reservations system. For example, commenters suggested limiting features that must be included to bathroom type (tub or roll-in shower) and communications features.

The Department recognizes that a reservations system is not intended to be an accessibility survey. However, specific information concerning accessibility features is essential to travelers with disabilities. Because of the wide variations in the level of accessibility that travelers will encounter, the Department cannot specify what information must be included in every instance. For hotels that were built in compliance with the 1991 Standards, it may be sufficient to specify that the hotel is accessible and, for each accessible room, to describe the general type of room (*e.g.,* deluxe executive suite), the size and number of beds (*e.g.,* two queen beds), the type of accessible bathing facility (*e.g.,* roll-in shower), and communications features available in the room (*e.g.,* alarms and visual notification devices). Based on that information, many individuals with disabilities will be comfortable making reservations.

For older hotels with limited accessibility features, information about the hotel should include, at a minimum, information about accessible entrances to the hotel, the path of travel to guest check-in and other essential services, and the accessible route to the accessible room or rooms. In addition to the room information described above, these hotels should provide information about important features that do not comply with the 1991 Standards. For example, if the door to the "accessible" room or bathroom is narrower than required, this information should be included (*e.g.,* door to guest room measures 30 inches clear). This width may not meet current standards but may be adequate for some wheelchair users who use narrower chairs. In many cases, older hotels provide services through alternatives to barrier removal, for example, by providing check-in or concierge services at a different, accessible location. Reservations services for these entities should include this information and provide a way for guests to contact the appropriate hotel employee for additional information. To recognize that the information and level of detail needed will vary based on the nature and age of the facility, § 36.302(e)(2) has been moved to § 36.302(e)(1)(ii) in the final rule and modified to require reservations services to:

Identify and describe accessible features in the hotels and guest rooms offered through its reservations service *in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs.* [Emphasis added]

As commenters representing hotels have described, once reservations are made, some hotels may wish to contact the guest to offer additional information and services. Or, many individuals with disabilities may wish to contact the hotel or reservations service for more detailed information. At that point, trained staff (including staff located on-site at the hotel and staff located off-site at a reservations center) should be available to provide additional information such as the specific layout of the room and bathroom, shower design, grab-bar locations, and other amenities available (*e.g.,* bathtub bench).

In the NPRM, the Department sought guidance concerning whether this requirement should be applied to third-party reservations services. Comments made by or on behalf of hotels, resort managers, and other members of the lodging and resort industry pointed out that, in most cases, these third parties do not have direct access to this information and must obtain it from the hotel or other place of lodging. Because third-party reservations services must rely on the place of lodging to provide the requisite information and to ensure that it is accurate and timely, the Department has declined to extend this requirement directly to third-party reservations services.

Hold and release of accessible guest rooms. The Department has addressed the hold and release of accessible guest rooms in settlement agreements and recognizes that current practices vary widely. The Department is concerned about current practices by which accessible guest rooms are released to the general public even though the hotel is not sold out. In such instances, individuals with disabilities may be denied an equal opportunity to benefit from the services offered by the public accommodation, *i.e.,* a hotel guest room. In the NPRM, the Department requested information concerning the current practices of hotels and third-party reservations services with respect to (1) holding accessible rooms for individuals with disabilities and (2) releasing accessible rooms to individuals without disabilities.

Individuals with disabilities and organizations commenting on their behalf strongly supported requiring accessible rooms to be held back for rental by individuals with disabilities. In some cases commenters supported holding back all accessible rooms until all non-accessible rooms were rented. Others supported holding back accessible rooms in each category of rooms until all other rooms of that type were reserved. This latter position was also supported in comments received on behalf of the lodging industry; commenters also noted that this is the current practice of many hotels. In general, holding accessible rooms until requested by an individual who needs a room with accessible features or until it is the only available room of its type was viewed widely as a sensible approach to allocating scarce accessible rooms without imposing unnecessary costs on hotels.

The Department agrees with this latter approach and has added § 36.302(e)(1)(iii), which requires covered entities to hold accessible rooms for use by individuals with disabilities until all other guest rooms of that type have been rented and the accessible room requested is the only remaining room of that type. For example, if there are 25 rooms of a given type and two of these rooms are accessible, the reservations service is required to rent all 23 non-accessible rooms before it is permitted to rent these two accessible rooms to individuals without disabilities. If a one-of-a-kind room is accessible, that room is available to the first party to request it. The Department believes that this is the fairest approach available

since it reserves accessible rooms for individuals who require them until all non-accessible rooms of that type have been reserved, and then provides equal access to any remaining rooms. It is also fair to hotels because it does not require them to forego renting a room that actually has been requested in favor of the possibility that an individual with a disability may want to reserve it at a later date.

Requirement to block accessible guest room reservations. NPRM § 36.302(e)(3) required a public accommodation that owns, leases (or leases to), or operates a place of lodging to guarantee accessible guest rooms that are reserved through a reservations service to the same extent that it guarantees rooms that are not accessible. In the NPRM, the Department sought comment on the current practices of hotels and third party reservations services with respect to "guaranteed" hotel reservations and on the impact of requiring a public accommodation to guarantee accessible rooms to the extent it guarantees other rooms.

Comments received by the Department by and on behalf of both individuals with disabilities and public accommodations that provide reservations services made clear that, in many cases, when speaking of room guarantees, parties who are not familiar with hotel terminology actually mean to refer to policies for blocking and holding specific hotel rooms. Several commenters explained that, in most cases, when an individual makes "reservations," hotels do not reserve specific rooms; rather the individual is reserving a room with certain features at a given price. When the hotel guest arrives, he or she is provided with a room that has those features.

In most cases, this does not pose a problem because there are many available rooms of a given type. However, in comparison, accessible rooms are much more limited in availability and there may be only one room in a given hotel that meets a guest's needs. As described in the discussion on the identification of accessible features in hotels and guest rooms, the presence or absence of particular accessible features may be the difference between a room that is usable by a particular person with a disability and one that is not.

For that reason, the Department has added § 36.302(e)(1)(iv) to the final rule. Section 36.302(e)(1)(iv) requires covered entities to reserve, upon request, accessible guest rooms or specific types of guest rooms and ensure that the guest rooms requested are blocked and removed from all reservations systems (to eliminate double-booking, which is a common problem that arises when rooms are made available to be reserved through more than one reservations service). Of course, if a public accommodation typically requires a payment or deposit from its patrons in order to reserve a room, it may require the same payment or deposit from individuals with disabilities before it reserves an accessible room and removes it from all its reservations systems. These requirements should alleviate the widely-reported problem of arriving at a hotel only to discover that, although an accessible room was reserved, the room available is not accessible or does not have the specific accessible features needed. Many hotels already have a similar process in place for other guest rooms that are unique or one-of-a-kind, such as "Presidential" suites. The Department has declined to extend this requirement directly to third-party reservations services. Comments the Department received in response to the NPRM indicate that most of the actions required to implement these requirements primarily are within the control of the entities that own the place of lodging or that manage it on behalf of its owners.

Guarantees of reservations for accessible guest rooms. The Department recognizes that not all reservations are guaranteed, and the rule does not impose an affirmative duty to guarantee reservations. When a public accommodation does guarantee hotel or other room reservations, it must provide the same guarantee for accessible guest rooms as it makes for other rooms, except that it must apply that guarantee to the specific room reserved and blocked, even if in other situations, its guarantee policy only guarantees that a room of a specific type will be available at the guaranteed price. Without this reasonable modification to its guarantee policy, any guarantee for accessible rooms would be meaningless. If, for example, a hotel makes reservations for an accessible "Executive Suite" but, upon arrival, offers its guest an inaccessible Executive Suite that the guest is unable to enter, it would be meaningless to consider the hotel's guarantee fulfilled. As with the requirements for identifying, holding, and blocking accessible rooms, the Department has declined to extend this requirement directly to third-party reservations services because the fulfillment of guarantees largely is beyond their power to control.

Application to rental units in timeshare, vacation communities, and condo-hotels. Because the Department has revised the definition of "Places of Lodging" in the final rule, the reservations requirements now apply to guest rooms and other rental units in timeshares, vacation communities, and condo-hotels where some or all of the units are owned and controlled by individual owners and rented out some portion of time to the public, as compared to traditional hotels and motels that are owned, controlled, and rented to the public by one entity. If a reservations service owns and controls one or more of the guest rooms or other units in the rental property (*e.g.,* a developer who retains and rents out unsold inventory), it is subject to the requirements set forth in § 36.302(e).

Several commenters expressed concern about any rule that would require accessible units that are owned individually to be removed from the rental pool and rented last. Commenters pointed out that this would be a disadvantage to the owners of accessible units because they would be rented last, if at all. Further, certain vacation property managers consider holding specific units back to be a violation of their ethical responsibility to present all properties they manage at an equal advantage. To address these concerns, the Department has added § 36.302(e)(2), which exempts reservations for individual guest rooms and other units that are not owned or substantially controlled by the entity that owns, leases, or operates the overall facility from the requirement that accessible guest rooms be held back from rental until all other guest rooms of that type have been rented. Section 36.302(e)(2) also exempts such rooms from requirements for blocking and guaranteeing reserved rooms. In resort developments with mixed ownership structures, such as a resort where some units are operated as hotel rooms and others are owned and controlled individually, a reservations service operated by the owner of the hotel portion may apply the exemption only to the rooms that are not owned or substantially controlled by the entity that owns, manages, or otherwise controls the overall facility.

Other reservations-related comments made on behalf of these entities reflected concerns similar to the general concerns expressed with respect to traditional hotel properties. For example, commenters noted that because of the unique nature of the timeshare industry, additional flexibility is needed when making reservations for accessible units. One commenter explained that reservations are sometimes made through unusual entities such as exchange companies, which are not public accommodations and which operate to trade ownership interests of millions of individual owners. The commenter expressed concern that developers or resort owners would be held responsible for the actions of these exchange entities. If, as described, the choice to list a unit with an exchange company is made by the individual owner of the property and the exchange company does not operate on behalf of the reservations service, the reservations service is not liable for the exchange company's actions.

As with hotels, the Department believes that within the 18-month transition period these reservations services should be able to modify their systems to ensure that potential guests with disabilities who need accessible rooms can make reservations during the same hours and in the same manner as those who do not need accessible rooms.

Section 36.302(f) Ticketing

The 1991 title III regulation did not contain specific regulatory language on ticketing. The ticketing policies and practices of public accommodations, however, are subject to title III's nondiscrimination provisions. Through the investigation of complaints, enforcement actions, and public comments related to ticketing, the Department became aware that some venue operators, ticket sellers, and distributors were violating title III's nondiscrimination mandate by not providing individuals with disabilities the same opportunities to purchase tickets for accessible seating as provided to spectators purchasing conventional seats. In the NPRM, the Department proposed § 36.302(f) to provide explicit direction and guidance on discriminatory practices for entities involved in the sale or distribution of tickets.

The Department received comments from advocacy groups, assembly area trade associations, public accommodations, and individuals. Many commenters supported the addition of regulatory language pertaining to ticketing and urged the Department to retain

it in the final rule. Several commenters, however, questioned why there were inconsistencies between the title II and title III provisions and suggested that the same language be used for both titles. The Department has decided to retain ticketing regulatory language and to ensure consistency between the ticketing provisions in title II and title III.

Because many in the ticketing industry view season tickets and other multi-event packages differently from individual tickets, the Department bifurcated some season ticket provisions from those concerning single-event tickets in the NPRM. This structure, however, resulted in some provisions being repeated for both types of tickets but not for others even though they were intended to apply to both types of tickets. The result was that it was not entirely clear that some of the provisions that were not repeated also were intended to apply to season tickets. The Department is addressing the issues raised by these commenters using a different approach. For the purposes of this section, a *single event* refers to an individual performance for which tickets may be purchased. In contrast, a *series of events* includes, but is not limited to, subscription events, event packages, season tickets, or any other tickets that may be purchased for multiple events of the same type over the course of a specified period of time whose ownership right reverts to the public accommodation at the end of each season or time period. Series-of-events tickets that give their holders an enhanced ability to purchase such tickets from the public accommodation in seasons or periods of time that follow, such as a right of first refusal or higher ranking on waiting lists for more desirable seats, are subject to the provisions in this section. In addition, the final rule merges together some NPRM paragraphs that dealt with related topics and has reordered and renamed some of the paragraphs that were in the NPRM.

Ticket sales. In the NPRM, the Department proposed, in § 36.302(f)(1), a general rule that a public accommodation shall modify its policies, practices, or procedures to ensure that individuals with disabilities can purchase tickets for accessible seating for an event or series of events in the same way as others (*i.e.,* during the same hours and through the same distribution methods as other seating is sold). "Accessible seating" is defined in § 36.302(f)(1)(i) of the final rule to mean "wheelchair spaces and companion seats that comply with sections 221 and 802 of the 2010 Standards along with any other seats required to be offered for sale to the individual with a disability pursuant to paragraph (4) of this section." The defined term does not include designated aisle seats. A "wheelchair space" refers to a space for a single wheelchair and its occupant.

The NPRM proposed requiring that accessible seats be sold through the "same methods of distribution" as non-accessible seats. 73 FR 34508, 34554 (June 17, 2008). Comments from venue managers and others in the business community, in general, noted that multiple parties are involved in ticketing, and because accessible seats may not be allotted to all parties involved at each stage, such parties should be protected from liability. For example, one commenter noted that a third-party ticket vendor, like Ticketmaster, can only sell the tickets it receives from its client. Because § 36.302(f)(1) of the final rule requires venue operators to make available accessible seating through the same methods of distribution they use for their regular tickets, venue operators that provide tickets to third-party ticket vendors are required to provide accessible seating to the third-party ticket vendor. This provision will enhance third-party ticket vendors' ability to acquire and sell accessible seating for sale in the future. The Department notes that once third-party ticket vendors acquire accessible tickets, they are obligated to sell them in accordance with these rules.

The Department also has received frequent complaints that individuals with disabilities have not been able to purchase accessible seating over the Internet, and instead have had to engage in a laborious process of calling a customer service line, or sending an email to a customer service representative and waiting for a response. Not only is such a process burdensome, but it puts individuals with disabilities at a disadvantage in purchasing tickets for events that are popular and may sell out in minutes. Because § 36.302(f)(5) of the final rule authorizes venues to release accessible seating in case of a sell-out, individuals with disabilities effectively could be cut off from buying tickets unless they also have the ability to purchase tickets in real time over the Internet. The Department's new regulatory language is designed to address this problem.

Several commenters representing assembly areas raised concerns about offering accessible seating for sale over the Internet. They contended that this approach would increase the incidence of fraud since anyone easily could purchase accessible seating over the Internet. They also asserted that it would be difficult technologically to provide accessible seating for sale in real time over the Internet, or that to do so would require simplifying the rules concerning the purchase of multiple additional accompanying seats. Moreover, these commenters argued that requiring an individual purchasing accessible seating to speak with a customer service representative would allow the venue to meet the patron's needs most appropriately and ensure that wheelchair spaces are reserved for individuals with disabilities who require wheelchair spaces. Finally, these commenters argued that individuals who can transfer effectively and conveniently from a wheelchair to a seat with a movable armrest seat could instead purchase designated aisle seats.

The Department considered these concerns carefully and has decided to continue with the general approach proposed in the NPRM. Although fraud is an important concern, the Department believes that it is best combated by other means that would not have the effect of limiting the ability of individuals with disabilities to purchase tickets, particularly since restricting the purchase of accessible seating over the Internet will, of itself, not curb fraud. In addition, the Department has identified permissible means for covered entities to reduce the incidence of fraudulent accessible seating ticket purchases in § 36.302(f)(8) of the final rule.

Several commenters questioned whether ticket Web sites themselves must be accessible to individuals who are blind or have low vision, and if so, what that requires. The Department has consistently interpreted the ADA to cover Web sites that are operated by public accommodations and stated that such sites must provide their services in an accessible manner or provide an accessible alternative to the Web site that is available 24 hours a day, seven days a week. The final rule, therefore, does not impose any new obligation in this area. The accessibility of Web sites is discussed in more detail in the section entitled "Other Issues."

In § 36.302(f)(2) of the NPRM, the Department also proposed requiring public accommodations to make accessible seating available during all stages of tickets sales including, but not limited to, presales, promotions, lotteries, waitlists, and general sales. For example, if tickets will be presold for an event that is open only to members of a fan club, or to holders of a particular credit card, then tickets for accessible seating must be made available for purchase through those means. This requirement does not mean that any individual with a disability would be able to purchase those seats. Rather, it means that an individual with a disability who meets the requirement for such a sale (*e.g.,* who is a member of the fan club or holds that credit card) will be able to participate in the special promotion and purchase accessible seating. The Department has maintained the substantive provisions of the NPRM's §§ 36.302(f)(1) and (f)(2) but has combined them in a single paragraph at § 36.302(f)(1)(ii) of the final rule so that all of the provisions having to do with the manner in which tickets are sold are located in a single paragraph.

Identification of available accessible seating. In the NPRM, the Department proposed § 36.302(f)(3), which, as modified and renumbered § 36.302(f)(2)(iii) in the final rule, requires a facility to identify available accessible seating through seating maps, brochures, or other methods if that information is made available about other seats sold to the general public. This rule requires public accommodations to provide information about accessible seating to the same degree of specificity that it provides information about general seating. For example, if a seating map displays color-coded blocks pegged to prices for general seating, then accessible seating must be similarly color-coded. Likewise, if covered entities provide detailed maps that show exact seating and pricing for general seating, they must provide the same for accessible seating.

The NPRM did not specify a requirement to identify prices for accessible seating. The final rule requires that if such information is provided for general seating, it must be provided for accessible seating as well.

In the NPRM, the Department proposed in § 36.302(f)(4) that a public accommodation, upon being asked, must inform persons with disabilities and their companions of the locations of all unsold or otherwise available seating. This provision is intended to prevent

the practice of "steering" individuals with disabilities to certain accessible seating so that the facility can maximize potential ticket sales by releasing unsold accessible seating, especially in preferred or desirable locations, for sale to the general public. The Department received no significant comment on this proposal. The Department has retained this provision in the final rule but has added it, with minor modifications, to § 36.302(f)(2) as paragraph (i).

Ticket prices. In the NPRM, the Department proposed § 36.302(f)(7) requiring that ticket prices for accessible seating be set no higher than the prices for other seats in that seating section for that event. The NPRM's provision also required that accessible seating be made available at every price range, and if an existing facility has barriers to accessible seating within a particular price range, a proportionate amount of seating (determined by the ratio of the total number of seats at that price level to the total number of seats in the assembly area) must be offered in an accessible location at that same price. Under this rule, for example, if it is not readily achievable for a 20,000-seat facility built in 1980 to place accessible seating in the $20-price category, which is on the upper deck, it must place a proportionate number of seats in an accessible location for $20. If the upper deck has 2,000 seats, then the facility must place 10 percent of its accessible seating in an accessible location for $20 provided that it is part of a seating section where ticket prices are equal to or more than $20—a facility may not place the $20-accessible seating in a $10-seating section. The Department received no significant comment on this rule, and it has been retained, as amended, in the final rule in § 36.302(f)(3).

Purchase of multiple tickets. In the NPRM, the Department proposed § 36.302(f)(9) to address one of the most common ticketing complaints raised with the Department: that individuals with disabilities are not able to purchase more than two tickets. The Department proposed this provision to facilitate the ability of individuals with disabilities to attend events with friends, companions, or associates who may or may not have a disability by enabling individuals with disabilities to purchase the maximum number of tickets allowed per transaction to other spectators; by requiring venues to place accompanying individuals in general seating as close as possible to accessible seating (in the event that a group must be divided because of the large size of the group); and by allowing an individual with a disability to purchase up to three additional contiguous seats per wheelchair space if they are available at the time of sale. Section 36.302(f)(9)(ii) of the NPRM required that a group containing one or more wheelchair users must be placed together, if possible, and that in the event that the group could not be placed together, the individuals with disabilities may not be isolated from the rest of the group.

The Department asked in the NPRM whether this rule was sufficient to effectuate the integration of individuals with disabilities. Many advocates and individuals praised it as a welcome and much-needed change, stating that the trade-off of being able to sit with their family or friends was worth reducing the number of seats available for individuals with disabilities. Some commenters went one step further and suggested that the number of additional accompanying seats should not be restricted to three.

Although most of the substance of the proposed provision on the purchase of multiple tickets has been maintained in the final rule, it has been renumbered as § 36.302(f)(4), reorganized, and supplemented. To preserve the availability of accessible seating for other individuals with disabilities, the Department has not expanded the rule beyond three additional contiguous seats. Section 36.302(f)(4)(i) of the final rule requires public accommodations to make available for purchase three additional tickets for seats in the same row that are contiguous with the wheelchair space, provided that at the time of purchase there are three such seats available. The requirement that the additional seats be "contiguous with the wheelchair space" does not mean that each of the additional seats must be in actual contact or have a border in common with the wheelchair space; however, at least one of the additional seats should be immediately adjacent to the wheelchair space. The Department recognizes that it will often be necessary to use vacant wheelchair spaces to provide for contiguous seating.

The Department has added paragraphs (4)(ii) and (4)(iii) to clarify that in situations where there are insufficient unsold seats to provide three additional contiguous seats per wheelchair space or a ticket office restricts sales of tickets to a particular event to less than four tickets per customer, the obligation to make available three additional contiguous seats per wheelchair space would be affected. For example, if at the time of purchase, there are only two additional contiguous seats available for purchase because the third has been sold already, then the ticket purchaser would be entitled to two such seats. In this situation, the public entity would be required to make up the difference by offering one additional ticket for sale that is as close as possible to the accessible seats. Likewise, if ticket purchases for an event are limited to two per customer, a person who uses a wheelchair who seeks to purchase tickets would be entitled to purchase only one additional contiguous seat for the event.

The Department has also added paragraph (4)(iv) to clarify that the requirement for three additional contiguous seats is not intended to serve as a cap if the maximum number of tickets that may be purchased by members of the general public exceeds the four tickets an individual with a disability ordinarily would be allowed to purchase (*i.e.,* a wheelchair space and three additional contiguous seats). If the maximum number of tickets that may be purchased by members of the general public exceeds four, an individual with a disability is to be allowed to purchase the maximum number of tickets; however, additional tickets purchased by an individual with a disability beyond the wheelchair space and the three additional contiguous seats provided in § 36.302(f)(4)(i) do not have to be contiguous with the wheelchair space.

The NPRM proposed at § 36.302(f)(9)(ii) that for group sales, if a group includes one or more individuals who use a wheelchair, then the group shall be placed in a seating area with accessible seating so that, if possible, the group can sit together. If it is necessary to divide the group, it should be divided so that the individuals in the group who use wheelchairs are not isolated from the rest of the members of their group. The final rule retains the NPRM language in paragraph (4)(v).

Hold and release of unsold accessible seating. The Department recognizes that not all accessible seating will be sold in all assembly areas for every event to individuals with disabilities who need such seating and that public accommodations may have opportunities to sell such seating to the general public. The Department proposed in the NPRM a provision aimed at striking a balance between affording individuals with disabilities adequate time to purchase accessible seating and the entity's desire to maximize ticket sales. In the NPRM, the Department proposed § 36.302(f)(6), which allowed for the release of accessible seating under the following circumstances: (i) When all seating in the facility has been sold, excluding luxury boxes, club boxes, or suites; (ii) when all seating in a designated area has been sold and the accessible seating being released is in the same area; or (iii) when all seating in a designated price range has been sold and the accessible seating being released is within the same price range.

The Department's NPRM asked "whether additional regulatory guidance is required or appropriate in terms of a more detailed or set schedule for the release of tickets in conjunction with the three approaches described above. For example, does the proposed regulation address the variable needs of assembly areas covered by the ADA? Is additional regulatory guidance required to eliminate discriminatory policies, practices and procedures related to the sale, hold, and release of accessible seating? What considerations should appropriately inform the determination of when unsold accessible seating can be released to the general public?" 73 FR 34508, 34527 (June 17, 2008).

The Department received comments both supporting and opposing the inclusion of a hold-and-release provision. One side proposed loosening the restrictions on the release of unsold accessible seating. One commenter from a trade association suggested that tickets should be released regardless of whether there is a sell-out, and that these tickets should be released according to a set schedule. Conversely, numerous individuals, advocacy groups, and at least one public entity urged the Department to tighten the conditions under which unsold tickets for accessible seating may be released. These commenters suggested that venues should not be permitted to release tickets during the first two weeks of sale, or alternatively, that they should not be permitted to be released earlier than 48 hours before a sold-out event. Many of these commenters criticized the release of accessible seating under the second and third prongs of § 36.302(f)(6) in the NPRM (when there is a sell-out in general seating in a

designated seating area or in a price range), arguing that it would create situations where general seating would be available for purchase while accessible seating would not be.

Numerous commenters—both from the industry and from advocacy groups—asked for clarification of the term "sell-out." Business groups commented that industry practice is to declare a sell-out when there are only "scattered singles" available—isolated seats that cannot be purchased as a set of adjacent pairs. Many of those same commenters also requested that "sell-out" be qualified with the phrase "of all seating available for sale" since it is industry practice to hold back from release tickets to be used for groups connected with that event (*e.g.,* the promoter, home team, or sports league). They argued that those tickets are not available for sale and any return of these tickets to the general inventory happens close to the event date. Noting the practice of holding back tickets, one advocacy group suggested that covered entities be required to hold back accessible seating in proportion to the number of tickets that are held back for later release.

The Department has concluded that it would be inappropriate to interfere with industry practice by defining what constitutes a "sell-out" and that a public accommodation should continue to use its own approach to defining a "sell-out." If, however, a public accommodation declares a sell-out by reference to those seats that are available for sale, but it holds back tickets that it reasonably anticipates will be released later, it must hold back a proportional percentage of accessible seating to be released as well.

Adopting any of the alternatives proposed in the comments summarized above would have upset the balance between protecting the rights of individuals with disabilities and meeting venues' concerns about lost revenue from unsold accessible seating. As a result, the Department has retained § 36.302(f)(6) renumbered as § 36.302(f)(5) in the final rule. The Department has, however, modified the regulation text to specify that accessible seating may be released only when "all non-accessible tickets in a designated seating area have been sold and the tickets for accessible seating are being released in the same designated area." As stated in the NPRM, the Department intended for this provision to allow, for example, the release of accessible seating at the orchestra level when all other seating at the orchestra level is sold. The Department has added this language to the final rule at § 36.302(f)(5)(B) to clarify that venues cannot designate or redesignate seating areas for the purpose of maximizing the release of unsold accessible seating. So, for example, a venue may not determine on an ad hoc basis that a group of seats at the orchestra level is a designated seating area in order to release unsold accessible seating in that area.

The Department also has maintained the hold-and-release provisions that appeared in the NPRM, but has added a provision to address the release of accessible seating for series-of-events tickets on a series-of-events basis. Many commenters asked the Department whether unsold accessible seating may be converted to general seating and released to the general public on a season-ticket basis or longer when tickets typically are sold as a season-ticket package or other long-term basis. Several disability rights organizations and individual commenters argued that such a practice should not be permitted, and, if it were, that conditions should be imposed to ensure that individuals with disabilities have future access to those seats.

The Department interprets the fundamental principle of the ADA as a requirement to give individuals with disabilities equal, not better, access to those opportunities available to the general public. Thus, for example, a public accommodation that sells out its facility on a season-ticket only basis is not required to leave unsold its accessible seating if no persons with disabilities purchase those season-ticket seats. Of course, public accommodations may choose to go beyond what is required by reserving accessible seating for individuals with disabilities (or releasing such seats for sale to the general public) on an individual-game basis.

If a covered entity chooses to release unsold accessible seating for sale on a season-ticket or other long-term basis, it must meet at least two conditions. Under § 36.302(f)(5)(iii) of the final rule, public accommodations must leave flexibility for game-day change-outs to accommodate ticket transfers on the secondary market. And public accommodations must modify their ticketing policies so that, in future years, individuals with disabilities will have the ability to purchase accessible seating on the same basis as other patrons (*e.g.,* as season tickets). Put differently, releasing accessible seating to the general public on a season-ticket or other long-term basis cannot result in that seating being lost to individuals with disabilities in perpetuity. If, in future years, season tickets become available and persons with disabilities have reached the top of the waiting list or have met any other eligibility criteria for season ticket purchases, public accommodations must ensure that accessible seating will be made available to the eligible individuals. In order to accomplish this, the Department has added § 36.302(f)(5)(iii)(A) to require public accommodations that release accessible season tickets to individuals who do not have disabilities that require the features of accessible seating to establish a process to prevent the automatic reassignment of such ticket holders to accessible seating. For example, a public accommodation could have in place a system whereby accessible seating that was released because it was not purchased by individuals with disabilities is not in the pool of tickets available for purchase for the following season unless and until the conditions for ticket release have been satisfied in the following season. Alternatively, a public accommodation might release tickets for accessible seating only when a purchaser who does not need its features agrees that he or she has no guarantee of or right to the same seats in the following season, or that if season tickets are guaranteed for the following season, the purchaser agrees that the offer to purchase tickets is limited to non-accessible seats with, to the extent practicable, comparable price, view, and amenities to the accessible seats such individuals held in the prior year. The Department is aware that this rule may require some administrative changes but believes that this process will not create undue financial and administrative burdens. The Department believes that this approach is balanced and beneficial. It will allow public accommodations to sell all of their seats and will leave open the possibility, in future seasons or series of events, that persons who need accessible seating may have access to it.

The Department also has added § 36.302(f)(5)(iii)(B) to address how season tickets or series-of-events tickets that have attached ownership rights should be handled if the ownership right returns to the public accommodation (*e.g.,* when holders forfeit their ownership right by failing to purchase season tickets or sell their ownership right back to a public accommodation). If the ownership right is for accessible seating, the public accommodation is required to adopt a process that allows an eligible individual with a disability who requires the features of such seating to purchase the rights and tickets for such seating.

Nothing in the regulatory text prevents a public accommodation from establishing a process whereby such ticket holders agree to be voluntarily reassigned from accessible seating to another seating area so that individuals with mobility disabilities or disabilities that require the features of accessible seating and who become newly eligible to purchase season tickets have an opportunity to do so. For example, a public accommodation might seek volunteers to relocate to another location that is at least as good in terms of its location, price, and amenities or a public accommodation might use a seat with forfeited ownership rights as an inducement to get a ticket holder to give up accessible seating he or she does not need.

Ticket transfer. The Department received many comments asking whether accessible seating has the same transfer rights as general seats. The proposed regulation at § 36.302(f)(5) required that individuals with disabilities must be allowed to purchase season tickets for accessible seating on the same terms and conditions as individuals purchasing season tickets for general seating, including the right—if it exists for other ticket-holders—to transfer individual tickets to friends or associates. Some commenters pointed out that the NPRM proposed explicitly allowing individuals with disabilities holding season tickets to transfer tickets but did not address the transfer of tickets purchased for individual events. Several commenters representing assembly areas argued that persons with disabilities holding tickets for an individual event should not be allowed to sell or transfer them to third parties because such ticket transfers would increase the risk of fraud or would make unclear the obligation of the entity to accommodate secondary ticket transfers. They argued that individuals holding accessible seating should either be required to transfer their tickets to another individual with a disability or return them to the facility for a refund.

Although the Department is sympathetic to concerns about administrative burden, curtailing transfer rights for accessible seating when other ticket holders are permitted to transfer tickets would be inconsistent with the ADA's guiding principle that individuals with disabilities must have rights equal to others. Thus, the Department has added language in the final rule in § 36.302(f)(6) that requires that individuals with disabilities holding accessible seating for any event have the same transfer rights accorded other ticket holders for that event. Section 36.302(f)(6) also preserves the rights of individuals with disabilities who hold tickets to accessible seats for a series of events to transfer individual tickets to others, regardless of whether the transferee needs accessible seating. This approach recognizes the common practice of individuals splitting season tickets or other multi-event ticket packages with friends, colleagues, or other spectators to make the purchase of season tickets affordable; individuals with disabilities should not be placed in the burdensome position of having to find another individual with a disability with whom to share the package.

This provision, however, does not require public accommodations to seat an individual who holds a ticket to an accessible seat in such seating if the individual does not need the accessible features of the seat. A public accommodation may reserve the right to switch these individuals to different seats if they are available, but a public accommodation is not required to remove a person without a disability who is using accessible seating from that seating, even if a person who uses a wheelchair shows up with a ticket from the secondary market for a non-accessible seat and wants accessible seating.

Secondary ticket market. Section 36.302(f)(7) is a new provision in the final rule that requires a public accommodation to modify its policies, practices, or procedures to ensure that an individual with a disability, who acquires a ticket in the secondary ticket market, may use that ticket under the same terms and conditions as other ticket holders who acquire a ticket in the secondary market for an event or series of events. This principle was discussed in the NPRM in connection with § 36.302(f)(5), pertaining to season-ticket sales. There, the Department asked for public comment regarding a public accommodation's proposed obligation to accommodate the transfer of accessible seating tickets on the secondary ticket market to those who do not need accessible seating and vice versa.

The secondary ticket market, for the purposes of this rule, broadly means any transfer of tickets after the public accommodation's initial sale of tickets to individuals or entities. It thus encompasses a wide variety of transactions, from ticket transfers between friends to transfers using commercial exchange systems. Many commenters noted that the distinction between the primary and secondary ticket market has become blurred as a result of agreements between teams, leagues, and secondary market sellers. These commenters noted that the secondary market may operate independently of the public accommodation, and parts of the secondary market, such as ticket transfers between friends, undoubtedly are outside the direct jurisdiction of the public accommodation. To the extent that venues seat persons who have purchased tickets on the secondary market, they must similarly seat persons with disabilities who have purchased tickets on the secondary market. In addition, some public accommodations may acquire ADA obligations directly by formally entering the secondary ticket market.

The Department's enforcement experience with assembly areas also has revealed that venues regularly provide for and make last-minute seat transfers. As long as there are vacant wheelchair spaces, requiring venues to provide wheelchair spaces for patrons who acquired inaccessible seats and need wheelchair spaces is an example of a reasonable modification of a policy under title III of the ADA. Similarly, a person who has a ticket for a wheelchair space but who does not require its accessible features could be offered non-accessible seating if such seating is available.

The Department's longstanding position that title III of the ADA requires venues to make reasonable modifications in their policies to allow individuals with disabilities who acquired non-accessible tickets on the secondary ticket market to be seated in accessible seating, where such seating is vacant, is supported by the only Federal court to address this issue. *See Independent Living Resources* v. *Oregon Arena Corp.,* 1 F. Supp. 2d 1159, 1171 (D. Or. 1998). The Department has incorporated this position into the final rule at § 36.302(f)(7)(ii).

The NPRM contained two questions aimed at gauging concern with the Department's consideration of secondary ticket market sales. The first question asked whether a secondary purchaser who does not have a disability and who buys an accessible seat should be required to move if the space is needed for someone with a disability.

Many disability rights advocates answered that the individual should move provided that there is a seat of comparable or better quality available for him and his companion. Some venues, however, expressed concerns about this provision, and asked how they are to identify who should be moved and what obligations apply if there are no seats available that are equivalent or better in quality.

The Department's second question asked whether there are particular concerns about the obligation to provide accessible seating, including a wheelchair space, to an individual with a disability who purchases an inaccessible seat through the secondary market.

Industry commenters contended that this requirement would create a "logistical nightmare," with venues scrambling to reseat patrons in the short time between the opening of the venues' doors and the commencement of the event. Furthermore, they argued that they might not be able to reseat all individuals and that even if they were able to do so, patrons might be moved to inferior seats (whether in accessible or non-accessible seating). These commenters also were concerned that they would be sued by patrons moved under such circumstances.

These commenters seem to have misconstrued the rule. Covered entities are not required to seat every person who acquires a ticket for inaccessible seating but needs accessible seating, and are not required to move any individual who acquires a ticket for accessible seating but does not need it. Covered entities that allow patrons to buy and sell tickets on the secondary market must make reasonable modifications to their policies to allow persons with disabilities to participate in secondary ticket transfers. The Department believes that there is no one-size-fits-all rule that will suit all assembly areas. In those circumstances where a venue has accessible seating vacant at the time an individual with a disability who needs accessible seating presents his ticket for inaccessible seating at the box office, the venue must allow the individual to exchange his ticket for an accessible seat in a comparable location if such an accessible seat is vacant. Where, however, a venue has sold all of its accessible seating, the venue has no obligation to provide accessible seating to the person with a disability who purchased an inaccessible seat on the secondary market. Venues may encourage individuals with disabilities who hold tickets for inaccessible seating to contact the box office before the event to notify them of their need for accessible seating, even though they may not require ticketholders to provide such notice.

The Department notes that public accommodations are permitted, though not required, to adopt policies regarding moving patrons who do not need the features of an accessible seat. If a public accommodation chooses to do so, it might mitigate administrative concerns by marking tickets for accessible seating as such, and printing on the ticket that individuals who purchase such seats but who do not need accessible seating are subject to being moved to other seats in the facility if the accessible seating is required for an individual with a disability. Such a venue might also develop and publish a ticketing policy to provide transparency to the general public and to put holders of tickets for accessible seating who do not require it on notice that they may be moved.

Prevention of fraud in purchase of accessible seating. Assembly area managers and advocacy groups have informed the Department that the fraudulent purchase of accessible seating is a pressing concern. Curbing fraud is a goal that public accommodations and individuals with disabilities share. Steps taken to prevent fraud, however, must be balanced carefully against the privacy rights of individuals with disabilities. Such measures also must not impose burdensome requirements upon, nor restrict the rights of, individuals with disabilities.

In the NPRM, the Department struck a balance between these competing concerns by proposing § 36.302(f)(8), which prohibited public accommodations from asking for proof of disability before the purchase of accessible seating but provided guidance in two

paragraphs on appropriate measures for curbing fraud. Paragraph (i) proposed allowing a public accommodation to ask individuals purchasing single-event tickets for accessible seating whether they are wheelchair users. Paragraph (ii) proposed allowing a public accommodation to require individuals purchasing accessible seating for season tickets or other multi-event ticket packages to attest in writing that the accessible seating is for a wheelchair user. Additionally, the NPRM proposed to permit venues, when they have good cause to believe that an individual has fraudulently purchased accessible seating, to investigate that individual.

Several commenters objected to this rule on the ground that it would require a wheelchair user to be the purchaser of tickets. The Department has reworded this paragraph to reflect that the individual with a disability does not have to be the ticket purchaser. The final rule allows third parties to purchase accessible tickets at the request of an individual with a disability.

Commenters also argued that other individuals with disabilities who do not use wheelchairs should be permitted to purchase accessible seating. Some individuals with disabilities who do not use wheelchairs urged the Department to change the rule, asserting that they, too, need accessible seating. The Department agrees that such seating, although designed for use by a wheelchair user, may be used by non-wheelchair users, if those persons are persons with a disability who need to use accessible seating because of a mobility disability or because their disability requires the use of the features that accessible seating provides (*e.g.,* individuals who cannot bend their legs because of braces, or individuals who, because of their disability, cannot sit in a straight-back chair).

Some commenters raised concerns that allowing venues to ask questions to determine whether individuals purchasing accessible seating are doing so legitimately would burden individuals with disabilities in the purchase of accessible seating. The Department has retained the substance of this provision in § 36.302(f)(8) of the final rule, but emphasizes that such questions should be asked at the initial time of purchase. For example, if the method of purchase is via the Internet, then the question(s) should be answered by clicking a yes or no box during the transaction. The public accommodation may warn purchasers that accessible seating is for individuals with disabilities and that individuals purchasing such tickets fraudulently are subject to relocation.

One commenter argued that face-to-face contact between the venue and the ticket holder should be required in order to prevent fraud and suggested that individuals who purchase accessible seating should be required to pick up their tickets at the box office and then enter the venue immediately. The Department has declined to adopt that suggestion. It would be discriminatory to require individuals with disabilities to pick up tickets at the box office when other spectators are not required to do so. If the assembly area wishes to make face-to-face contact with accessible seating ticket holders to curb fraud, it may do so through its ushers and other customer service personnel located within the seating area.

Some commenters asked whether it is permissible for assembly areas to have voluntary clubs where individuals with disabilities self-identify to the public accommodation in order to become a member of a club that entitles them to purchase accessible seating reserved for club members or otherwise receive priority in purchasing accessible seating. The Department agrees that such clubs are permissible, provided that a reasonable amount of accessible seating remains available at all prices and dispersed at all locations for individuals with disabilities who are non-members.

Section 36.303 Auxiliary Aids and Services

Section 36.303(a) of the 1991 title III regulation requires a public accommodation to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking such steps would fundamentally alter the nature of the goods, services, facilities, advantages, or accommodations being offered or would result in an undue burden. Implicit in this duty to provide auxiliary aids and services is the underlying obligation of a public accommodation to communicate effectively with customers, clients, patients, companions, or participants who have disabilities affecting hearing, vision, or speech. The Department notes that § 36.303(a) does not require public accommodations to provide assistance to individuals with disabilities that is unrelated to effective communication, although requests for such assistance may be otherwise subject to the reasonable modifications or barrier removal requirements.

The Department has investigated hundreds of complaints alleging that public accommodations have failed to provide effective communication, and many of these investigations have resulted in settlement agreements and consent decrees. During the course of these investigations, the Department has determined that public accommodations sometimes misunderstand the scope of their obligations under the statute and the regulation. Section 36.303 in the final rule codifies the Department's longstanding policies in this area, and includes provisions based on technological advances and breakthroughs in the area of auxiliary aids and services that have occurred since the 1991 title III regulation was published.

Video remote interpreting (VRI). Section 36.303(b)(1) sets out examples of auxiliary aids and services. In the NPRM, the Department proposed adding video remote services (hereafter referred to as "video remote interpreting" or "VRI") and the exchange of written notes among the examples. The Department also proposed amending the provision to reflect technological advances, such as the wide availability of real-time capability in transcription services and captioning.

VRI is defined in the final rule at § 36.104 as "an interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images as provided in § 36.303(f)." The Department notes that VRI generally consists of a videophone, monitors, cameras, a high-speed video connection, and an interpreter provided by the public accommodation pursuant to a contract for services. The term's inclusion within the definition of "qualified interpreter" makes clear that a public accommodation's use of VRI satisfies its title III obligations only where VRI affords effective communication. Comments from advocates and persons with disabilities expressed concern that VRI may not always provide effective communication, especially in hospitals and emergency rooms. Examples were provided of patients who are unable to see the video monitor because they are semi-conscious or unable to focus on the video screen; other examples were given of cases where the video monitor is out of the sightline of the patient or the image is out of focus; still other examples were given of patients who cannot see the screen because the signal is interrupted, causing unnatural pauses in communication, or the image is grainy or otherwise unclear. Many commenters requested more explicit guidelines on the use of VRI, and some recommended requirements for equipment maintenance, dedicated high-speed, wide-bandwidth video connections, and training of staff using VRI, especially in hospital and health care situations. Several major organizations requested a requirement to include the interpreter's face, head, arms, hands, and eyes in all transmissions.

The Department has determined that VRI can be an effective method of providing interpreting service in certain situations, particularly when a live interpreter cannot be immediately on the scene. To ensure that VRI is effective, the Department has established performance standards for VRI in § 36.303(f). The Department recognizes that reliance on VRI may not be effective in certain situations, such as those involving the exchange of complex information or involving multiple parties, and for some individuals, such as for persons who are deaf-blind, and using VRI in those circumstances would not satisfy a public accommodation's obligation to provide effective communication.

Comments from several disability advocacy organizations and individuals discouraged the Department from adding the exchange of written notes to the list of available auxiliary aids in § 36.303(b). The Department consistently has recognized that the exchange of written notes may provide effective communication in certain contexts. The NPRM proposed adding an explicit reference to written notes because some title III entities do not understand that exchange of written notes using paper and pencil may be an available option in some circumstances. Advocates and persons with disabilities requested explicit limits on the use of written notes as a form of auxiliary aid because, they argued, most exchanges are not simple, and handwritten notes do not afford effective

communication. One major advocacy organization, for example, noted that the speed at which individuals communicate orally or use sign language averages about 200 words per minute or more, and thus, the exchange of notes may provide only truncated or incomplete communication. For persons whose primary language is American Sign Language (ASL), some commenters pointed out, using written English in exchange of notes often is ineffective because ASL syntax and vocabulary is dissimilar from English. By contrast, some commenters from professional medical associations sought more specific guidance on when notes are allowed, especially in the context of medical offices and health care situations.

Exchange of notes likely will be effective in situations that do not involve substantial conversation, for example, when blood is drawn for routine lab tests or regular allergy shots are administered. However, interpreters should be used when the matter involves more complexity, such as in communication of medical history or diagnoses, in conversations about medical procedures and treatment decisions, or in communication of instructions for care at home or elsewhere. The Department discussed in the NPRM the kinds of situations in which use of interpreters or captioning is necessary. Additional guidance on this issue can be found in a number of agreements entered into with health care providers and hospitals that are available on the Department's Web site at *http://www.ada.gov.*

In addition, commenters requested that the Department include "real-time" before any mention of "computer-aided" or "captioning" technology to highlight the value of simultaneous translation of any communication. The Department has added to the final rule appropriate references to "real-time" to recognize this aspect of effective communication. Lastly, in this provision and elsewhere in the title III regulation, the Department has replaced the term "telecommunications devices for deaf persons (TDD)" with "text telephones (TTYs)." As noted in the NPRM, TTY has become the commonly accepted term and is consistent with the terminology used by the Access Board in the 2004 ADAAG. Comments from advocates and persons with disabilities expressed approval of the substitution of TTY for TDD in the proposed regulation, but expressed the view that the Department should expand the definition to "voice, text, and video-based telecommunications products and systems, including TTY's, videophones, and captioned telephones, or equally effective telecommunications systems." The Department has expanded its definition of "auxiliary aids and services" in § 36.303 to include those examples in the final rule. Other additions proposed in the NPRM, and retained in the final rule, include Brailled materials and displays, screen reader software, magnification software, optical readers, secondary auditory programs (SAP), and accessible electronic and information technology.

As the Department noted in the preamble to the NPRM, the list of auxiliary aids in § 36.303(b) is merely illustrative. The Department does not intend that every public accommodation covered by title III must have access to every device or all new technology at all times, as long as the communication provided is effective.

Companions who are individuals with disabilities. The Department has added several new provisions to § 36.303(c), but these provisions do not impose new obligations on places of public accommodation. Rather, these provisions simply codify the Department's longstanding positions. Section 36.303(c)(1) now states that "[a] public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities. This includes an obligation to provide effective communication to companions who are individuals with disabilities." Section 36.303(c)(1)(i) defines "companion" as "a family member, friend, or associate of an individual seeking access to, or participating in, the goods, services, facilities, privileges, advantages, or accommodations of a public accommodation, who, along with such individual, is an appropriate person with whom the public accommodation should communicate."

This provision makes clear that if the companion is someone with whom the public accommodation normally would or should communicate, then the public accommodation must provide appropriate auxiliary aids and services to that companion to ensure effective communication with the companion. This commonsense rule provides the necessary guidance to public accommodations to implement properly the nondiscrimination requirements of the ADA. Commenters also questioned why, in the NPRM, the Department defined companion as "a family member, friend, or associate of a program participant * * *," noting that the scope of a public accommodation's obligation is not limited to "program participants" but rather includes all individuals seeking access to, or participating in, the goods, services, facilities, privileges, advantages, or accommodations of the public accommodation. 73 FR 34508, 34554 (June 17, 2008). The Department agrees and has amended the regulatory language accordingly. Many commenters supported inclusion of companions in the rule and requested that the Department clarify that a companion with a disability may be entitled to effective communication from the public accommodation, even though the individual seeking access to, or participating in, the goods, services, facilities, privileges, advantages, or accommodations of the public accommodation is not an individual with a disability. Some commenters asked the Department to make clear that if the individual seeking access to or participating in the public accommodation's program or services is an individual with a disability and the companion is not, the public accommodation may not limit its communication to the companion, instead of communicating directly with the individual with a disability, when it would otherwise be appropriate to communicate with the individual with the disability.

Most entities and individuals from the medical field objected to the Department's proposal, suggesting that medical and health care providers, and they alone, should determine to whom medical information should be communicated and when auxiliary aids and services should be provided to companions. Others asked that the Department limit the public accommodation's obligation to communicate effectively with a companion to situations where such communication is necessary to serve the interests of the person who is receiving the public accommodation's services. It also was suggested that companions should receive auxiliary aids and services only when necessary to ensure effective communication with the person receiving the public accommodation's services, with an emphasis on the particular needs of the patient requiring assistance, not the patient's family or guardian.

Some in the medical community objected to the inclusion of any regulatory language regarding companions, asserting that such language is overbroad, seeks services for individuals whose presence is neither required by the public accommodation nor necessary for the delivery of the services or good, places additional burdens on the medical community, and represents an uncompensated mandate. One medical association commenter stated that such a mandate was particularly burdensome in situations where a patient is fully and legally capable of participating in the decision-making process and needs little or no assistance in obtaining care and following through on physician's instructions.

The final rule codifies the Department's longstanding interpretation of the ADA, and clarifies that public accommodations have effective communication obligations with respect to companions who are individuals with disabilities even where the individual seeking to participate in or benefit from what a public accommodation offers does not have a disability. There are many instances in which such an individual may not be an individual with a disability but his or her companion is an individual with a disability. The effective communication requirement applies equally to that companion.

Effective communication with companions is particularly critical in health care settings where miscommunication may lead to misdiagnosis and improper or delayed medical treatment. The Department has encountered confusion and reluctance by medical care providers regarding the scope of their obligation with respect to such companions. Effective communication with a companion is necessary in a variety of circumstances. For example, a companion may be legally authorized to make health care decisions on behalf of the patient or may need to help the patient with information or instructions given by hospital personnel. In addition, a companion may be the patient's next of kin or health care surrogate with whom hospital personnel need to communicate concerning the patient's medical condition. Moreover, a companion could be designated by the patient to communicate with hospital personnel about the patient's symptoms, needs, condition, or medical history. Furthermore, the companion could be a family member with whom

hospital personnel normally would communicate. It has been the Department's longstanding position that public accommodations are required to provide effective communication to companions when they accompany patients to medical care providers for treatment.

The individual with a disability does not need to be present physically to trigger the public accommodation's obligation to provide effective communication to a companion. The controlling principle regarding whether appropriate auxiliary aids and services should be provided is whether the companion is an appropriate person with whom the public accommodation should communicate. Examples of such situations include back-to-school night or parent-teacher conferences at a private school. If the faculty writes on the board or otherwise displays information in a visual context during back-to-school night, this information must be communicated effectively to parents or guardians who are blind or have low vision. At a parent-teacher conference, deaf parents or guardians are to be provided with appropriate auxiliary aids and service to communicate effectively with the teacher and administrators. Likewise, when a deaf spouse attempts to communicate with private social service agencies about the services necessary for the hearing spouse, appropriate auxiliary aids and services must be provided to the deaf spouse by the public accommodation to ensure effective communication.

One medical association sought approval to impose a charge against an individual with a disability, either the patient or the companion, where that person had stated he or she needed an interpreter for a scheduled appointment, the medical provider had arranged for an interpreter to appear, and then the individual requiring the interpreter did not show up for the scheduled appointment. Section 36.301(c) of the 1991 title III regulation prohibits the imposition of surcharges to cover the costs of necessary auxiliary aids and services. As such, medical providers cannot pass along to their patients with disabilities the cost of obtaining an interpreter, even in situations where the individual cancels his or her appointment at the last minute or is a "no-show" for the scheduled appointment. The medical provider, however, may charge for the missed appointment if all other patients are subject to such a charge in the same circumstances.

Determining appropriate auxiliary aids. The type of auxiliary aid the public accommodation provides is dependent on which auxiliary aid is appropriate under the particular circumstances. Section 36.303(c)(1)(ii) codifies the Department's longstanding interpretation that the type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. As the Department explained in the NPRM, this provision lists factors the public accommodation should consider in determining which type of auxiliary aids and services are necessary. For example, an individual with a disability who is deaf or hard of hearing may need a qualified interpreter to discuss with hospital personnel a diagnosis, procedures, tests, treatment options, surgery, or prescribed medication (*e.g.,* dosage, side effects, drug interactions, etc.). In comparison, an individual who is deaf or hard of hearing who purchases an item in the hospital gift shop may need only an exchange of written notes to achieve effective communication.

The language in the first sentence of § 36.303(c)(1)(ii) is derived from the Department's Technical Assistance Manual. *See* Department of Justice, Americans with Disabilities Act, *ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities,* III–4.3200, available at *http://www.ada.gov/taman3.html.* There were few comments regarding inclusion of this policy in the regulation itself, and those received were positive.

Many advocacy groups, particularly those representing blind individuals and those with low vision, urged the Department to add language in the final rule requiring the provision of accessible material in a manner that is timely, accurate, and private. This, they argued, would be especially important with regard to billing information, other time-sensitive material, or confidential information. The Department has added a provision in § 36.303(c)(1)(ii) stating that in "order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way so as to protect the privacy and independence of the individual with a disability."

The second sentence of § 36.303(c)(1)(ii) states that "[a] public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication." Many commenters urged the Department to amend this provision to require public accommodations to give primary consideration to the expressed choice of an individual with a disability. However, as the Department explained when it initially promulgated the 1991 title III regulation, the Department believes that Congress did not intend under title III to impose upon a public accommodation the requirement that it give primary consideration to the request of the individual with a disability. *See* 28 CFR part 36, app. B at 726 (2009). The legislative history does, however, demonstrate congressional intent to strongly encourage consulting with persons with disabilities. *Id.* As the Department explained in the 1991 preamble, "the House Education and Labor Committee stated that it 'expects' that 'public accommodation(s) will consult with the individual with a disability before providing a particular auxiliary aid or service.' (Education and Labor report at 107)." *Id.*

The commenters who urged that primary consideration be given to the individual with a disability noted, for example, that a public accommodation would not provide effective communication by using written notes where the individual requiring an auxiliary aid is in severe pain, or by providing a qualified ASL interpreter when an individual needs an oral interpreter instead. Both examples illustrate the importance of consulting with the individual with a disability in order to ensure that the communication provided is effective. When a public accommodation ignores the communication needs of the individual requiring an auxiliary aid or service, it does so at its peril, for if the communication provided is not effective, the public accommodation will have violated title III of the ADA.

Consequently, the regulation strongly encourages the public accommodation to engage in a dialogue with the individual with a disability to determine what auxiliary aids and services are appropriate under the circumstances. This dialogue should include a communication assessment of the individual with a disability initially, regularly, and as needed, because the auxiliary aids and services necessary to provide effective communication to the individual may fluctuate. For example, a deaf individual may go to a private community health center with what is at first believed to be a minor medical emergency, such as a sore knee, and the individual with a disability and the community health center both may believe that exchanging written notes will be effective; however, during that individual's visit, it may be determined that the individual is, in fact, suffering from an anterior cruciate ligament tear and must have surgery to repair the torn ligament. As the situation develops and the diagnosis and recommended course of action evolve into surgery, an interpreter likely will be necessary. The community health center has a continuing obligation to assess the auxiliary aids and services it is providing, and should consult with individuals with disabilities on a continuing basis to assess what measures are required to ensure effective communication.

Similarly, the Department strongly encourages public accommodations to keep individuals with disabilities apprised of the status of the expected arrival of an interpreter or the delivery of other requested or anticipated auxiliary aids and services. Also, when the public accommodation decides not to provide the auxiliary aids and services requested by an individual with a disability, the public accommodation should provide that individual with the reason for its decision.

Family members and friends as interpreters. Section 36.303(c)(2), which was proposed in the NPRM, has been included in the final rule to make clear that a public accommodation shall not require an individual with a disability to bring another individual to interpret for him or her. The Department has added this regulatory requirement to emphasize that when a public accommodation is interacting with a person with a disability, it is the public accommodation's responsibility to provide an interpreter to ensure effective communication. It is not appropriate to require the person with a disability to bring another individual to provide such services.

Many commenters supported inclusion of this language in the new rule. A representative from a cruise line association opined, however, that if a guest chose to cruise without an interpreter or companion, the ship would not be compelled to provide an interpreter for the medical facility. On the contrary, when an individual with a disability goes on a cruise, the cruise ship has an obligation to provide effective communication, including, if necessary, a qualified interpreter as defined in the rule.

Some representatives of pediatricians objected to this provision, stating that parents of children with disabilities often know best how to interpret their children's needs and health status and relay that information to the child's physician, and to remove that parent, or add a stranger into the examining room, may frighten children. These commenters requested clarification in the regulation that public accommodations should permit parents, guardians, or caregivers of children with disabilities to accompany them in medical settings to ensure effective communication. The regulation does not prohibit parents, guardians, or caregivers from being present or providing effective communication for children. Rather, it prohibits medical professionals (and other public accommodations) from requiring or forcing individuals with disabilities to bring other individuals with them to facilitate communication so that the public accommodation will not have to provide appropriate auxiliary aids and services. The public accommodation cannot avoid its obligation to provide an interpreter except under the circumstances described in § 36.303(c)(3)–(4).

A State medical association also objected to this provision, opining that medical providers should have the authority to ask patients to bring someone with them to provide interpreting services if the medical provider determines that such a practice would result in effective communication and that patient privacy and confidentiality would be maintained. While the public accommodation has the obligation to determine what type of auxiliary aids and services are necessary to ensure effective communication, it cannot unilaterally determine whether the patient's privacy and confidentiality would be maintained.

Section 36.303(c)(3) of the final rule codifies the Department's position that there are certain limited instances when a public accommodation may rely on an accompanying adult to interpret or facilitate communication: (1) In an emergency involving an imminent threat to the safety or welfare of an individual or the public; or (2) if the individual with a disability specifically requests it, the accompanying adult agrees to provide the assistance, and reliance on that adult for this assistance is appropriate under the circumstances. In such instances, the public accommodation should first offer to provide appropriate auxiliary aids and services free of charge.

Commenters requested that the Department make clear that the public accommodation cannot request, rely on, or coerce an accompanying adult to provide effective communication for an individual with a disability, and that only a voluntary offer of assistance is acceptable. The Department states unequivocally that consent of, and for, the accompanying adult to facilitate communication must be provided freely and voluntarily both by the individual with a disability and the accompanying adult—absent an emergency involving an imminent threat to the safety or welfare of an individual or the public. The public accommodation cannot coerce or attempt to persuade another adult to provide effective communication for the individual with a disability.

Several commenters asked that the Department make clear that children are not to be used to provide effective communication for family members and friends and that it is the responsibility of the public accommodation to provide effective communication, stating that interpreters often are needed in settings where it would not be appropriate for children to be interpreting, such as those involving medical issues, domestic violence, or other situations involving the exchange of confidential or adult-related material. Children often are hesitant to decline requests to provide communication services, which puts them in a very difficult position vis-a-vis family members and friends. The Department agrees. It is the Department's position that a public accommodation shall not rely on a minor child to facilitate communication with a family member, friend, or other individual except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where no interpreter is available. Accordingly, the Department has revised the rule to state that "[a] public accommodation shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available." § 36.303(c)(4). Sections 36.303(c)(3) and (c)(4) have no application in circumstances where an interpreter would not otherwise be required in order to provide effective communication (*e.g.,* in simple transactions such as purchasing movie tickets at a theater).

The Department stresses that privacy and confidentiality must be maintained but notes that covered entities, such as hospitals, that are subject to the Privacy Rules, 45 CFR parts 160 and 164, of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104–191, are permitted to disclose to a patient's relative, close friend, or any other person identified by the patient (such as an interpreter) relevant patient information if the patient agrees to such disclosures. *See* 45 CFR parts 160 and 164. The agreement need not be in writing. Covered entities should consult the HIPAA Privacy Rules regarding other ways disclosures may be made to such persons.

With regard to emergency situations, proposed § 36.303(c)(3) permitted reliance on an individual accompanying an individual with a disability to interpret or facilitate communication in an emergency involving a threat to the safety or welfare of an individual or the public. Commenters requested that the Department make clear that often a public accommodation can obtain appropriate auxiliary aids and services in advance of an emergency, particularly in anticipated emergencies, such as predicted dangerous weather, or in certain medical situations, such as pending childbirth, by making necessary pre-arrangements. These commenters did not want public accommodations to be relieved of their responsibilities to provide effective communication in emergency situations, noting that the need for effective communication in emergencies is heightened. For the same reason, several commenters requested a separate rule that requires public accommodations to provide timely and effective communication in the event of an emergency.

One group of commenters asked that the Department narrow the regulation permitting reliance on a companion to interpret or facilitate communication in emergency situations so that it is not available to entities with responsibilities for emergency preparedness and response. Some commenters noted that certain exigent circumstances, such as those that exist during and, perhaps, immediately after a major hurricane, temporarily may excuse public accommodations of their responsibilities to provide effective communication. However, they asked that the Department clarify that these obligations are ongoing, and that as soon as such situations begin to abate or become stabilized, the public accommodation must provide effective communication.

The Department recognizes the need for effective communication is critical in emergency situations. After due consideration of all of these concerns raised by commenters, the Department has revised § 36.303(c) to narrow the exception permitting reliance on individuals accompanying the individual with a disability during an emergency to make it clear that it applies only to emergencies involving an "imminent threat to the safety or welfare of an individual or the public * * *." § 36.303(c)(3)–(4). The Department wishes to emphasize, however, that application of this exception is narrowly tailored to emergencies involving an imminent threat to the safety or welfare of individuals or the public. Arguably, all visits to an emergency room are by definition emergencies. Likewise, an argument can be made that most situations to which emergency workers respond involve, in one way or another, a threat to the safety or welfare of an individual or the public. The imminent threat exception in § 36.303(c)(3)–(4) is not intended to apply to typical and foreseeable emergency situations that are part of the normal operations of these institutions. As such, a public accommodation may rely on an accompanying individual to interpret or facilitate communication under the § 36.303(c)(3)–(4) imminent threat exception only where there is a true emergency, *i.e.,* where any delay in providing immediate services to the individual could have life-altering or life-ending consequences.

Telecommunications. In addition to the changes discussed in § 36.303(b) regarding

telecommunications, telephones, and text telephones, the Department has adopted provisions in § 36.303(d) of the final rule (which also were included in the NPRM) requiring that public accommodations must not disconnect or refuse to take calls from FCC-approved telecommunications relay systems, including Internet-based relay systems. Commenters from some State agencies, many advocacy organizations, and individuals strongly urged the Department to mandate such action because of the high proportion of TTY calls and relay service calls to title III entities that are not completed because of phone systems or employees not taking the calls. This refusal presents a significant obstacle for persons using TTYs who do business with public accommodations and denies persons with disabilities telephone access for business that typically is handled over the telephone.

Section 36.303(d)(1)(ii) of the NPRM added public telephones equipped with volume control mechanisms and hearing aid-compatible telephones to the examples of types of telephone equipment to be provided. Commenters from the disability community and from telecommunications relay service providers argued that requirements for these particular features on telephones are obsolete not only because the deaf and hard of hearing community uses video technology more frequently than other types of telecommunication, but also because all public coin phones have been hearing aid compatible since 1983, pursuant to the Telecommunications for the Disabled Act of 1982, 47 U.S.C. 610. The Hearing Aid Compatibility Act of 1988, 47 U.S.C. 610, extended this requirement to all wireline telephones imported into or manufactured in the United States since 1989. In 1997, the FCC further required that all such phones also be equipped with volume control. *See* 47 CFR 68.6. Given these existing statutory obligations, the proposed language is unnecessary. Accordingly, the Department has deleted that language from the final rule.

The Department understands that there are many new devices and advances in technology that should be included in the definition of available auxiliary aids and is including many of the telecommunications devices and some new technology. While much of this technology is not expensive and should be available to most title III entities, there may be legitimate reasons why in a particular situation some of these new and developing auxiliary aids may not be available, may be prohibitively costly (thus supporting an undue burden defense), or may otherwise not be suitable given other circumstances related to the particular terrain, situation, or functionality in specialized areas where security, among other things, may be a factor limiting the appropriateness of the use of a particular technology or device. The Department recognizes that the available new technology may provide more effective communication than existing technology and that providing effective communication often will include use of new technology and video relay services, as well as interpreters. However, the Department has not mandated that title III entities make all technology or services available upon demand in all situations. When a public accommodation provides the opportunity to make outgoing phone calls on more than an incidental-convenience basis, it shall make available accessible public telephones, TTYs, or other telecommunications products and systems for use by an individual who is deaf or hard of hearing, or has a speech impairment.

Video remote interpreting (VRI) services. In § 36.303(f) of the NPRM, the Department proposed the inclusion of four performance standards for VRI (which the NPRM termed video interpreting services (VIS)), for effective communication: (1) High-quality, clear, real-time, full-motion video, and audio over a dedicated high-speed Internet connection; (2) a clear, sufficiently large, and sharply delineated picture of the participants' heads, arms, hands, and fingers, regardless of their body position; (3) clear transmission of voices; and (4) persons who are trained to set up and operate the VIS quickly and efficiently.

Commenters generally approved of these proposed performance standards, but recommended that some additional standards be included in the final rule. For persons who are deaf with limited vision, commenters requested that the Department include an explicit requirement that interpreters wear high-contrast clothing with no patterns that might distract from their hands as they are interpreting, so that a person with limited vision could still see the signs made by the interpreter. While the Department reiterates the importance of such practices in the delivery of effective VRI as well as in-person interpreting, the Department declines to adopt such performance standards as part of this rule. In general, professional interpreters already follow such practices, as the Code of Professional Conduct for interpreters developed by the Registry of Interpreter for the Deaf and the National Association of the Deaf incorporates attire considerations into their standards of professionalism and conduct. Moreover, as a result of this code, many VRI agencies have adopted detailed dress standards that interpreters hired by the agency must follow. Commenters also urged explicit requirement of a clear image of the face and eyes of the interpreter and others. Because the face includes the eyes, the Department has amended § 36.303(f)(2) of the final rule to include a requirement that the interpreter's face be displayed. Other commenters requested requirement of a wide-bandwidth video connection for the VRI system, and the Department has included this requirement in § 36.303(f)(1) of the final rule.

ATMs. The 2010 Standards set out detailed requirements for ATMs, including communication-related requirements to make ATMs usable by individuals who are blind or have low vision. In the NPRM, the Department discussed the application of a safe harbor to the communication-related elements of ATMs. The NPRM explained that the Department considers the communication-related elements of ATMs to be auxiliary aids and services, to which the safe harbor for elements built in compliance with the 1991 standards does not apply.

The Department received several comments regarding this issue. Several commenters representing banks objected to the exclusion of communication-related aspects of ATMs from the safe harbor provision. They explained that the useful life of ATMs—on average 10 years—was longer than the Department noted; thus, without the safe harbor, banks would be forced to retrofit many ATMs in order to comply with the proposed regulation. Such retrofitting, they noted, would be costly to the industry. A few representatives of the disability community commented that communication-related aspects of ATMs should be excluded from the safe harbor.

The Department consistently has taken the position that the communication-related elements of ATMs are auxiliary aids and services, rather than structural elements. *See* 28 CFR part 36, app. B at 728 (2009). Thus, the safe harbor provision does not apply to these elements. The Department believes that the limitations on the effective communication requirements, which provide that a covered entity does not have to take measures that would result in a fundamental alteration of its program or would cause undue burdens, provide adequate protection to covered entities that operate ATMs.

Captioning at sporting venues. In § 36.303(g) of the NPRM, the Department proposed that sports stadiums that have a capacity of 25,000 or more shall provide captioning for safety and emergency information on scoreboards and video monitors. In addition, the Department posed four questions about captioning of information, especially safety and emergency information announcements, provided over public address (PA) systems. The Department received many detailed and divergent responses to each of the four questions and the proposed regulatory text. Because comments submitted on the Department's title II and title III proposals were intertwined, because of the similarity of issues involved for title II entities and title III entities, and in recognition of the fact that many large sports stadiums are covered by both title II and title III as joint operations of State or local government and one or more public accommodations, the Department presents here a single consolidated review and summary of the issues raised in comments.

The Department asked whether requiring captioning of safety and emergency information made over the public address system in stadiums seating fewer than 25,000 would create an undue burden for smaller entities, and whether it would be feasible for small stadiums to provide such captioning, or whether a larger threshold, such as sports stadiums with a capacity of 50,000 or more, would be appropriate.

There was a consensus among the commenters, including disability advocates as well as venue owners and stadium designers and operators, that using the stadium size or seating capacity should not be the exclusive deciding factor for any obligation to provide captioning for safety and emergency information broadcast over the PA system. Most disability advocacy organizations and individuals with

disabilities complained that using size or seating capacity as a threshold for captioning safety and emergency information would undermine the "undue burden" defense found in both titles II and III. Many commenters provided examples of facilities such as professional hockey arenas that seat less than 25,000 fans but that, commenters argued, should be able to provide real-time captioning. Other commenters suggested that some high school or college stadiums, for example, may hold 25,000 fans or more and yet lack the resources to provide real-time captioning. Many commenters noted that real-time captioning would require use of trained stenographers, and that most high school and college sports facilities rely upon volunteers to operate scoreboards and PA systems and they would not be qualified stenographers, especially in case of an emergency. One national association noted that the typical stenographer expense for a professional football game in Washington, DC, is about $550 per game. Similarly, one trade association representing venues estimated that the cost for a professional stenographer at a sporting event runs between $500 and $1,000 per game or event, the cost of which, they argued, would be unduly burdensome in many cases. Some commenters posited that schools that do not sell tickets to athletic events would be challenged to meet such expenses, in contrast to major college athletic programs and professional sports teams, which would be less likely to prevail using an "undue burden" defense.

Some venue owners and operators and other covered entities also argued that stadium size should not be the key consideration for whether scoreboard captioning will be required. Instead, these entities suggested that equipment already installed in the stadium, including necessary electrical equipment and backup power supply, should be the determining factor for whether captioning is mandated. Many commenters argued that the requirement to provide captioning should apply only to stadiums with scoreboards that meet the National Fire Protection Association (NFPA) National Fire Alarm Code. Commenters reported that NFPA 72 requires at least two independent and reliable power supplies for emergency information systems, including one source that is a generator or a battery sufficient to run the system in the event the primary power fails. Alternatively, some stadium designers and title II entities commented that the requirement should arise when the facility has at least one elevator providing firefighter emergency operation, along with approval of authorities with responsibility for fire safety. An organization concerned with fire safety codes commented that the Department lacks the expertise to regulate on this topic. Other commenters argued for flexibility in the requirements for providing captioning and contended that any requirement should apply only to stadiums constructed after the effective date of the regulation.

In the NPRM, the Department also asked whether the rule should address the specific means of captioning equipment, whether captioning should be provided through any effective means (*e.g.,* scoreboards, line boards, handheld devices, or other means), or whether some means, such as handheld devices, should be eliminated as options. This question elicited many comments from advocates for persons with disabilities as well as from covered entities. Advocacy organizations and individuals with experience using handheld devices argued that such devices do not provide effective communication. These commenters noted that information is often delayed in the transmission to such devices, making them hard to use when following action on the playing field or in the event of an emergency when the crowd is already reacting to aural information provided over the PA system well before it is received on the handheld device.

Several venue owners and operators and others commented that handheld technology offers advantages of flexibility and portability so that it may be used successfully regardless of where in the facility the user is located, even when not in the line of sight of a scoreboard or other captioning system. Still other commenters urged the Department not to regulate in such a way as to limit innovation and use of such technology now and in the future. Cost considerations were included in comments from some stadium designers and venue owners and operators who reported that the cost of providing handheld systems is far less than the cost of providing real-time captioning on scoreboards, especially in facilities that do not currently have the capacity to provide real-time captions on existing equipment. Others noted that handheld technology is not covered by fire and safety model codes, including the NFPA, and thus would be more easily adapted into existing facilities if captioning were required by the Department.

The Department also asked about requiring open captioning of all public address announcements, rather than limiting the captioning requirement to safety and emergency information. A variety of advocates and persons with disabilities argued that all information broadcast over a PA system should be captioned in real time at all facilities in order to provide effective communication, and that a requirement only to provide emergency and safety information would not be sufficient. A few organizations representing persons with disabilities commented that installation of new systems should not be required, but that all systems within existing facilities that are capable of providing captioning should provide captioning of information to the maximum extent possible. Several organizations for persons with disabilities commented that all facilities should include in their safety planning measures a requirement that all aurally provided information for patrons with communication disabilities be captioned. Some advocates suggested that demand for captions will only increase as the number of deaf and hard of hearing persons grows with the aging of the general population and with increasing numbers of veterans returning from war with disabilities. Multiple commenters noted that the captioning would benefit others as well as those with communication disabilities.

By contrast, venue owners and operators and others commented that the action on the sports field is self-explanatory and does not require captioning. These commenters objected to an explicit requirement to provide real-time captioning for all information broadcast on the PA system at a sporting event. Other commenters objected to requiring captioning even for emergency and safety information over the scoreboard rather than through some other means. By contrast, venue operators, State government agencies, and some model code groups, including the NFPA, commented that emergency and safety information must be provided in an accessible format and that public safety is a paramount concern. Other commenters argued that the best method to deliver safety and emergency information would be television monitors showing local TV broadcasts with captions already mandated by the FCC. Some commenters posited that the most reliable information about a major emergency would be provided on the television news broadcasts. They argued that television monitors may be located throughout the facility, improving line of sight for patrons, some of whom might not be able to see the scoreboard from their seats or elsewhere in the facility. Some stadium designers, venue operators, and model code groups pointed out that video monitors are not regulated by the NFPA or other agencies, so that such monitors could be more easily provided. Video monitors may receive transmissions from within the facility and could provide real-time captions if there is the necessary software and equipment to feed the captioning signal to a closed video network within the facility. Several commenters suggested that using monitors would be preferable to requiring captions on the scoreboard if the regulation mandates real-time captioning. Some venue owners and operators argued that retrofitting existing stadiums with new systems could easily cost in the hundreds of thousands of dollars per scoreboard or system. Some stadium designers and others argued that captioning should be required only in stadiums built after the effective date of the regulation. For stadiums with existing systems that allow for real-time captioning, one commenter posited that dedicating the system exclusively to real-time captioning would lead to an annual loss of between two and three million dollars per stadium in revenue from advertising currently running in that space.

After carefully considering the wide range of public comments on this issue, the Department has concluded that the final rule will not provide additional requirements for effective communication or emergency information provided at sports stadiums at this time. The 1991 title II and title III regulations and statutory requirements are not in any way affected by this decision. The decision to postpone rulemaking on this complex issue is based on a number of factors, including the multiple layers of existing regulations by various agencies and levels of government, and the wide array of information, requests, and recommendations related to developing technology offered by the public. The diversity of existing information and communication systems and

other characteristics among sports stadiums also complicates the regulation of captioning. The Department has concluded that further consideration and review is prudent before it issues specific regulatory requirements.

Movie captioning. In the NPRM, the Department stated that options were being considered to require movie theater owners and operators to exhibit movies that are captioned for patrons who are deaf or hard of hearing. Captioning makes films accessible to individuals whose hearing is too limited to benefit from assistive listening devices. Both open and closed captioning are examples of auxiliary aids and services required under the Department's 1991 title III regulation. *See* 28 CFR 36.303(b)(1). Open captions are similar to subtitles in that the text is visible to everyone in the theater, while closed captioning displays the written text of the audio only to those individuals who request it.

In the NPRM, the Department also stated that options were being considered to require movie theater owners and operators to exhibit movies with video description,[3] a technology that enables individuals who are blind or have low vision to enjoy movies by providing a spoken interpretation of key visual elements of a movie, such as actions, settings, facial expressions, costumes, and scene changes. The descriptions are narrated and recorded onto an audiotape or disk that can be synchronized with the film as it is projected. An audio recording is an example of an auxiliary aid and service required under the Department's 1991 title III regulation. *See* 28 CFR 36.303(b)(2).

The NPRM stated that technological advances since the early 1990s have made open and closed captioning and video description for movies more readily available and effective and noted that the Department was considering options to require captioning and video description for movies exhibited by public accommodations. The NPRM also noted that the Department is aware that the movie industry is transitioning, in whole or in part, to movies in digital format and that movie theater owners and operators are beginning to purchase digital projectors. The Department noted in the NPRM that movie theater owners and operators with digital projectors may have available to them different capabilities than those without digital projectors. The Department sought comment regarding whether and how to require captioning and video description while the film industry makes this transition. In addition, the NPRM stated the Department's concern about the potential cost to exhibit captioned movies, noting that cost may vary depending upon whether open or closed captioning is used and whether or not digital projectors are used, and stated that the cost of captioning must stay within the parameters of the undue burden requirement in 28 CFR 36.303(a). The Department further noted that it understands the cost of video description equipment to be less than that for closed captioning. The Department then stated that it was considering the possibility of requiring public accommodations to exhibit all new movies in captioned format and with video description at every showing. The NPRM stated that the Department would not specify the types of captioning required, leaving such decisions to the discretion of the movie theater owners and operators.

In the NPRM, the Department requested public comment as to whether public accommodations should be required to exhibit all new movies in captioned format at every showing, whether it would be more appropriate to require captioning less frequently, and, if so, with what frequency captioning should be provided. The Department also inquired as to whether the requirement for captioning should be tied to the conversion of movies from film to the use of a digital format. The Department also asked for public comment regarding the exhibition of all new movies with narrative description, whether it would it be more appropriate to require narrative description less frequently, and whether narrative description of movies should be tied to the use of a digital format.

Representatives from the movie industry, a commenter from a non-profit organization, and a disability rights advocacy group provided information in their comments on the status of captioning and video description technology today as well as an update on the transition to digital cinema in the industry. A representative of major movie producers and distributors commented that traditionally open captions were created by "burning" the captions onto a special print of a selected movie, which the studios would make available to the exhibitors (movie theater owners and operators). Releases with open captions typically would be presented at special screenings. More recently, according to this commenter, alternative methods have been developed for presenting movies with open captions, but their common feature is that the captions are visible to all theater-goers. Closed captioning is an innovation in technology that was first made available in a feature film presentation in late 1997. Closed captioning technology currently in use allows viewers to see captions using a clear panel that is mounted in front of the viewer's seat.[4] According to commenters from the industry, the panel reflects captions that are shown in reverse on an LED display in the back of the theater, with captions appearing on or near the movie image. Moviegoers may use this technology at any showing at a theater that has been equipped with the technology, so that the theater does not have to arrange limited special screenings.

Video description technology also has existed since 1997, according to a commenter who works with the captioning and video description industry. According to a movie industry commenter, video description requires the creation of a separate script written by specially trained writers called "describers." As the commenter explained, a describer initially listens to the movie without watching it in order to approximate the experience of an audience member who is blind or has low vision. Using software to map out the pauses in the soundtrack, the describer writes a description in the space available. After an initial script is written for video description, it is edited and checked for timing, continuity, accuracy, and a natural flow. A narrator then records the new script to match the corresponding movie. This same industry commenter said that video description currently is provided in theaters through screens equipped with the same type of technology as that used for closed captioning. As commenters explained, technologies in use today deliver video descriptions via infrared or FM listening systems to headsets worn by individuals who are blind or have low vision.

According to the commenter representing major movie producers and distributors, the percentage of motion pictures produced with closed captioning by its member studios had grown to 88 percent of total releases by 2007; the percentage of motion pictures produced with open captioning by its member studios had grown to 78 percent of total releases by 2007; and the percentage of motion pictures provided with video description has ranged consistently between 50 percent and 60 percent of total releases. It is the movie producers and distributors, not the movie theater owners and operators, who determine what to caption and describe, the type of captioning to use, and the content of the captions and video description script. These same producers and distributors also assume the costs of captioning and describing movies. Movie theater owners and operators simply purchase the equipment to display the captions and play the video description in their auditoria.

The transition to digital cinema, considered by the industry to be one of the most profound advancements in motion picture production and technology of the last 100 years, will provide numerous advantages both for the industry and the audience. According to one commenter, currently there are sufficient standards and interim solutions to support captioning and video description now in digital format. Additionally, movie studios are supporting those efforts by providing accessibility tracks (captioning and video description) in many digital cinema content packages. Moreover, a group of industry commenters composed in pertinent part of members of the motion picture industry, the central standards organizations for this industry, and key digital equipment vendors, noted that they are participating in a joint venture to establish the remaining accessibility specifications and standards for access audio tracks. Access audio tracks are supplemental sound audio tracks for the hard of hearing and narrative audio tracks for individuals who have vision disabilities. According to a commenter and to industry documents, these standards were expected to

[3] In the NPRM, the Department referred to this technology as "narrative description." 73 FR 34508, 34531 (June 17, 2008). Several commenters informed the Department that the more accurate and commonly understood term is "video description," even though the subject is movies, not video, and so the Department decided to employ that term.

[4] Other closed captioning technologies for movies that have been developed but are not in use at this time include hand-held displays similar to a PDA (personal digital assistant); eyeglasses fitted with a prism over one lens; and projected bitmap captions. The PDA and eyeglass systems use a wireless transmitter to send the captions to the display device.

be in place by spring 2009. According to a commenter, at that time, all of the major digital cinema equipment vendors were expected to have support for a variety of closed caption display and video description products. This same commenter stated that these technologies will be supported by the studios that produce and distribute feature films, by the theaters that show these films to the public, and by the full complement of equipment in the production, distribution, and display chain.

The initial investment for movie theater owners and operators to convert to digital cinema is expensive. One industry commenter estimated that converting theaters to digital projection costs between $70,000 and $100,000 per screen and that maintenance costs for digital projectors are estimated to run between $5,000 and $10,000 a year—approximately five times as expensive as the maintenance costs for film projectors. According to this same commenter, while there has been progress in making the conversion, only approximately 5,000 screens out of 38,794 nationwide have been converted, and the cost to make the remaining conversions involves a total investment of several billion dollars. According to another commenter, predictions as to when more than half of all screens will have been converted to digital projection are 10 years or more, depending on the finances of the movie theater owners and operators, the state of the economy, and the incentives supporting conversion. That said, according to one commenter who represents movie theater owners and operators, the majority of screens in the United States were expected to enter into agreements by the end of 2008 to convert to digital cinema. Most importantly, however, according to a few commenters, the systems in place today for captioning and video description will not become obsolete once a theater has converted to digital cinema but still can be used by the movie theater owner and operator to exhibit captions and video description. The only difference for a movie theater owner or operator will be the way the data is delivered to the captioning and video description equipment in place in an auditorium.

Despite the current availability of movies that are captioned and provide video description, movie theater owners and operators rarely exhibit the captions or descriptions. According to several commenters, less than 1 percent of all movies being exhibited in theaters are shown with captions.

Individuals with disabilities, advocacy groups, the representative from a non-profit, and representatives of State governments, including 11 State attorneys general, overwhelmingly supported issuance of a regulation requiring movie theater owners and operators to exhibit captioned and video described movies at all showings unless doing so would result in an undue burden or fundamental alteration of the goods and services offered by the public accommodation. In addition, this same group of commenters urged that any such regulation should be made effective now, and should not be tied to the conversion to digital cinema by the movie theater owners and operators. In support of such arguments, these commenters stated that the technology exists now to display movies with captions and video descriptions, regardless of whether the movie is exhibited on film or using digital cinema. Moreover, since the technology in use for displaying captions and video descriptions on film will be compatible with digital projection systems, they argued, there is no need to postpone implementation of a captioning or video description regulation until the conversion to digital has been made. Furthermore, since the conversion to digital may take years, commenters urged the Department to issue a regulation requiring captioning and video description now, rather than several years from now.

Advocacy groups and the 11 State attorneys general also requested that any regulation include factors describing what constitutes effective captioning and video description. Recommendations included requiring that captioning be within the same line of sight to the screen as the movie so that individuals who are deaf or hard of hearing can watch the movie and read the captions at the same time; that the captioning be accessible from each seat; that the captions be of sufficient size and contrast to the background so as to be readable easily; and that the recent recommendations of the Telecommunications and Electronics and Information Technology Advisory Committee Report to the Access Board that captions be "timely, accurate, complete, and efficient" [5] also be included.

The State attorneys general supported the Department's statement in the NPRM that the Department did not anticipate specifying which type of captioning to provide or what type of technology to use to provide video description, but would instead leave that to the discretion of the movie theater owners and operators. These State attorneys general opined that such discretion in the selection of the type of technology was consistent with the statutory and regulatory scheme of the ADA and would permit any new regulation to keep pace with future advancements in captioning and video description technology. These same commenters stated that such discretion may result in a mixed use of both closed captioning and open captioning, affording more choices both for the movie theater owners and operators and for individuals who are deaf or hard of hearing.

The representatives from the movie theater industry strongly urged the Department against issuing a regulation requiring captioning or video description. These commenters argued that the legislative history of the ADA expressly precluded regulating in the area of captioning. (These same commenters were silent with regard to video description on this issue.) The industry commenters also argued that to require movie theater owners and operators to exhibit captioned and video described movies would constitute a fundamental alteration in the nature of the goods and services offered by the movie theater owners and operators. In addition, some industry commenters argued that any such regulation by the Department would be inconsistent with the Access Board's guidelines. Also, these commenters noted the progress that has been made in the industry in making cinema more accessible even though there is no mandate to caption or describe movies, and they questioned whether any mandate is necessary. Finally, all the industry commenters argued that to require captioning or video description in 100 percent of movie theater screens for all showings would constitute an undue burden.

The comments have provided the Department with significant information on the state of the movie industry with regard to the availability of captioning and video description, the status of closed captioning technology, and the status of the transition to digital cinema. The Department also has given due consideration to the comments it has received from individuals, advocacy groups, governmental entities, and representatives of the movie industry. Recently, the United States Court of Appeals for the Ninth Circuit held that the ADA requires a chain of movie theaters to exhibit movies with closed captioning and video description unless the theaters can show that to do so would amount to a fundamental alteration or undue burden. *Arizona ex rel. Goddard* v. *Harkins Amusement Enterprises, Inc.,* 603 F.3d 666 (9th Cir. 2010). However, rather than issue specific regulatory text at this time, the Department has determined that it should obtain additional information regarding issues raised by commenters that were not contemplated at the time of the 2008 NPRM, supplemental technical information, and updated information regarding the current and future status of the conversion to digital cinema by movie theater owners and operators. To this end, the Department is planning to engage in rulemaking relating specifically to movie captioning under the ADA in the near future.

Section 36.304 Removal of Barriers

With the adoption of the 2010 Standards, an important issue that the Department must address is the effect that the new (referred to as "supplemental") and revised ADA Standards will have on the continuing obligation of public accommodations to remove architectural, transportation, and communication barriers in existing facilities to the extent that it is readily achievable to do so. *See* 42 U.S.C. 12182(b)(2)(A)(iv). This issue was not addressed in the 2004 ADAAG because it was outside the scope of the Access Board's statutory authority under the ADA and section 502 of the Rehabilitation Act of 1973. *See* 29 U.S.C. 792(b)(3)(A)–(B) (authorizing the Access Board to establish and maintain minimum guidelines for the standards issued pursuant to the Architectural Barriers Act of 1968 and titles II and III of the ADA). Responsibility for implementing title III's requirement that public accommodations eliminate barriers in existing facilities where such removal is readily achievable rests solely with the Department. The term "existing facility" is defined in § 36.104 of the final rule. This definition is discussed in more detail above.

[5] *Refreshed Accessibility Standards and Guidelines in Telecommunications and Electronic and Information Technology* (April 2008), available at *http://www.access-board.gov/sec508/refresh/report/* (last visited June 24, 2010).

See Appendix A discussion of definitions (§ 36.104).

The requirements for barrier removal by public accommodations are established in the Department's title III regulation. 28 CFR 36.304. Under this regulation, the Department used the 1991 Standards as a guide to identify what constitutes an architectural barrier, as well as the specifications that covered entities must follow in making architectural changes to remove the barrier to the extent that such removal is readily achievable. 28 CFR 36.304(d); 28 CFR part 36, app. A (2009). With adoption of the final rule, public accommodations will now be guided by the 2010 Standards, defined in § 36.104 as the 2004 ADAAG and the requirements contained in subpart D of 28 CFR part 36.

The 2010 Standards include technical and scoping specifications for a number of elements that were not addressed specifically in the 1991 Standards; these new requirements were identified as "supplemental requirements" in the NPRM. The 2010 Standards also include revisions to technical or scoping specifications for certain elements that were addressed in the 1991 Standards, *i.e.,* elements for which there already were technical and scoping specifications. Requirements for which there are revised technical or scoping specifications in the 2010 Standards are referred to in the NPRM as "incremental changes."

The Department expressed concern that requiring barrier removal for incremental changes might place unnecessary cost burdens on businesses that already had removed barriers in existing facilities in compliance with the 1991 Standards. With this rulemaking, the Department sought to strike an appropriate balance between ensuring that individuals with disabilities are provided access to facilities and mitigating potential financial burdens from barrier removal on existing places of public accommodation that satisfied their obligations under the 1991 Standards.

In the NPRM, the Department proposed several potential additions to § 36.304(d) that might reduce such financial burdens. First, the Department proposed a safe harbor for elements in existing facilities that were compliant with the 1991 Standards. Under this approach, an element that is not altered after the effective date of the 2010 Standards and that complies with the scoping and technical requirements for that element in the 1991 Standards would not be required to undergo modification to comply with the 2010 Standards to satisfy the ADA's barrier removal obligations. The public accommodation would thus be deemed to have met its barrier removal obligation with respect to that element.

The Department received many comments on this issue during the 60-day public comment period. After consideration of all relevant information presented on the issue, it is the Department's view that this element-by-element safe harbor provision should be retained in the final rule. This issue is discussed further below.

Second, the NPRM proposed several exceptions and exemptions from certain supplemental requirements to mitigate the barrier removal obligations of existing play areas and recreation facilities under the 2004 ADAAG. These proposals elicited many comments from both the business and disability communities. After consideration of all relevant information presented on the issue, it is the Department's view that these exceptions and exemptions should not be retained in the final rule. The specific proposals and comments, and the Department's conclusions, are discussed below.

Third, the NPRM proposed a new safe harbor approach to readily achievable barrier removal as applied to qualified small businesses. This proposed small business safe harbor was based on suggestions from small business advocacy groups that requested clearer guidance on the barrier removal obligations for small businesses. According to these groups, the Department's traditional approach to barrier removal disproportionately affects small businesses. They argued that most small businesses owners neither are equipped to understand the ADA Standards nor can they afford the architects, consultants, and attorneys that might provide some level of assurance of compliance with the ADA. For these same reasons, these commenters contended, small business owners are vulnerable to litigation, particularly lawsuits arising under title III, and often are forced to settle because the ADA Standards' complexity makes inadvertent noncompliance likely, even when a small business owner is acting in good faith, or because the business cannot afford the costs of litigation.

To address these and similar concerns, the NPRM proposed a level of barrier removal expenditures at which qualified small businesses would be deemed to have met their readily achievable barrier removal obligations for certain tax years. This safe harbor would have provided some protection from litigation because compliance could be assessed easily. Such a rule, the Department believed, also could further accessibility, because qualified small businesses would have an incentive to incorporate barrier removal into short- and long-term planning. The Department recognized that a qualified small business safe harbor would be a significant change to the Department's title III enforcement scheme. Accordingly, the Department sought comment on whether such an approach would further the aims underlying the statute's barrier removal provisions, and, if so, the appropriate parameters of the provision.

After consideration of the many comments received on this issue, the Department has decided not to include a qualified small business safe harbor in the final rule. This decision is discussed more fully below.

Element-by-element safe harbor for public accommodations. Public accommodations have a continuing obligation to remove certain architectural, communications, and transportation barriers in existing facilities to the extent readily achievable. 42 U.S.C. 12182(b)(2)(A)(iv). Because the Department uses the ADA Standards as a guide to identifying what constitutes an architectural barrier, the 2010 Standards, once they become effective, will provide a new reference point for assessing an entity's barrier removal obligations. The 2010 Standards introduce technical and scoping specifications for many elements that were not included in the 1991 Standards. Accordingly, public accommodations will have to consider these supplemental requirements when evaluating whether there are covered barriers in existing facilities, and, if so, remove them to the extent readily achievable. Also included in the 2010 Standards are revised technical and scoping requirements for elements that were addressed in the 1991 Standards. These incremental changes were made to address technological changes that have occurred since the promulgation of the 1991 Standards, to reflect additional study by the Access Board, and to harmonize ADAAG requirements with the model codes.

In the NPRM, the Department sought input on a safe harbor in proposed § 36.304(d)(2) intended to address concerns about the practical effects of the incremental changes on public accommodations' readily achievable barrier removal obligations. The proposed element-by-element safe harbor provided that in existing facilities elements that are, as of the effective date of the 2010 Standards, fully compliant with the applicable technical and scoping requirements in the 1991 Standards, need not be modified or retrofitted to meet the 2010 Standards, until and unless those elements are altered. The Department posited that it would be an inefficient use of resources to require covered entities that have complied with the 1991 Standards to retrofit already compliant elements when the change might only provide a minimal improvement in accessibility. In addition, the Department was concerned that covered entities would have a strong disincentive for voluntary compliance if every time the applicable standards were revised covered entities would be required once again to modify elements to keep pace with new requirements. The Department recognized that revisions to some elements might confer a significant benefit on some individuals with disabilities and because of the safe harbor these benefits would be unavailable until the facility undergoes alterations.

The Department received many comments on this issue from the business and disability communities. Business owners and operators, industry groups and trade associations, and business advocacy organizations strongly supported the element-by-element safe harbor. By contrast, disability advocacy organizations and individuals commenting on behalf of the disability community were opposed to this safe harbor with near unanimity.

Businesses and business groups agreed with the concerns outlined by the Department in the NPRM, and asserted that the element-by-element safe harbor is integral to ensuring continued good faith compliance efforts by covered entities. These commenters argued that the financial cost and business disruption resulting from retrofitting elements constructed or previously modified to comply with 1991 Standards would be detrimental to nearly all businesses and not

readily achievable for most. They contended that it would be fundamentally unfair to place these entities in a position where, despite full compliance with the 1991 Standards, the entities would now, overnight, be vulnerable to barrier removal litigation. They further contended that public accommodations will have little incentive to undertake large barrier removal projects or incorporate barrier removal into long-term planning if there is no assurance that the actions taken and money spent for barrier removal would offer some protection from litigation. One commenter also pointed out that the proposed safe harbor would be consistent with practices under other Federal accessibility standards, including the Uniform Federal Accessibility Standards (UFAS) and the ADAAG.

Some business commenters urged the Department to expand the element-by-element safe harbor to include supplemental requirements. These commenters argued that imposing the 2010 Standards on existing facilities will provide a strong incentive for such facilities to eliminate some elements entirely, particularly where the element is not critical to the public accommodation's business or operations (*e.g.,* play areas in fast food restaurants) or the cost of retrofitting is significant. Some of these same commenters urged the Department to include within the safe harbor those elements not covered by the 1991 Standards, but which an entity had built in compliance with State or local accessibility laws. Other commenters requested safe harbor protection where a business had attempted barrier removal prior to the establishment of technical and scoping requirements for a particular element (*e.g.,* play area equipment) if the business could show that the element now covered by the 2010 Standards was functionally accessible.

Other commenters noted ambiguity in the NPRM as to whether the element-by-element safe harbor applies only to elements that comply fully with the 1991 Standards, or also encompasses elements that comply with the 1991 Standards to the extent readily achievable. Some commenters proposed that the safe harbor should exist in perpetuity—that an element subject to a safe harbor at one point in time also should be afforded the same protection with respect to all future revisions to the ADA Standards (as with many building codes). These groups contended that allowing permanent compliance with the 1991 Standards will ensure readily accessible and usable facilities while also mitigating the need for expensive and time-consuming documentation of changes and maintenance.

A number of commenters inquired about the effect of the element-by-element safe harbor on elements that are not in strict compliance with the 1991 Standards, but conform to the terms of settlement agreements or consent decrees resulting from private litigation or Federal enforcement actions. These commenters noted that litigation or threatened litigation often has resulted in compromise among parties as to what is readily achievable. Business groups argued that facilities that have made modifications subject to those negotiated agreements should not be subject to the risk of further litigation as a result of the 2010 Standards.

Lastly, some business groups that supported the element-by-element safe harbor nevertheless contended that a better approach would be to separate barrier removal altogether from the 2010 Standards, such that the 2010 Standards would not be used to determine whether access to an existing facility is impeded by architectural barriers. These commenters argued that application of the 2010 Standards to barrier removal obligations is contrary to the ADA's directive that barrier removal is required only where "easily accomplishable and able to be carried out without much difficulty or expense," 42 U.S.C. 12181(9).

Nearly all commenters from the disability community objected to the proposed element-by-element safe harbor. These commenters asserted that the adoption of this safe harbor would permit and sanction the retention of outdated access standards even in cases where retrofitting to the 2010 Standards would be readily achievable. They argued that title III's readily achievable defense is adequate to address businesses' cost concerns, and rejected the premise that requiring businesses to retrofit currently compliant elements would be an inefficient use of resources where readily achievable to do so. The proposed regulations, these commenters asserted, incorporate advances in technology, design, and construction, and reflect congressional and societal understanding that accessibility is not a static concept and that the ADA is a civil rights law intended to maximize accessibility. Additionally, these commenters noted that since the 2004 revision of the ADAAG will not be the last, setting a precedent of safe harbors for compliant elements will have the effect of preserving and protecting layers of increasingly outdated accessibility standards.

Many commenters objected to the Department's characterization of the requirements subject to the safe harbor as reflecting only incremental changes and asserted that many of these incremental changes will result in significantly enhanced accessibility at little cost. The requirement concerning side-reach ranges was highlighted as an example of such requirements. Commenters from the disability community argued that the revised maximum side-reach range (from 54 inches to 48 inches) will result in a substantial increase in accessibility for many persons with disabilities—particularly individuals of short stature, for whom the revised reach range represents the difference between independent access to many features and dependence—and that the revisions should be made where readily achievable to do so. Business commenters, on the other hand, contended that application of the safe harbor to this requirement is critical because retrofitting items, such as light switches and thermostats often requires work (*e.g.,* rewiring, patching, painting, and re-wallpapering), that would be extremely burdensome for entities to undertake. These commenters argued that such a burden is not justified where many of the affected entities already have retrofitted to meet the 1991 Standards.

Some commenters that were opposed to the element-by-element safe harbor proposed that an entity's past efforts to comply with the 1991 Standards might appropriately be a factor in the readily achievable analysis. Several commenters proposed a temporary 5-year safe harbor that would provide reassurance and stability to covered entities that have recently taken proactive steps for barrier removal, but would also avoid the problems of preserving access deficits in perpetuity and creating multiple standards as subsequent updates are adopted.

After consideration of all relevant information presented on this issue during the comment period, the Department has decided to retain the proposed element-by-element safe harbor. Title III's architectural-barrier provisions place the most significant requirements of accessibility on new construction and alterations. The aim is to require businesses to make their facilities fully accessible at the time they are first constructing or altering those facilities, when burdens are less and many design elements will necessarily be in flux, and to impose a correspondingly lesser duty on businesses that are not changing their facilities. The Department believes that it would be consistent with this statutory structure not to change the requirements for design elements that were specifically addressed in our prior standards for those facilities that were built or altered in full compliance with those standards. The Department similarly believes it would be consistent with the statutory scheme not to change the requirements for design elements that were specifically addressed in our prior standards for those existing facilities that came into full compliance with those standards. Accordingly, the final rule at § 36.304(d)(2)(i) provides that elements that have not been altered in existing facilities on or after March 15, 2012 and that comply with the corresponding technical and scoping specifications for those elements in the 1991 Standards are not required to be modified in order to comply with the requirements set forth in the 2010 Standards. The safe harbor adopted is consistent in principle with the proposed provision in the NPRM, and reflects the Department's determination that this approach furthers the statute's barrier removal provisions and promotes continued good-faith compliance by public accommodations.

The element-by-element safe harbor adopted in this final rule is a narrow one. The Department recognizes that this safe harbor will delay, in some cases, the increased accessibility that the incremental changes would provide and that for some individuals with disabilities the impact may be significant. This safe harbor, however, is not a blanket exemption for every element in existing facilities. Compliance with the 1991 Standards is determined on an element-by-element basis in each existing facility.

Section 36.304(d)(2)(ii)(A) provides that prior to the compliance date of the rule March 15, 2012, noncompliant elements that have not been altered are obligated to be modified to the extent readily achievable to comply with the requirements set forth in the 1991 Standards or the 2010 Standards.

Section 36.304(d)(2)(ii)(B) provides that after the date the 2010 Standards take effect (18 months after publication of the rule), noncompliant elements that have not been altered must be modified to the extent readily achievable to comply with the requirements set forth in the 2010 Standards. Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406(a)(5).

The Department has not expanded the scope of the element-by-element safe harbor beyond those elements subject to the incremental changes. The Department has added § 36.304(d)(2)(iii), explicitly clarifying that existing elements subject to supplemental requirements for which scoping and technical specifications are provided for the first time in the 2010 Standards (*e.g.,* play area requirements) are not covered by the safe harbor and, therefore, must be modified to comply with the 2010 Standards to the extent readily achievable. Section 36.304(d)(2)(iii) also identifies the elements in the 2010 Standards that are not eligible for the element-by-element safe harbor. The safe harbor also does not apply to the accessible routes not previously scoped in the 1991 standards, such as those required to connect the boundary of each area of sport activity, including soccer fields, basketball courts, baseball fields, running tracks, skating rinks, and areas surrounding a piece of gymnastic equipment. *See* Advisory note to section F206.2.2 of the 2010 Standards. The resource and fairness concerns underlying the element-by-element safe harbor are not implicated by barrier removal involving supplemental requirements. Public accommodations have not been subject previously to technical and scoping specifications for these supplemental requirements. Thus, with respect to supplemental requirements, the existing readily achievable standard best maximizes accessibility in the built environment without imposing unnecessary burdens on public accommodations.

The Department also has declined to expand the element-by-element safe harbor to cover existing elements subject to supplemental requirements that also may have been built in compliance with State or local accessibility laws. Measures taken to remove barriers under a Federal accessibility provision logically must be considered in regard to Federal standards, in this case the 2010 Standards. This approach is based on the Department's determination that reference to ADA Standards for barrier removal will promote certainty, safety, and good design while still permitting slight deviations through readily achievable alternative methods. The Department continues to believe that this approach provides an appropriate and workable framework for implementation of title III's barrier removal provisions. Because compliance with State or local accessibility codes is not a reliable indicator of effective access for purposes of the ADA Standards, the Department has decided not to include reliance on such codes as part of the safe harbor provision.

Only elements compliant with the 1991 Standards are eligible for the safe harbor. Thus, where a public accommodation attempted barrier removal but full compliance with the 1991 Standards was not readily achievable, the modified element does not fall within the scope of the safe harbor provision. A public accommodation at any point in time must remove barriers to the extent readily achievable. For existing elements, for which removal is not readily achievable at any given time, the public accommodation must provide its goods, services, facilities, privileges, advantages, or accommodations through alternative methods that are readily achievable. *See* 42 U.S.C. 12182(b)(2)(A)(iv), (v).

One-time evaluation and implementation of the readily achievable standard is not the end of the public accommodation's barrier-removal obligation. Public accommodations have a continuing obligation to reevaluate barrier removal on a regular basis. For example, if a public accommodation identified barriers under the 1991 Standards but did not remove them because removal was not readily achievable based on cost considerations, it has a continuing obligation to remove these barriers if the economic considerations for the public accommodation change. The fact that the public accommodation has been providing its goods or services through alternative methods does not negate the continuing obligation to assess whether removal of the barrier at issue has become readily achievable. Public accommodations should incorporate consideration of their continuing barrier removal obligations in both short-term and long-term business planning.

The Department notes that commenters across the board expressed concern with recordkeeping burdens implicated by the element-by-element safe harbor. Businesses noted the additional costs and administrative burdens associated with identifying elements that fall within the element-by-element safe harbor, as well as tracking, documenting, and maintaining data on installation dates. Disability advocates expressed concern that varying compliance standards will make enforcement efforts more difficult, and urged the Department to clarify that title III entities bear the burden of proof regarding entitlement to safe harbor protection. The Department emphasizes that public accommodations wishing to benefit from the element-by-element safe harbor must demonstrate their safe harbor eligibility. The Department encourages public accommodations to take appropriate steps to confirm and document the compliance of existing elements with the 1991 Standards. Finally, while the Department has decided not to adopt in this rulemaking the suggestion by some commenters to make the protection afforded by the element-by-element safe harbor temporary, the Department believes this proposal merits further consideration. The Department, therefore, will continue to evaluate the efficacy and appropriateness of a safe harbor expiration or sunset provision.

Application to specific scenarios raised in comments. In response to the NPRM, the Department received a number of comments that raised issues regarding application of the element-by-element safe harbor to particular situations. Business commenters requested guidance on whether the replacement for a broken or malfunctioning element that is covered by the 1991 Standards would have to comply with the 2010 Standards. These commenters expressed concern that in some cases replacement of a broken fixture might necessitate moving a number of other accessible fixtures (such as in a bathroom) in order to comply with the fixture and space requirements of the 2010 Standards. Others questioned the effect of the new standards where an entity replaces an existing element currently protected by the safe harbor provision for water or energy conservation reasons. The Department intends to address these types of scenarios in technical guidance.

Effective date for barrier removal. Several commenters expressed concern that the NPRM did not propose a transition period for applying the 2004 ADAAG to barrier removal in existing facilities in cases where the safe harbors do not apply. These commenters argued that for newly covered elements, they needed time to hire attorneys and consultants to assess the impact of the new requirements, determine whether they need to make additional retrofits, price those retrofits, assess whether the change actually is "readily achievable," obtain approval for the removal from owners who must pay for the changes, obtain permits, and then do the actual work. The commenters recognized that there may be some barrier removal actions that require little planning, but stated that other actions cost significantly more and require more budgeting, planning, and construction time.

Barrier removal has been an ongoing requirement that has applied to public accommodations since the original regulation took effect on January 26, 1992. The final rule maintains the existing regulatory provision that barrier removal does not have to be undertaken unless it is "readily achievable." The Department has provided in § 36.304(d)(2)(ii)(B) that public accommodations are not required to apply the 2010 Standards to barrier removal until 18 months after the publication date of this rule. It is the Department's view that 18 months is a sufficient amount of time for application of the 2010 Standards to barrier removal for those elements not subject to the safe harbor. This is also consistent with the compliance date the Department has specified for applying the 2010 Standards to new construction and alterations.

Reduced scoping for play areas and other recreation facilities.

Play areas. The Access Board published final guidelines for play areas in October 2000. 65 FR 62498 (Oct. 18, 2000). The guidelines include requirements for ground-level and elevated play components, accessible routes connecting the components, accessible ground surfaces, and maintenance of those surfaces. They have been referenced in Federal playground construction and safety guidelines and in some State and local codes and have been used voluntarily when many play areas across the country have been altered or constructed.

In adopting the 2004 ADAAG (which includes the play area guidelines published in 2000), the Department acknowledges both

the importance of integrated, full access to play areas for children and parents with disabilities as well as the need to avoid placing an untenable fiscal burden on businesses. Consequently, the Department asked seven questions in the NPRM related to existing play areas. Two questions related to safe harbors: one on the appropriateness of a general safe harbor for existing play areas and another on public accommodations that have complied with State or local standards specific to play areas. The others related to reduced scoping, limited exemptions, and whether there is a "tipping point" at which the costs of compliance with supplemental requirements would be so burdensome that a public accommodation would shut down a program rather than comply with the new requirements. In the nearly 100 comments received on title III play areas, the majority of commenters strongly opposed all safe harbors, exemptions, and reductions in scoping, and questioned the feasibility of determining a tipping point. A smaller number of commenters advocated for a safe harbor from compliance with the 2004 ADAAG play area requirements along with reduced scoping and exemptions for both readily achievable barrier removal and alterations.

Commenters were split as to whether the Department should exempt owners and operators of public accommodations from compliance with the supplemental requirements for play areas and recreation facilities and instead continue to determine accessibility in these facilities on a case-by-case basis under existing law. Many commenters were of the view that the exemption was not necessary because concerns of financial burden are addressed adequately by the defenses inherent in the standard for what constitutes readily achievable barrier removal. A number of commenters found the exemption inappropriate because no standards for play areas previously existed. Commenters also were concerned that a safe harbor applicable only to play areas and recreation facilities (but not to other facilities operated by a public accommodation) would create confusion, significantly limit access for children and parents with disabilities, and perpetuate the discrimination and segregation individuals with disabilities face in the important social arenas of play and recreation—areas where little access has been provided in the absence of specific standards. Many commenters suggested that instead of an exemption, the Department should provide guidance on barrier removal with respect to play areas and other recreation facilities.

Several commenters supported the exemption, mainly on the basis of the cost of barrier removal. More than one commenter noted that the most expensive aspect of barrier removal on existing play areas is the surfaces for the accessible routes and use zones. Several commenters expressed the view that where a play area is ancillary to a public accommodation (*e.g.,* in quick service restaurants or shopping centers), the play area should be exempt from compliance with the supplemental requirements because barrier removal would be too costly, and as a result, the public accommodation might eliminate the area.

The Department has been persuaded that the ADA's approach to barrier removal, the readily achievable standard, provides the appropriate balance for the application of the 2010 Standards to existing play areas. Thus, in existing playgrounds, public accommodations will be required to remove barriers to access where these barriers can be removed without much difficulty or expense.

The NPRM asked if there are State and local standards specifically regarding play and recreation area accessibility and whether facilities currently governed by, and in compliance with, such State and local standards or codes should be subject to a safe harbor from compliance with similar applicable requirements in the 2004 ADAAG. The Department also requested comments on whether it would be appropriate for the Access Board to consider the implementation of guidelines that would extend such a safe harbor to play and recreation areas undertaking alterations. In response, no comprehensive State or local codes were identified, and commenters generally noted that because the 2004 ADAAG contained comprehensive accessibility requirements for these unique areas, public accommodations should not be afforded a safe harbor from compliance with them when altering play and recreation areas. The Department is persuaded by these comments that there is insufficient basis to apply a safe harbor for readily achievable barrier removal or alterations for play areas built in compliance with State or local laws.

In the NPRM, the Department requested that public accommodations identify a "tipping point" at which the costs of compliance with the supplemental requirements for existing play areas would be so burdensome that the entity simply would shut down the playground. In response, no tipping point was identified. Some commenters noted, however, that the scope of the requirements may create the choice between wholesale replacement of play areas and discontinuance of some play areas, while others speculated that some public accommodations may remove play areas that are merely ancillary amenities rather than incur the cost of barrier removal under the 2010 Standards. The Department has decided that the comments did not establish any clear tipping point and therefore that no regulatory response is appropriate in this area.

The NPRM also asked for comment about the potential effect of exempting existing play areas of less than 1,000 square feet in size from the requirements applicable to play areas. Many trade and business associations favored exempting these small play areas, with some arguing that where the play areas are only ancillary amenities, the cost of barrier removal may dictate that they be closed down. Some commenters sought guidance on the definition of a 1,000-square-foot play area, seeking clarification that seating and bathroom spaces associated with a play area are not included in the size definition. Disability rights advocates, by contrast, overwhelmingly opposed this exemption, arguing that these play areas may be some of the few available in a community; that restaurants and day care facilities are important places for socialization between children with disabilities and those without disabilities; that integrated play is important to the mission of day care centers and that many day care centers and play areas in large cities, such as New York City, have play areas that are less than 1,000 square feet in size; and that 1,000 square feet was an arbitrary size requirement.

The Department agrees that children with disabilities are entitled to access to integrated play opportunities. However, the Department is aware that small public accommodations are concerned about the costs and efforts associated with barrier removal. The Department has given careful consideration as to how best to insulate small entities from overly burdensome costs and undertakings and has concluded that the existing readily achievable standard, not a separate exemption, is an effective and employable method by which to protect these entities. Under the existing readily achievable standard, small public accommodations would be required to comply only with the scoping and technical requirements of the 2010 Standards that are easily accomplishable and able to be carried out without much difficulty or expense. Thus, concerns about prohibitive costs and efforts clearly are addressed by the existing readily achievable standard. Moreover, as evidenced by comments inquiring as to how 1,000-square-foot play areas are to be measured and complaining that the 1,000-square-foot cut-off is arbitrary, the exemption posited in the NPRM would have been difficult to apply. Finally, a separate exemption would have created confusion as to whether, or when, to apply the exemption or the readily achievable standard. Consequently, the Department has decided that an exemption, separate and apart from the readily achievable standard, is not appropriate or necessary for small private play areas.

In the NPRM, the Department requested public comment as to whether existing play areas should be permitted to substitute additional ground-level play components for the elevated play components that they otherwise would have been required to make accessible. Most commenters opposed this substitution because the guidelines as well as considerations of "readily achievable barrier removal" inherently contain the flexibility necessary for a variety of situations. Such commenters also noted that the Access Board adopted extensive guidelines with ample public input, including significant negotiation and balancing of costs. In addition, commenters advised that including additional ground level play components might result in higher costs because more accessible route surfaces might be required. A limited number of commenters favored substitution. The Department is persuaded by these comments that the proposed substitution of elements may not be beneficial. The current rules applicable to readily achievable barrier removal will be used to determine the number and type of accessible elements appropriate for a specific facility.

In the NPRM, the Department requested public comment on whether it would be

appropriate for the Access Board to consider issuing guidelines for alterations to play and recreation facilities that would permit reduced scoping of accessible components or substitution of ground level play components in lieu of elevated play components. The Department received little input on this issue, and most commenters disfavored the suggestion. One commenter that supported this approach conjectured that it would encourage public accommodations to maintain and improve their playgrounds as well as provide more accessibility. The Department is persuaded that it is not necessary to ask the Access Board to revisit this issue.

The NPRM also asked whether only one play area of each type should be required to comply at existing sites with multiple play areas and whether there are other select requirements applicable to play areas in the 2004 ADAAG for which the Department should consider exemptions or reduced scoping. Some commenters were opposed to the concept of requiring compliance at one play area of each type at a site with multiple play areas, citing lack of choice and ongoing segregation of children and adults with disabilities. Other commenters who supported an exemption and reduced scoping for alterations noted that the play equipment industry has adjusted to, and does not take issue with, the provisions of the 2004 ADAAG; however, they asked for some flexibility in the barrier removal requirements as applied to play equipment, arguing that augmentation of the existing equipment and installation of accessible play surfacing equates to wholesale replacement of the play equipment. The Department is persuaded that the current rules applicable to readily achievable barrier removal should be used to decide which play areas must comply with the supplemental requirements presented in the 2010 Standards.

Swimming pools, wading pools, saunas, and steam rooms. Section 36.304(d)(3)(ii) in the NPRM specified that for measures taken to comply with the barrier removal requirements, existing swimming pools with at least 300 linear feet of swimming pool wall would need to provide only one accessible means of entry that complies with section 1009.2 or section 1009.3 of the 2004 ADAAG, instead of the two means required for new construction. Commenters opposed the Department's reducing the scoping from that required in the 2004 ADAAG. The following were among the factors cited in comments: that swimming is a common therapeutic form of exercise for many individuals with disabilities; that the cost of a swimming pool lift or other options for pool access is readily achievable and can be accomplished without much difficulty or expense; and that the readily achievable standard already provides public accommodations with a means to reduce their scoping requirements. A few commenters cited safety concerns resulting from having just one accessible means of access, and stated that because pools typically have one ladder for every 75 linear feet of pool wall, they should have more than one accessible means of egress. Other commenters either approved or did not oppose providing one accessible means of access for larger pools so long as a lift was used.

Section 36.304(d)(4)(ii) of the NPRM proposed to exempt existing swimming pools with fewer than 300 linear feet of swimming pool wall from the obligation to provide an accessible means of entry. Most commenters strongly opposed this provision, arguing that aquatic activity is a safe and beneficial form of exercise that is particularly appropriate for individuals with disabilities. Many argued that the readily achievable standard for barrier removal is available as a defense and is preferable to creating an exemption for pool operators for whom providing an accessible means of entry would be readily achievable. Commenters who supported this provision apparently assumed that providing an accessible means of entry would be readily achievable and that therefore the exemption is needed so that small pool operators do not have to provide an accessible means of entry.

The Department has carefully considered all the information available to it as well as the comments submitted on these two proposed exemptions for swimming pools owned or operated by title III entities. The Department acknowledges that swimming provides important therapeutic, exercise, and social benefits for many individuals with disabilities and is persuaded that exemption of the vast majority of privately owned or operated pools from the 2010 Standards is neither appropriate nor necessary. The Department agrees with the commenters that title III already contains sufficient limitations on private entities' obligations to remove barriers. In particular, the Department agrees that those public accommodations that can demonstrate that making particular existing swimming pools accessible in accordance with the 2010 Standards is not readily achievable are sufficiently protected from excessive compliance costs. Thus, the Department has eliminated proposed § 36.304(d)(3)(ii) and (d)(4)(ii) from the final rule.

Proposed § 36.304(d)(4)(iii) would have exempted existing saunas and steam rooms that seat only two individuals from the obligation to remove barriers. This provision generated far fewer comments than the provisions for swimming pools. People who commented were split fairly evenly between those who argued that the readily achievable standard for barrier removal should be applied to all existing saunas and steam rooms and those who argued that all existing saunas and steam rooms, regardless of size, should be exempt from any barrier removal obligations. The Department considered these comments and has decided to eliminate the exemption for existing saunas and steam rooms that seat only two people. Such an exemption for saunas and steam rooms that seat only two people is unnecessary because the readily achievable standard provides sufficient protection against barrier removal that is overly expensive or too difficult. Moreover, the Department believes barrier removal likely will not be readily achievable for most of these small saunas because the nature of their prefabricated forms, which include built-in seats, make it either technically infeasible or too difficult or expensive to remove barriers. Consequently a separate exemption for saunas and steam rooms would have been superfluous. Finally, employing the readily achievable standard for small saunas and steam rooms is consistent with the Department's decisions regarding the proposed exemptions for play areas and swimming pools.

Several commenters also argued in favor of a specific exemption for existing spas. The Department notes that the technically infeasible and readily achievable defenses are applicable equally to existing spas and declines to adopt such an exemption.

The Department also solicited comment on the possibility of exempting existing wading pools from the obligation to remove barriers where readily achievable. Most commenters stated that installing a sloped entry in an existing wading pool is not likely to be feasible. Because covered entities are not required to undertake modifications that are not readily achievable or that would be technically infeasible, the Department believes that the rule as drafted provides sufficient protection from unwarranted expense to the operators of small existing wading pools. Other existing wading pools, particularly those large wading pools found in facilities such as water parks, must be assessed on a case-by-case basis. Therefore, the Department has not included an exemption for wading pools in its final rule.

The Department received several comments recommending that existing wave pools be exempt from barrier removal requirements. The commenters pointed out that existing wave pools often have a sloped entry, but do not have the handrails, level landings, or edge protection required for accessible entry. Because pool bottom slabs are structural, they could be subject to catastrophic failure if the soil pressure stability or the under slab dewatering are not maintained during the installation of these accessibility features in an already-constructed pool. They also argue that the only safe design scenario is to design the wheelchair ramp, pool lift, or transfer access in a side cove where the mean water level largely is unaffected by the wave action, and that this additional construction to an existing wave pool is not readily achievable. If located in the main pool area, the handrails, stanchions, and edge protection for sloped entry will become underwater hazards when the wave action is pushing onto pool users, and the use of a pool lift will not be safe without a means of stabilizing the person against the forces of the waves while using the lift. They also pointed out that a wheelchair would pose a hazard to all wave pool users, in that the wave action might push other pool users into the wheelchair or push the wheelchair into other pool users. The wheelchair would have to be removed from the pool after the user has entered (and has transferred to a flotation device if needed). The commenters did not specify if these two latter concerns are applicable to all wave pools or only to those with more aggressive wave action. The Department has decided that the issue of modifications to wave pools is best addressed on a case-by-case basis, and therefore, this rule does not contain barrier removal exemptions applicable to wave pools.

The Department also received comments suggesting that it is not appropriate to require two accessible means of entry to wave pools, lazy rivers, sand bottom pools, and other water amusements that have only one point of entry. The Department agrees. The 2010 Standards (at section 242.2, Exception 2) provide that only one means of entry is required for wave pools, lazy rivers, sand bottom pools, and other water amusement where user access is limited to one area.

Other recreation facilities. In the NPRM, the Department asked about a number of issues relating to recreation facilities, such as team or player seating areas, areas of sport activity, exercise machines, boating facilities, fishing piers and platforms, golf courses, and miniature golf courses. The Department asked for public comment on the costs and benefits of applying the 2004 ADAAG to these spaces and facilities. The discussion of the comments received by the Department on these issues and the Department's response to those comments can be found in either the section entitled "Other Issues" of Appendix A to this final rule.

Safe harbor for qualified small businesses. Section 36.304(d)(5) of the NPRM would have provided that a qualified small business would meet its obligation to remove architectural barriers where readily achievable for a given year if, during that tax year, the entity spent at least 1 percent of its gross revenue in the preceding tax year on measures undertaken in compliance with barrier removal requirements. Proposed § 36.304(d)(5) has been omitted from the final rule.

The qualified small business safe harbor was proposed in response to small business advocates' requests for clearer guidance on when barrier removal is, and is not, readily achievable. According to these groups, the Department's approach to readily achievable barrier removal disproportionately affects small business for the following reasons: (1) Small businesses are more likely to operate in older buildings and facilities; (2) the 1991 Standards are too numerous and technical for most small business owners to understand and determine how they relate to State and local building or accessibility codes; and (3) small businesses are vulnerable to title III litigation and often are compelled to settle because they cannot afford the litigation costs involved in proving that an action is not readily achievable.

The 2010 Standards go a long way toward meeting the concern of small businesses with regard to achieving compliance with both Federal and State accessibility requirements, because the Access Board harmonized the 2004 ADAAG with the model codes that form the basis of most State and local accessibility codes. Moreover, the element-by-element safe harbor will ensure that unless and until a small business engages in alteration of affected elements, the small business will not have to retrofit elements that were constructed in compliance with the 1991 Standards or, with respect to elements in an existing facility, that were retrofitted to the 1991 Standards in conjunction with the business's barrier removal obligation prior to the rule's compliance date.

In proposing an additional safe harbor for small businesses, the Department had sought to promulgate a rule that would provide small businesses a level of certainty in short-term and long-term planning with respect to barrier removal. This in turn would benefit individuals with disabilities in that it would encourage small businesses to consider and incorporate barrier removal in their yearly budgets. Such a rule also would provide some protection, through diminished litigation risks, to small businesses that undertake significant barrier removal projects.

As proposed in the NPRM, the qualified small business safe harbor would provide that a qualified small business has met its readily achievable barrier removal obligations for a given year if, during that tax year, the entity has spent at least 1 percent of its gross revenue in the preceding tax year on measures undertaken to comply with title III barrier removal requirements. (Several small business advocacy organizations pointed out an inconsistency between the Department's description of the small business safe harbor in the Section-by-Section Analysis for § 36.304 and the proposed regulatory text for that provision. The proposed regulatory text sets out the correct parameters of the proposed rule. The Department does not believe that the error substantively affected the comments on this issue. Some commenters noted the discrepancy and commented on both; others commented more generally on the proposal, so the discrepancy was not relevant.) The Department noted that the efficacy of any proposal for a small business safe harbor would turn on the following two determinations: (1) The definition of a qualified small business, and (2) the formula for calculating what percentage of revenue is sufficient to satisfy the readily achievable presumption.

As proposed in § 36.104 in the NPRM, a "qualified small business" is a business entity defined as a small business concern under the regulations promulgated by the Small Business Administration (SBA) pursuant to the Small Business Act. *See* 15 U.S.C. 632; 13 CFR part 121. The Department noted that under section 3(a)(2)(C) of the Small Business Act, Federal departments and agencies are prohibited from prescribing a size standard for categorizing a business concern as a small business unless the department or agency has been authorized specifically to do so or has proposed a size standard in compliance with the criteria set forth in the SBA regulations, has provided an opportunity for public notice and comment on the proposed standard, and has received approval from the Administrator of the SBA to use the standard. *See* 15 U.S.C. 632(a)(2)(C). The Department further noted that Federal agencies or departments promulgating regulations relating to small businesses usually use SBA size criteria, and they otherwise must be prepared to justify how they arrived at a different standard and why the SBA's regulations do not satisfy the agency's program requirements. *See* 13 CFR 121.903. The ADA does not define "small business" or specifically authorize the Department to prescribe size standards.

In the NPRM, the Department indicated its belief that the size standards developed by the SBA are appropriate for determining which businesses subject to the ADA should be eligible for the small business safe harbor provisions, and proposed to adopt the SBA's size standards to define small businesses for purposes of the qualified small business safe harbor. The SBA's small business size standards define the maximum size that a concern, together with all of its affiliates, may be if it is to be eligible for Federal small business programs or to be considered a small business for the purpose of other Federal agency programs. Concerns primarily engaged in the same kind of economic activity are classified in the same industry regardless of their types of ownership (such as sole proprietorship, partnership, or corporation). Approximately 1200 industries are described in detail in the North American Industry Classification System—United States, 2007. For most businesses, the SBA has established a size standard based on average annual receipts. The majority of places of public accommodation will be classified as small businesses if their average annual receipts are less than $6.5 million. However, some will qualify with higher annual receipts. The SBA small business size standards should be familiar to many if not most small businesses, and using these standards in the ADA regulation would provide some certainty to owners, operators, and individuals because the SBA's current size standards can be changed only after notice and comment rulemaking.

The Department explained in the NPRM that the choice of gross revenue as the basis for calculating the safe harbor threshold was intended to avoid the effect of differences in bookkeeping practices and to maximize accessibility consistent with congressional intent. The Department recognized, however, that entities with similar gross revenue could have very different net revenue, and that this difference might affect what is readily achievable for a particular entity. The Department also recognized that adopting a small business safe harbor would effect a marked change to the Department's current position on barrier removal. Accordingly, the Department sought public comment on whether a presumption should be adopted whereby qualifying small businesses are presumed to have done what is readily achievable for a given year if, during that tax year, the entity spent at least 1 percent of its gross revenue in the preceding tax year on barrier removal, and on whether 1 percent is an appropriate amount or whether gross revenue would be the appropriate measure.

The Department received many comments on the proposed qualified small business safe harbor. From the business community, comments were received from individual business owners and operators, industry and trade groups, and advocacy organizations for business and industry. From the disability community, comments were received from individuals, disability advocacy groups, and nonprofit organizations involved in providing services for persons with disabilities or involved in disability-related fields. The Department has considered all relevant matter submitted on this issue during the 60-day public comment period.

Small businesses and industry groups strongly supported a qualified small business

safe harbor of some sort, but none supported the structure proposed by the Department in the NPRM. All felt strongly that clarifications and modifications were needed to strengthen the provision and to provide adequate protection from litigation.

Business commenters' objections to the proposed qualified small business safe harbor fell generally into three categories: (1) That gross revenue is an inappropriate and inaccurate basis for determining what is readily achievable by a small business since it does not take into account expenses that may result in a small business operating at a loss; (2) that courts will interpret the regulation to mean that a small business *must* spend 1 percent of gross revenue each year on barrier removal, *i.e.,* that expenditure of 1 percent of gross revenue on barrier removal is always "readily achievable"; and (3) that a similar misinterpretation of the 1 percent gross revenue concept, *i.e.,* that 1 percent of gross revenue is always "readily achievable," will be applied to public accommodations that are not small businesses and that have substantially larger gross revenue. Business groups also expressed significant concern about the recordkeeping burdens they viewed as inherent in the Department's proposal.

Across the board, business commenters objected to the Department's proposed use of gross revenue as the basis for calculating whether the small business safe harbor has been met. All contended that 1 percent of gross revenue is too substantial a trigger for safe harbor protection and would result in barrier removal burdens far exceeding what is readily achievable or "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. 12181(9). These commenters further pointed out that gross revenue and receipts vary considerably from industry to industry depending on the outputs sold in each industry, and that the use of gross revenue or receipts would therefore result in arbitrary and inequitable burdens on those subject to the rule. These commenters stated that the readily achievable analysis, and thus the safe harbor threshold, should be premised on a business's net revenue so that operating expenses are offset before determining what amount might be available for barrier removal. Many business commenters contended that barrier removal is not readily achievable if an entity is operating at a loss, and that a spending formula premised on net revenue can reflect more accurately businesses' ability to engage in barrier removal.

There was no consensus among the business commenters as to a formula that would reflect more accurately what is readily achievable for small businesses with respect to barrier removal. Those that proposed alternative formulas offered little in the way of substantive support for their proposals. One advocacy organization representing a large cross-section of small businesses provided some detail on the gross and net revenue of various industry types and sizes in support of its position that for nearly all small businesses, net revenue is a better indicator of a business's financial ability to spend money on barrier removal. The data also incidentally highlighted the importance and complexity of ensuring that each component in a safe harbor formula accurately informs and contributes to the ultimate question of what is and is not readily achievable for a small business.

Several business groups proposed that a threshold of 0.5 percent (or one-half of 1 percent) of gross revenue, or 2.5 percent of net revenue, spent on ADA compliance might be a workable measure of what is "readily achievable" for small businesses. Other groups proposed 3 to 5 percent of net revenue as a possible measure. Several commenters proposed affording small businesses an option of using gross or net revenue to determine safe harbor eligibility. Another commenter proposed premising the safe harbor threshold on a designated percentage of the amount spent on renovation in a given year. Others proposed averaging gross or net revenue over a number of years to account for cyclical changes in economic and business environments. Additionally, many proposed that an entity should be able to roll over expenditures in excess of the safe harbor for inclusion in safe harbor analysis in subsequent years, to facilitate barrier removal planning and encourage large-scale barrier removal measures.

Another primary concern of many businesses and business groups is that the 1 percent threshold for safe harbor protection would become a de facto "floor" for what is readily achievable for any small business entity. These commenters urged the Department to clarify that readily achievable barrier removal remains the standard, and that in any given case, an entity retains the right to assert that barrier removal expenditures below the 1 percent threshold are not readily achievable. Other business groups worried that courts would apply the 1 percent calculus to questions of barrier removal by businesses too large to qualify for the small business safe harbor. These commenters requested clarification that the rationale underlying the Department's determination that a percentage of gross revenue can appropriately approximate readily achievable barrier removal for small businesses does not apply outside the small business context.

Small businesses and business groups uniformly requested guidance as to what expenses would be included in barrier removal costs for purposes of determining whether the safe harbor threshold has been met. These commenters contended that any and all expenses associated with ADA compliance—*e.g.,* consultants, architects, engineers, staff training, and recordkeeping—should be included in the calculation. Some proposed that litigation-related expenses, including defensive litigation costs, also should be accounted for in a small business safe harbor. Additionally, several commenters urged the Department to issue a small business compliance guide with detailed guidance and examples regarding application of the readily achievable barrier removal standard and the safe harbor. Some commenters felt that the Department's regulatory efforts should be focused on clarifying the readily achievable standard rather than on introducing a safe harbor based on a set spending level.

Businesses and business groups expressed concern that the Department's proposed small business safe harbor would not alleviate small business vulnerability to litigation. Individuals and advocacy groups were equally concerned that the practical effect of the Department's proposal likely would be to accelerate or advance the initiation of litigation. These commenters pointed out that an individual encountering barriers in small business facilities will not know whether the entity is noncompliant or entitled to safe harbor protection. Safe harbor eligibility can be evaluated only after review of the small business's barrier removal records *and* financial records. Individuals and advocacy groups argued that the Department should not promulgate a rule by which individuals must file suit to obtain the information needed to determine whether a lawsuit is appropriate in a particular case, and that, therefore, the rule should clarify that small businesses are required to produce such documentation to any individual upon request.

Several commenters noted that a small business safe harbor based on net, rather than gross, revenue would complicate exponentially its efficacy as an affirmative defense, because accounting practices and asserted expenses would be subject to discovery and dispute. One business advocacy group representing a large cross-section of small businesses noted that some small business owners and operators likely would be uncomfortable with producing detailed financial information, or could be prevented from using the safe harbor because of inadvertent recordkeeping deficiencies.

Individuals, advocacy groups, and nonprofit organizations commenting on behalf of the disability community uniformly and strongly opposed a safe harbor for qualified small businesses, saying it is fundamentally at odds with the intent of Congress and the plain language of the ADA. These commenters contended that the case-specific factors underlying the statute's readily achievable standard cannot be reconciled with a formulaic accounting approach, and that a blanket formula inherently is less fair, less flexible, and less effective than the current case-by-case determination for whether an action is readily achievable. Moreover, they argued, a small business safe harbor for readily achievable barrier removal is unnecessary because the statutory standard explicitly provides that a business need only spend what is readily achievable—an amount that may be more or less than 1 percent of revenue in any given year.

Several commenters opined that the formulaic approach proposed by the Department overlooks the factors that often prove most conducive and integral to readily achievable barrier removal—planning and prioritization. Many commenters expressed concern that the safe harbor creates an incentive for business entities to forego large-scale barrier removal in favor of smaller, less costly removal projects, regardless of the relative access the measures might provide. Others commented that an emphasis on a formulaic amount rather than readily achievable barrier removal might result in

competition among types of disabilities as to which barriers get removed first, or discrimination against particular types of disabilities if barrier removal for those groups is more expensive.

Many commenters opposed to the small business safe harbor proposed clarifications and limiting rules. A substantial number of commenters were strongly opposed to what they perceived as a vastly overbroad and overly complicated definition of "qualified small business" for purposes of eligibility for the safe harbor, and urged the Department to limit the qualified small business safe harbor to those businesses eligible for the ADA small business tax credit under section 44 of the Tax Code. Some commenters from the disability community contended that the spending level that triggers the safe harbor should be cumulative, to reflect the continuing nature of the readily achievable barrier obligation and to preclude a business from erasing years of unjustifiable inaction or insufficient action by spending up to the safe harbor threshold for one year. These commenters also sought explicit clarification that the small business safe harbor is an affirmative defense.

A number of commenters proposed that a business seeking to use the qualified small business safe harbor should be required to have a written barrier removal plan that contains a prioritized list of significant access barriers, a schedule for removal, and a description of the methods used to identify and prioritize barriers. These commenters argued that only spending consistent with the plan should count toward the qualified small business threshold.

After consideration of all relevant matter presented, the Department has concluded that neither the qualified small business safe harbor proposed in the NPRM nor any of the alternatives proposed by commenters will achieve the Department's intended results. Business and industry commenters uniformly objected to a safe harbor based on gross revenue, argued that 1 percent of gross revenue was out of reach for most, if not all, small businesses, and asserted that a safe harbor based on net revenue would better capture whether and to what extent barrier removal is readily achievable for small businesses. Individuals and disability advocacy groups rejected a set formula as fundamentally inconsistent with the case-specific approach reflected in the statute.

Commenters on both sides noted ambiguity as to which ADA-related costs appropriately should be included in the calculation of the safe harbor threshold, and expressed concern about the practical effect of the proposed safe harbor on litigation. Disability organizations expressed concern that the proposal might increase litigation because individuals with disabilities confronted with barriers in places of public accommodation would not be able to independently assess whether an entity is noncompliant or is, in fact, protected by the small business safe harbor. The Department notes that the concerns about enforcement-related complexity and expense likely would increase exponentially with a small business safe harbor based on net revenue.

The Department continues to believe that promulgation of a small business safe harbor would be within the scope of the Attorney General's mandate under 42 U.S.C. 12186(b) to issue regulations to carry out the provisions of title III. Title III defines "readily achievable" to mean "easily accomplishable and able to be carried out without much difficulty or expense," 42 U.S.C. 12181(9), and sets out factors to consider in determining whether an action is readily achievable. While the statutory factors reflect that whether an action is readily achievable is a fact-based determination, there is no inherent inconsistency with the Department's proposition that a formula based on revenue and barrier removal expenditure could accurately approximate the high end of the level of expenditure that can be considered readily achievable for a circumscribed subset of title III entities defined, in part, by their maximum annual average receipts. Moreover, the Department's obligation under the SBREFA to consider alternative means of compliance for small businesses, *see* 5 U.S.C. 603(c), further supports the Department's conclusion that a well-targeted formula is a reasonable approach to implementation of the statute's readily achievable standard. While the Department ultimately has concluded that a small business safe harbor should not be included in the final rule, the Department continues to believe that it is within the Department's authority to develop and implement such a safe harbor.

As noted above, the business community strongly objected to a safe harbor premised on gross revenue, on the ground that gross revenue is an unreliable indicator of an entity's ability to remove barriers, and urged the Department to formulate a safe harbor based on net revenue. The Department's proposed use of gross revenue was intended to offer a measure of certainty for qualified small businesses while ensuring that those businesses continue to meet their ongoing obligation to remove architectural barriers where doing so is readily achievable.

The Department believes that a qualified small business safe harbor based on net revenue would be an unreliable indicator of what is readily achievable and would be unworkable in practice. Evaluation of what is readily achievable for a small business cannot rest solely on a business's net revenue because many decisions about expenses are inherently subjective, and in some cases a net loss may be more beneficial (in terms of taxes, for example) than a small net profit. The Department does not read the ADA's readily achievable standard to mean necessarily that architectural barrier removal is to be, or should be, a business's last concern, or that a business can claim that every barrier removal obligation is not readily achievable. Therefore, if a qualified small business safe harbor were to be premised on net revenue, assertion of the affirmative defense would trigger discovery and examination of the business's accounting methods and the validity or necessity of offsetting expenses. The practical benefits and legal certainty intended by the NPRM would be lost.

Because there was little to no support for the Department's proposed use of gross revenue and no workable alternatives are available at this time, the Department will not adopt a small business safe harbor in this final rule. Small business public accommodations are subject to the barrier removal requirements set out in § 36.304 of the final rule. In addition, the Department plans to provide small businesses with more detailed guidance on assessing and meeting their barrier removal obligations in a small business compliance guide.

Section 36.308 Seating in Assembly Areas

In the 1991 rule, § 36.308 covered seating obligations for public accommodations in assembly areas. It was bifurcated into (a) existing facilities and (b) new construction and alterations. The new construction and alterations provision, § 36.308(b), merely stated that assembly areas should be built or altered in accordance with the applicable provisions in the 1991 Standards. Section 36.308(a), by contrast, provided detailed guidelines on what barrier removal was required.

The Department explained in the preamble to the 1991 rule that § 36.308 provided specific rules on assembly areas to ensure that wheelchair users, who typically were relegated to inferior seating in the back of assembly areas separate from their friends and family, would be provided access to seats that were integrated and equal in quality to those provided to the general public. Specific guidance on assembly areas was desirable because they are found in many different types of places of public accommodation, ranging from opera houses (places of exhibition or entertainment) to private university lecture halls (places of education), and include assembly areas that range in size from small movie theaters of 100 or fewer seats to 100,000-seat sports stadiums.

In the NPRM, the Department proposed to update § 36.308(a) by incorporating some of the applicable assembly area provisions from the 2010 Standards. Upon further review, however, the Department has determined that the need to provide special guidance for assembly areas in a separate section no longer exists, except for specialty seating areas, as discussed below. Since enactment of the ADA, the Department has interpreted the 1991 Standards as a guide for determining the existence of barriers. Courts have affirmed this interpretation. *See, e.g., Colorado Cross Disability Coalition* v. *Too, Inc.,* 344 F. Supp. 2d 707 (D. Colo. 2004); *Access Now, Inc.* v. *AMH CGH, Inc.,* 2001 WL 1005593 (S.D. Fla. 2001); *Pascuiti* v. *New York Yankees,* 87 F. Supp. 2d 221 (S.D.N.Y. 1999). The 2010 Standards now establish detailed guidance for newly constructed and altered assembly areas, which is provided in § 36.406(f), and these Standards will serve as a new guide for barrier removal. Accordingly, the former § 36.308(a) has been replaced in the final rule. Assembly areas will benefit from the same safe harbor provisions applicable to barrier removal in all places of public accommodations as provided in § 36.304(d)(2) of the final rule.

The Department has also decided to remove proposed § 36.308(c)(2) from the final rule. This provision would have required assembly areas with more than 5,000 seats to provide five wheelchair spaces with at least

three designated companion seats for each of those five wheelchair spaces. The Department agrees with commenters who asserted that group seating already is addressed more appropriately in ticketing under § 36.302(f).

The Department has determined that proposed § 36.308(c)(1), addressing specialty seating in assembly areas, should remain as § 36.308 in the final rule with additional language. This paragraph is designed to ensure that individuals with disabilities have an opportunity to access specialty seating areas that entitle spectators to distinct services or amenities not generally available to others. This provision is not, as several commenters mistakenly thought, designed to cover luxury boxes and suites. Those areas have separate requirements outlined in section 221 of the 2010 Standards.

Section 36.308 requires only that accessible seating be provided in each area with *distinct* services or amenities. To the extent a covered entity provides multiple seating areas with the same services and amenities, each of those areas would not be distinct and thus all of them would not be required to be accessible. For example, if a facility has similar dining service in two areas, both areas would not need to be made accessible; however, if one dining service area is open to families, while the other is open only to individuals over the age of 21, both areas would need to be made accessible. Factors distinguishing specialty seating areas generally are dictated by the type of facility or event, but may include, for example, such distinct services and amenities as access to wait staff for in-seat food or beverage service; availability of catered food or beverages for pre-game, intermission, or post-game events; restricted access to lounges with special amenities, such as couches or flat-screen televisions; or access to team personnel or facilities for team-sponsored events (*e.g.,* autograph sessions, sideline passes, or facility tours) not otherwise available to other spectators.

The NPRM required public accommodations to locate wheelchair seating spaces and companion seats in each specialty seating area within the assembly area. The Department has added language in the final rule stating that public accommodations that cannot place wheelchair seating spaces and companion seats in each specialty area because it is not readily achievable to do so may meet their obligation by providing specialty services or amenities to individuals with disabilities and their companions at other designated accessible locations at no additional cost. For example, if a theater that only has barrier removal obligations provides wait service to spectators in the mezzanine, and it is not readily achievable to place accessible seating there, it may meet its obligation by providing wait service to patrons with disabilities who use wheelchairs and their companions at other designated accessible locations at no additional cost. This provision does not obviate the obligation to comply with applicable requirements for new construction and alterations, including dispersion of accessible seating.

Section 36.309 Examinations and Courses

Section 36.309(a) sets forth the general rule that any private entity that offers examinations or courses relating to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals. In the NPRM preamble and proposed regulatory amendment and in this final rule, the Department relied on its history of enforcement efforts, research, and body of knowledge of testing and modifications, accommodations, and aids in detailing steps testing entities should take to ensure that persons with disabilities receive appropriate modifications, accommodations, or auxiliary aids in examination and course settings as required by the ADA. The Department received comments from disability rights groups, organizations that administer tests, State governments, professional associations, and individuals on the language appearing in the NPRM preamble and amended regulation and has carefully considered these comments.

The Department initially set out the parameters of appropriate documentation requests relating to examinations and courses covered by this section in the 1991 preamble at 28 CFR part 36, stating that "requests for documentation must be reasonable and must be limited to the need for the modification or aid requested." *See* 28 CFR part 36, app. B at 735 (2009). Since that time, the Department, through its enforcement efforts pursuant to section 309, has addressed concerns that requests by testing entities for documentation regarding the existence of an individual's disability and need for a modification or auxiliary aid or service were often inappropriate and burdensome. The Department proposed language stating that while it may be appropriate for a testing entity to request that an applicant provide documentation supporting the existence of a disability and the need for a modification, accommodation, or auxiliary aid or service, the request by the testing entity for such documentation must be reasonable and limited. The NPRM proposed that testing entities should narrowly tailor requests for documentation, limiting those requests to materials that will allow the testing entities to ascertain the nature of the disability and the individual's need for the requested modification, accommodation, or auxiliary aid or service. This proposal codified the 1991 rule's preamble language regarding testing entities' requests for information supporting applicants' requests for testing modifications or accommodations.

Overall, most commenters supported this addition to the regulation. These commenters generally agreed that documentation sought by testing entities to support requests for modifications and testing accommodations should be reasonable and tailored. Commenters noted, for example, that the proposal to require reasonable and tailored documentation requests "is not objectionable. Indeed, it largely tracks DOJ's long-standing informal guidance that 'requests for documentation must be reasonable and limited to the need for the modification or aid requested.'"

Commenters including disability rights groups, State governments, professional associations, and individuals made it clear that, in addition to the proposed regulatory change, other significant problems remain for individuals with disabilities who seek necessary modifications to examinations and courses. These problems include detailed questions about the nature of documentation materials submitted by candidates, testing entities' questioning of documentation provided by qualified professionals with expertise in the particular disability at issue, and lack of timeliness in determining whether to provide requested accommodations or modifications. Several commenters expressed enthusiasm for the preamble language addressing some of these issues, and some of these commenters recommended the incorporation of portions of this preamble language into the regulatory text. Some testing entities expressed concerns and uncertainty about the language in the preamble and sought clarifications about its meaning. These commenters focused most of their attention on the following language from the NPRM preamble:

> Generally, a testing entity should accept without further inquiry documentation provided by a qualified professional who has made an individualized assessment of the applicant. Appropriate documentation may include a letter from a qualified professional or evidence of a prior diagnosis, or accommodation, or classification, such as eligibility for a special education program. When an applicant's documentation is recent and demonstrates a consistent history of a diagnosis, there is no need for further inquiry into the nature of the disability. A testing entity should consider an applicant's past use of a particular auxiliary aid or service.
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> 73 FR 34508, 34539 (June 17, 2008).

Professional organizations, State governments, individuals, and disability rights groups fully supported the Department's preamble language and recommended further modification of the regulations to encompass the issues raised in the preamble. A disability rights group recommended that the Department incorporate the preamble language into the regulations to ensure that "documentation demands are strictly limited in scope and met per se when documentation of previously provided accommodations or aids is provided." One professional education organization noted that many testing corporations disregard the documented diagnoses of qualified professionals, and instead substitute their own, often unqualified diagnoses of individuals with disabilities. Commenters confirmed that testing entities sometimes ask for unreasonable information that is either impossible, or extremely onerous, to provide. A disability rights organization supported the Department's proposals and noted that private testing companies impose burdensome documentation requirements upon applicants with disabilities seeking accommodations and that complying with

the documentation requests is frequently so difficult, and negotiations over the requests so prolonged, that test applicants ultimately forgo taking the test. Another disability rights group urged the Department to "expand the final regulatory language to ensure that regulations accurately provide guidance and support the comments made about reducing the burden of documenting the diagnosis and existence of a disability."

Testing entities, although generally supportive of the proposed regulatory amendment, expressed concern regarding the Department's proposed preamble language. The testing entities provided the Department with lengthy comments in which they suggested that the Department's rationale delineated in the preamble potentially could limit them from gathering meaningful and necessary documentation to determine whether, in any given circumstance, a disability is presented, whether modifications are warranted, and which modifications would be most appropriate. Some testing entities raised concerns about individuals skewing testing results by falsely claiming or feigning disabilities as an improper means of seeking advantage on an examination. Several testing entities raised concerns about and sought clarification regarding the Department's use of certain terms and concepts in the preamble, including "without further inquiry," "appropriate documentation," "qualified professional," "individualized assessment," and "consider." These entities discussed the preamble language at length, noting that testing entities need to be able to question some aspects of testing applicants' documentation or to request further documentation from some candidates when the initial documentation is unclear or incomplete. One testing entity expressed concern that the Department's preamble language would require the acceptance of a brief note on a doctor's prescription pad as adequate documentation of a disability and the need for an accommodation. One medical examination organization stated that the Department's preamble language would result in persons without disabilities receiving accommodations and passing examinations as part of a broad expansion of unwarranted accommodations, potentially endangering the health and welfare of the general public. Another medical board "strenuously objected" to the "without further inquiry" language. Several of the testing entities expressed concern that the Department's preamble language might require testing companies to accept documentation from persons with temporary or questionable disabilities, making test scores less reliable, harming persons with legitimate entitlements, and resulting in additional expense for testing companies to accommodate more test takers.

It remains the Department's view that, when testing entities receive documentation provided by a qualified professional who has made an individualized assessment of an applicant that supports the need for the modification, accommodation, or aid requested, they shall generally accept such documentation and provide the accommodation.

Several commenters sought clarifications on what types of documentation are acceptable to demonstrate the existence of a disability and the need for a requested modification, accommodation, or aid. The Department believes that appropriate documentation may vary depending on the nature of the disability and the specific modification or aid requested, and accordingly, testing entities should consider a variety of types of information submitted. Examples of types of information to consider include recommendations of qualified professionals familiar with the individual, results of psycho-educational or other professional evaluations, an applicant's history of diagnosis, participation in a special education program, observations by educators, or the applicant's past use of testing accommodations. If an applicant has been granted accommodations post-high school by a standardized testing agency, there is no need for reassessment for a subsequent examination.

Some commenters expressed concern regarding the use of the term "letter" in the proposed preamble sentence regarding appropriate documentation. The NPRM preamble language stated that "[a]ppropriate documentation may include a letter from a qualified professional or evidence of a prior diagnosis, accommodation, or classification, such as eligibility for a special education program." 73 FR 34508, 34539 (June 17, 2008). Some testing entities posited that the preamble language would require them to accept a brief letter from a doctor or even a doctor's note on a prescription pad indicating "I've been treating (student) for ADHD and he/she is entitled to extend time on the ACT." The Department's reference in the NPRM preamble to letters from physicians or other professionals was provided in order to offer examples of some types of acceptable documentation that may be considered by testing entities in evaluating the existence of an applicant's disability and the need for a certain modification, accommodation, or aid. No one piece of evidence may be dispositive in make a testing accommodation determination. The significance of a letter or other communication from a doctor or other qualified professional would depend on the professional's relationship with the candidate and the specific content of the communication, as well as how the letter fits in with the totality of the other factors used to determine testing accommodations under this rule. Similarly, an applicant's failure to provide results from a specific test or evaluation instrument should not of itself preclude approval of requests for modifications, accommodations, or aids if the documentation provided by the applicant, in its entirety, is sufficient to demonstrate that the individual has a disability and requires a requested modification, accommodation, or aid on the relevant examination. This issue is discussed in more detail below.

One disability rights organization noted that requiring a 25-year old who was diagnosed in junior high school with a learning disability and accommodated ever since "to produce elementary school report cards to demonstrate symptomology before the age of seven is unduly burdensome." The same organization commented that requiring an individual with a long and early history of disability to be assessed within three years of taking the test in question is similarly burdensome, stating that "[t]here is no scientific evidence that learning disabilities abate with time, nor that Attention Deficits abate with time * * *." This organization noted that there is no justification for repeatedly subjecting people to expensive testing regimens simply to satisfy a disbelieving industry. This is particularly true for adults with, for example, learning disabilities such as dyslexia, a persistent condition without the need for retesting once the diagnosis has been established and accepted by a standardized testing agency.

Some commenters from testing entities sought clarification regarding who may be considered a "qualified professional." Qualified professionals are licensed or otherwise properly credentialed and possess expertise in the disability for which modifications or accommodations are sought. For example, a podiatrist would not be considered to be a qualified professional to diagnose a learning disability or support a request for testing accommodations on that basis. Types of professionals who might possess the appropriate credentials and expertise are doctors (including psychiatrists), psychologists, nurses, physical therapists, occupational therapists, speech therapists, vocational rehabilitation specialists, school counselors, and licensed mental health professionals. Additionally, while testing applicants should present documentation from qualified professionals with expertise in the pertinent field, it also is critical that testing entities that review documentation submitted by prospective examinees in support of requests for testing modifications or accommodations ensure that their own reviews are conducted by qualified professionals with similarly relevant expertise.

Commenters also sought clarification of the term individualized assessment. The Department's intention in using this term is to ensure that documentation provided on behalf of a testing candidate is not only provided by a qualified professional, but also reflects that the qualified professional has individually and personally evaluated the candidate as opposed to simply considering scores from a review of documents. This is particularly important in the learning disabilities context, where proper diagnosis requires face-to-face evaluation. Reports from experts who have personal familiarity with the candidate should take precedence over those from, for example, reviewers for testing agencies, who have never personally met the candidate or conducted the requisite assessments for diagnosis and treatment.

Some testing entities objected to the NPRM preamble's use of the phrase "without further inquiry." The Department's intention here is to address the extent to which testing entities should accept documentation provided by an applicant when the testing entity is determining the need for modifications, accommodations, or auxiliary aids or services. The Department's view is that applicants who submit appropriate documentation, *e.g.,* documentation that is

based on the careful individual consideration of the candidate by a professional with expertise relating to the disability in question, should not be subjected to unreasonably burdensome requests for additional documentation. While some testing commenters objected to this standard, it reflects the Department's longstanding position. When an applicant's documentation demonstrates a consistent history of a diagnosis of a disability, and is prepared by a qualified professional who has made an individualized evaluation of the applicant, there is little need for further inquiry into the nature of the disability and generally testing entities should grant the requested modification, accommodation, or aid.

After a careful review of the comments, the Department has decided to maintain the proposed regulatory language on the scope of appropriate documentation in § 36.309(b)(1)(iv). The Department has also added new regulatory language at § 36.309(b)(1)(v) that provides that testing entities shall give considerable weight to documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations as well as such modifications, accommodations, or related aids and services provided in response to an Individualized Education Program (IEP) provided under the Individuals with Disabilities Education Act (IDEA) or a plan providing services pursuant to section 504 of the Rehabilitation Act of 1973, as amended (often referred to as a Section 504 Plan). These additions to the regulation are necessary because the Department's position on the bounds of appropriate documentation contained in Appendix B, 28 CFR part 36, app. B (2009), has not been implemented consistently and fully by organizations that administer tests.

The new regulatory language clarifies that an applicant's past use of a particular modification, accommodation, or auxiliary aid or service in a similar testing setting or pursuant to an IEP or Section 504 Plan provides critical information in determining those examination modifications that would be applicable in a given circumstance. The addition of this language and the appropriate weight to be accorded it is seen as important by the Department because the types of accommodations provided in both these circumstances are typically granted in the context of individual consideration of a student's needs by a team of qualified and experienced professionals. Even though these accommodations decisions form a common sense and logical basis for testing entities to rely upon, they are often discounted and ignored by testing entities.

For example, considerable weight is warranted when a student with a Section 504 Plan in place since middle school that includes the accommodations of extra time and a quiet room for testing is seeking these same accommodations from a testing entity covered by section 309 of the Act. In this example, a testing entity receiving such documentation should clearly grant the request for accommodations. A history of test accommodations in secondary schools or in post-secondary institutions, particularly when determined through the rigors of a process required and detailed by Federal law, is as useful and instructive for determining whether a specific accommodation is required as accommodations provided in standardized testing situations.

It is important to note, however, that the inclusion of this weight does not suggest that individuals without IEPs or Section 504 Plans are not also entitled to receive testing accommodations. Indeed, it is recommended that testing entities must consider the entirety of an applicant's history to determine whether that history, even without the context of a IEP or Section 504 Plan, indicates a need for accommodations. In addition, many students with learning disabilities have made use of informal, but effective accommodations. For example, such students often receive undocumented accommodations such as time to complete tests after school or at lunchtime, or being graded on content and not form or spelling of written work. Finally, testing entities shall also consider that because private schools are not subject to the IDEA, students at private schools may have a history of receiving accommodations in similar settings that are not pursuant to an IEP or Section 504 Plan.

Some testing entities sought clarification that they should only be required to consider particular use of past modifications, accommodations, auxiliary aids or services received by testing candidates for prior testing and examination settings. These commenters noted that it would be unhelpful to consider the classroom accommodations for a testing candidate, as those accommodations would not typically apply in a standardized test setting. The Department's history of enforcement in this area has demonstrated that a recent history of past accommodations is critical to an understanding of the applicant's disability and the appropriateness of testing accommodations.

The Department also incorporates the NPRM preamble's "timely manner" concept into the new regulatory language at § 36.309(b)(1)(vi). Under this provision, testing entities are required to respond in a timely manner to requests for testing accommodations in order to ensure equal opportunity for persons with disabilities. Testing entities are to ensure that their established process for securing testing accommodations provides applicants with a reasonable opportunity to supplement the testing entities' requests for additional information, if necessary, and still be able to take the test in the same testing cycle. A disability rights organization commented that testing entities should not subject applicants to unreasonable and intrusive requests for information in a process that should provide persons with disabilities effective modifications in a timely manner, fulfilling the core objective of title III to provide equal access. Echoing this perspective, several disability rights organizations and a State government commenter urged that testing entities should not make unreasonably burdensome demands for documentation, particularly where those demands create impediments to receiving accommodations in a timely manner. Access to examinations should be offered to persons with disabilities in as timely a manner as it is offered to persons without disabilities. Failure by a testing entity to act in a timely manner, coupled with seeking unnecessary documentation, could result in such an extended delay that it constitutes a denial of equal opportunity or equal treatment in an examination setting for persons with disabilities.

Section 36.311 Mobility Devices

Section 36.311 of the NPRM clarified the scope and circumstances under which covered entities are legally obligated to accommodate various "mobility devices." Section 36.311 set forth specific requirements for the accommodation of mobility devices, including wheelchairs, manually-powered mobility aids, and other power-driven mobility devices.

In both the NPRM and the final rule, § 36.311(a) states the general rule that in any areas open to pedestrians, public accommodations shall permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids, including walkers, crutches, canes, braces, or similar devices. Because mobility scooters satisfy the definition of "wheelchair" (*i.e.,* "a manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor, or of both indoor and outdoor locomotion"), the reference to them in § 36.311(a) of the final rule has been omitted to avoid redundancy.

Most business commenters expressed concern that permitting the use of other power-driven mobility devices by individuals with mobility disabilities would make such devices akin to wheelchairs and would require them to make physical changes to their facilities to accommodate their use. This concern is misplaced. If a facility complies with the applicable design requirements in the 1991 Standards or the 2010 Standards, the public accommodation will not be required to exceed those standards to accommodate the use of wheelchairs or other power-driven mobility devices that exceed those requirements.

Legal standard for other power-driven mobility devices. The NPRM version of § 36.311(b) provided that a public accommodation "shall make reasonable modifications in its policies, practices, and procedures to permit the use of other power-driven mobility devices by individuals with disabilities, unless the public accommodation can demonstrate that the use of the device is not reasonable or that its use will result in a fundamental alteration in the nature of the public accommodation's goods, services, facilities, privileges, advantages, or accommodations." 73 FR 34508, 34556 (June 17, 2008). In other words, public accommodations are by default required to permit the use of other power-driven mobility devices; the burden is on them to prove the existence of a valid exception.

Most commenters supported the notion of assessing whether the use of a particular device is reasonable in the context of a particular venue. Commenters, however, disagreed about the meaning of the word "reasonable" as it is used in § 36.311(b) of the

NPRM. Virtually every business and industry commenter took the use of the word "reasonable" to mean that a general reasonableness standard would be applied in making such an assessment. Advocacy and nonprofit groups almost universally objected to the use of a general reasonableness standard with regard to the assessment of whether a particular device should be allowed at a particular venue. They argued that the assessment should be based on whether reasonable modifications could be made to allow a particular device at a particular venue, and that the only factors that should be part of the calculus that results in the exclusion of a particular device are undue burden, direct threat, and fundamental alteration.

A few commenters opposed the proposed provision requiring public accommodations to assess whether reasonable modifications can be made to allow other power-driven mobility devices, preferring instead that the Department issue guidance materials so that public accommodations would not have to incur the cost of such analyses. Another commenter noted a "fox guarding the hen house"-type of concern with regard to public accommodations developing and enforcing their own modification policy.

In response to comments received, the Department has revised § 36.311(b) to provide greater clarity regarding the development of legitimate safety requirements regarding other power-driven mobility devices. The Department has not retained the proposed NPRM language stating that an other power-driven mobility device can be excluded if a public accommodation can demonstrate that the use of the device is not reasonable or that its use fundamentally alters the nature of the goods, services, facilities, privileges, advantages, or accommodations offered by the public accommodation because the Department believes that these exceptions are covered by the general reasonable modification requirement contained in § 36.302.

Assessment factors. Section 36.311(c) of the NPRM required public accommodations to "establish policies to permit the use of other power-driven mobility devices" and articulated four factors upon which public accommodations must base decisions as to whether a modification is reasonable to allow the use of a class of other power-driven mobility devices by individuals with disabilities in specific venues (*e.g.,* doctors' offices, parks, commercial buildings, etc.). 73 FR 34508, 34556 (June 17, 2008).

The Department has relocated and modified the NPRM text that appeared in § 36.311(c) to new paragraph § 36.311(b)(2) to clarify what factors the public accommodation shall use in determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification. Section 36.311(b)(2) now states that "[i]n determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification under (b)(1), a public accommodation shall consider" certain enumerated factors. The assessment factors are designed to assist public accommodations in determining whether allowing the use of a particular other power-driven mobility device in a specific facility is reasonable. Thus, the focus of the analysis must be on the appropriateness of the use of the device at a specific facility, rather than whether it is necessary for an individual to use a particular device.

The NPRM proposed the following specific assessment factors: (1) The dimensions, weight, and operating speed of the mobility device in relation to a wheelchair; (2) the potential risk of harm to others by the operation of the mobility device; (3) the risk of harm to the environment or natural or cultural resources or conflict with Federal land management laws and regulations; and (4) the ability of the public accommodation to stow the mobility device when not in use, if requested by the user.

Factor 1 was designed to help public accommodations assess whether a particular device was appropriate, given its particular physical features, for a particular location. Virtually all commenters said the physical features of the device affected their view of whether a particular device was appropriate for a particular location. For example, while many commenters supported the use of an other power-driven mobility device if the device were a Segway® PT, because of environmental and health concerns they did not offer the same level of support if the device were an off-highway vehicle, all-terrain vehicle (ATV), golf car, or other device with a fuel-powered or combustion engine. Most commenters noted that indicators such as speed, weight, and dimension really were an assessment of the appropriateness of a particular device in specific venues and suggested that factor 1 say this more specifically.

The term "in relation to a wheelchair" in the NPRM's factor 1 apparently created some concern that the same legal standards that apply to wheelchairs would be applied to other power-driven mobility devices. The Department has omitted the term "in relation to a wheelchair" from § 36.311(b)(2)(i) to clarify that if a facility that is in compliance with the applicable provisions of the 1991 Standards or the 2010 Standards grants permission for an other power-driven mobility device to go on-site, it is not required to exceed those standards to accommodate the use of other power-driven mobility devices.

In response to requests that NPRM factor 1 state more specifically that it requires an assessment of an other power-driven mobility device's appropriateness under particular circumstances or in particular venues, the Department has added several factors and more specific language. In addition, although the NPRM made reference to the operation of other power-driven mobility devices in "specific venues," the Department's intent is captured more clearly by referencing "specific facility" in paragraph (b)(2). The Department also notes that while speed is included in factor 1, public accommodations should not rely solely on a device's top speed when assessing whether the device can be accommodated; instead, public accommodations should also consider the minimum speeds at which a device can be operated and whether the development of speed limit policies can be established to address concerns regarding the speed of the device. Finally, since the ability of the public accommodation to stow the mobility device when not in use is an aspect of its design and operational characteristics, the text proposed as factor 4 in the NPRM has been incorporated in paragraph (b)(2)(iii).

The NPRM's version of factor 2 provided that the "potential risk of harm to others by the operation of the mobility device" is one of the determinants in the assessment of whether other power-driven mobility devices should be excluded from a site. With this language, the Department intended to incorporate the safety standard found in § 36.301(b), which provides that public accommodations may "impose legitimate safety requirements that are necessary for safe operation" into the assessment. However, several commenters indicated that they read this language, particularly the phrase "potential risk of harm" to mean that the Department had adopted a concept of risk analysis different from that which is in the existing standards. The Department did not intend to create a new standard and has changed the language in paragraphs (b)(1) and (b)(2) to clarify the applicable standards, thereby avoiding the introduction of new assessments of risk beyond those necessary for the safe operation of the public accommodation.

While all applicable affirmative defenses are available to public accommodations in the establishment and execution of their policies regarding other power-driven mobility devices, the Department did not explicitly incorporate the direct threat defense into the assessment factors because § 36.301(b) provides public accommodations the appropriate framework with which to assess whether legitimate safety requirements that may preclude the use of certain other power-driven mobility devices are necessary for the safe operation of the public accommodation. In order to be legitimate, the safety requirement must be based on actual risks and not mere speculation regarding the device or how it will be operated. Of course, public accommodations may enforce legitimate safety rules established for the operation of other-power driven mobility devices (*e.g.,* reasonable speed restrictions). Finally, NPRM factor 3 concerning environmental resources and conflicts of law has been relocated to paragraph (b)(2)(v).

As a result of these comments and requests, NPRM factors 1, 2, 3, and 4 have been revised and renumbered within paragraph 36.311(b)(2) in the final rule.

Several commenters requested that the Department provide guidance materials or more explicit concepts of which considerations might be appropriate for inclusion in a policy that allows the use of other power-driven mobility devices. A public accommodation that has determined that reasonable modifications can be made in its policies, practices, or procedures to allow the use of other power-driven mobility devices should develop a policy that clearly states the circumstances under which the use of other power-driven mobility devices by individuals with a mobility disability will be permitted. It also should include clear,

concise statements of specific rules governing the operation of such devices. Finally, the public accommodation should endeavor to provide individuals with disabilities who use other power-driven mobility devices with advanced notice of its policy regarding the use of such devices and what rules apply to the operation of these devices.

For example, the U.S. General Services Administration (GSA) has developed a policy allowing the use of the Segway® PT and other EPAMDs in all Federal buildings under GSA's jurisdiction. *See* General Services Administration, *Interim Segway® Personal Transporter Policy* (Dec. 3, 2007), available at *http://www.gsa.gov/graphics/pbs/Interim_Segway_Policy_121007.pdf* (last visited June 24, 2010). The GSA policy defines the policy's scope of coverage by setting out what devices are and are not covered by the policy. The policy also sets out requirements for safe operation, such as a speed limit, prohibits the use of EPAMDs on escalators, and provides guidance regarding security screening of these devices and their operators.

A public accommodation that determines that it can make reasonable modifications to permit the use of an other power-driven mobility device by an individual with a mobility disability might include in its policy the procedure by which claims that the other power-driven mobility device is being used for a mobility disability will be assessed for legitimacy (*i.e.,* a credible assurance that the device is being used for a mobility disability, including a verbal representation by the person with a disability that is not contradicted by observable fact, or the presentation of a disability parking space placard or card, or State-issued proof of disability); the type or classes of other power-driven mobility devices are permitted to be used by individuals with mobility disabilities; the size, weight, and dimensions of the other power-driven mobility devices that are permitted to be used by individuals with mobility disabilities; the speed limit for the other power-driven mobility devices that are permitted to be used by individuals with mobility disabilities; the places, times, or circumstances under which the use of the other power-driven mobility devices is or will be restricted or prohibited; safety, pedestrian, and other rules concerning the use of the other power-driven mobility devices; whether, and under which circumstances, storage for the other power-driven mobility devices will be made available; and how and where individuals with a mobility disability can obtain a copy of the other power-driven mobility device policy.

Public accommodations also might consider grouping other power-driven mobility devices by type (*e.g.,* EPAMDs, golf cars, gasoline-powered vehicles, and other devices). For example, an amusement park may determine that it is reasonable to allow individuals with disabilities to use EPAMDs in a variety of outdoor programs and activities, but that it would not be reasonable to allow the use of golf cars as mobility devices in similar circumstances. At the same time, the entity may address its concerns about factors such as space limitations by disallowing use of EPAMDs by members of the general public who do not have mobility disabilities.

The Department anticipates that in many circumstances, public accommodations will be able to develop policies that will allow the use of other power-driven mobility devices by individuals with mobility disabilities without resulting in a fundamental alteration of a public accommodation's goods, services, facilities, privileges, advantages, or accommodations. Consider the following examples:

Example 1: Although individuals who do not have mobility disabilities are prohibited from operating EPAMDs at a theme park, the park has developed a policy allowing individuals with mobility disabilities to use EPAMDs as their mobility device at the park. The policy states that EPAMDs are allowed in all areas of the theme park that are open to pedestrians as a reasonable modification to its general policy on EPAMDs. The public accommodation has determined that the facility provides adequate space for a taller device, such as an EPAMD, and that it does not fundamentally alter the nature of the theme park's goods and services. The theme park's policies do, however, require that EPAMDs be operated at a safe speed limit. A theme park employee may inquire at the ticket gate whether the device is needed due to the user's disability or may request the presentation of a valid, State-issued, disability parking placard (though presentation of such a placard is not necessary), or other State-issued proof of disability or a credible assurance that the use of the EPAMD is for the individual's mobility disability. The park employee also may inform an individual with a disability using an EPAMD that the theme park's policy requires that it be operated at or below the park's designated speed limit.

Example 2: A shopping mall has developed a policy whereby EPAMDs may be operated by individuals with mobility disabilities in the common pedestrian areas of the mall if the operator of the device agrees to the following: to operate the device no faster than the speed limit set by the policy; to use the elevator, not the escalator, to transport the EPAMD to different levels; to yield to pedestrian traffic; not to leave the device unattended unless it can stand upright and has a locking system; to refrain from using the device temporarily if the mall manager determines that the volume of pedestrian traffic is such that the operation of the device would interfere with legitimate safety requirements; and to present the mall management office with a valid, State-issued, disability parking placard (though presentation of such a placard is not necessary), or State-issued proof of disability, as a credible assurance that the use of the EPAMD is for the individual's mobility disability, upon entry to the mall.

Inquiry into the use of other power-driven mobility device. Section 36.311(d) of the NPRM provided that a "public accommodation may ask a person using a power-driven mobility device if the mobility device is required because of the person's disability. A public accommodation shall not ask a person using a mobility device questions about the nature and extent of the person's disability." 73 FR 34508, 34556 (June 17, 2008).

While business commenters did not take issue with applying this standard to individuals who use wheelchairs, they were not satisfied with the application of this standard to other power-driven mobility devices. Business commenters expressed concern about people feigning mobility disabilities to be able to use other power-driven mobility devices in public accommodations in which their use is otherwise restricted. These commenters felt that a mere inquiry into whether the device is being used for a mobility disability was an insufficient mechanism by which to detect fraud by other power-driven mobility device users who do not have mobility disabilities. These commenters believed they should be given more latitude to make inquiries of other power-driven mobility device users claiming a mobility disability than they would be given for wheelchair users. They sought the ability to establish a policy or method by which public accommodations may assess the legitimacy of the mobility disability. They suggested some form of certification, sticker, or other designation. One commenter suggested a requirement that a sticker bearing the international symbol for accessibility be placed on the device or that some other identification be required to signal that the use of the device is for a mobility disability. Other suggestions included displaying a disability parking placard on the device or issuing EPAMDs, like the Segway® PT, a permit that would be similar to permits associated with parking spaces reserved for those with disabilities.

Advocacy, nonprofit, and several individual commenters balked at the notion of allowing any inquiry beyond whether the device is necessary for a mobility disability and encouraged the Department to retain the NPRM's language on this topic. Other commenters, however, were empathetic with commenters who had concerns about fraud. At least one Segway® PT advocate suggested it would be permissible to seek documentation of the mobility disability in the form of a simple sign or permit.

The Department has sought to find common ground by balancing the needs of businesses and individuals with mobility disabilities wishing to use other power-driven mobility devices with the Department's longstanding, well-established policy of not allowing public accommodations or establishments to require proof of a mobility disability. There is no question that public accommodations have a legitimate interest in ferreting out fraudulent representations of mobility disabilities, especially given the recreational use of other power-driven mobility devices and the potential safety concerns created by having too many such devices in a specific facility at one time. However, the privacy of individuals with mobility disabilities and respect for those individuals are also vitally important.

Neither § 36.311(d) of the NPRM nor § 36.311(c) of the final rule permits inquiries into the nature of a person's mobility

disability. However, the Department does not believe it is unreasonable or overly intrusive for an individual with a mobility disability seeking to use an other power-driven mobility device to provide a credible assurance to verify that the use of the other power-driven mobility device is for a mobility disability. The Department sought to minimize the amount of discretion and subjectivity exercised by public accommodations in assessing whether an individual has a mobility disability and to allow public accommodations to verify the existence of a mobility disability. The solution was derived from comments made by several individuals who said they have been admitted with their Segway® PTs into public entities and public accommodations that ordinarily do not allow these devices on-site when they have presented or displayed State-issued disability parking placards. In the examples provided by commenters, the parking placards were accepted as verification that the Segway® PTs were being used as mobility devices.

Because many individuals with mobility disabilities avail themselves of State programs that issue disability parking placards or cards and because these programs have penalties for fraudulent representations of identity and disability, utilizing the parking placard system as a means to establish the existence of a mobility disability strikes a balance between the need for privacy of the individual and fraud protection for the public accommodation. Consequently, the Department has decided to include regulatory text in § 36.311(c)(2) of the final rule that requires public accommodations to accept the presentation of a valid, State-issued disability parking placard or card, or State-issued proof of disability, as verification that an individual uses the other power-driven mobility device for his or her mobility disability. A "valid" disability placard or card is one that is presented by the individual to whom it was issued and is otherwise in compliance with the State of issuance's requirements for disability placards or cards. Public accommodations are required to accept a valid, State-issued disability parking placard or card, or State-issued proof of disability, as a credible assurance, but they cannot demand or require the presentation of a valid disability placard or card, or State-issued proof of disability, as a prerequisite for use of an other power-driven mobility device, because not all persons with mobility disabilities have such means of proof. If an individual with a mobility disability does not have such a placard or card, or State-issued proof of disability, he or she may present other information that would serve as a credible assurance of the existence of a mobility disability.

In lieu of a valid, State-issued disability parking placard or card, or State-issued proof of disability, a verbal representation, not contradicted by observable fact, shall be accepted as a credible assurance that the other power-driven mobility device is being used because of a mobility disability. This does not mean, however, that a mobility disability must be observable as a condition for allowing the use of an other power-driven mobility device by an individual with a mobility disability, but rather that if an individual represents that a device is being used for a mobility disability and that individual is observed thereafter engaging in a physical activity that is contrary to the nature of the represented disability, the assurance given is no longer credible and the individual may be prevented from using the device.

Possession of a valid, State-issued disability parking placard or card or a verbal assurance does not trump a public accommodation's valid restrictions on the use of other power-driven mobility devices. Accordingly, a credible assurance that the other power-driven mobility device is being used because of a mobility disability is not a guarantee of entry to a public accommodation because notwithstanding such a credible assurance, use of the device in a particular venue may be at odds with the legal standard in § 36.311(b)(1) or with one or more of the § 36.311(b)(2) factors. Only after an individual with a disability has satisfied all of the public accommodation's policies regarding the use of other power-driven mobility devices does a credible assurance become a factor in allowing the use of the device. For example, if an individual seeking to use an other power-driven mobility device fails to satisfy any of the public accommodation's stated policies regarding the use of other power-driven mobility devices, the fact that the individual legitimately possesses and presents a valid, State-issued disability parking placard or card, or State-issued proof of disability, does not trump the policy and require the public accommodation to allow the use of the device. In fact, in some instances, the presentation of a legitimately held placard or card, or State-issued proof of disability, will have no relevance or bearing at all on whether the other power-driven mobility device may be used, because the public accommodation's policy does not permit the device in question on-site under any circumstances (*e.g.,* because its use would create a substantial risk of serious harm to the immediate environment or natural or cultural resources). Thus, an individual with a mobility disability who presents a valid disability placard or card, or State-issued proof of disability, will not be able to use an ATV as an other power-driven mobility device in a mall or a restaurant if the mall or restaurant has adopted a policy banning their use for any or all of the above-mentioned reasons.

However, an individual with a mobility disability who has complied with a public accommodation's stated policies cannot be refused use of the other power-driven mobility device if he or she has provided a credible assurance that the use of the device is for a mobility disability.

Subpart D—New Construction and Alterations

Subpart D establishes the title III requirements applicable to new construction and alterations. The Department has amended this subpart to adopt the 2004 ADAAG, set forth the effective dates for implementation of the 2010 Standards, and make related revisions as described below.

Section 36.403 Alterations: Path of Travel

In the NPRM, the Department proposed one change to § 36.403 on alterations and path of travel by adding a path of travel safe harbor. Proposed § 36.403(a)(1) stated that if a private entity has constructed or altered required elements of a path of travel in accordance with the 1991 Standards, the private entity is not required to retrofit such elements to reflect incremental changes in the 2010 Standards solely because of an alteration to a primary function area served by that path of travel.

A substantial number of commenters objected to the Department's creation of a safe harbor for alterations to required elements of a path of travel that comply with the current 1991 Standards. These commenters argued that if a public accommodation already is in the process of altering its facility, there should be a legal requirement that individuals with disabilities are entitled to increased accessibility provided by the 2004 ADAAG for path of travel work. These commenters also stated that they did not believe there was a statutory basis for "grandfathering" facilities that comply with the 1991 Standards. Another commenter argued that the updates incorporated into the 2004 ADAAG provide very substantial improvements for access, and that since there already is a 20 percent cost limit on the amount that can be expended on path of travel alterations, there is no need for a further limitation.

Some commenters supported the safe harbor as lessening the economic costs of implementing the 2004 ADAAG for existing facilities. One commenter also stated that without the safe harbor, entities that already have complied with the 1991 Standards will have to make and pay for compliance twice, as compared to those entities that made no effort to comply in the first place. Another commenter asked that the safe harbor be revised to include pre-ADA facilities that have been made compliant with the 1991 Standards to the extent "readily achievable" or, in the case of alterations, "to the maximum extent feasible," but that are not in full compliance with the 1991 Standards.

The final rule retains the safe harbor for required elements of a path of travel to altered primary function areas for private entities that already have complied with the 1991 Standards with respect to those required elements. As discussed with respect to § 36.304, the Department believes that this safe harbor strikes an appropriate balance between ensuring that individuals with disabilities are provided access to buildings and facilities and mitigating potential financial burdens on existing places of public accommodation that are undertaking alterations subject to the 2010 Standards. This safe harbor is not a blanket exemption for facilities. If a private entity undertakes an alteration to a primary function area, only the required elements of a path of travel to that area that already comply with the 1991 Standards are subject to the safe harbor. If a private entity undertakes an alteration to a primary function area and the required

elements of a path of travel to the altered area do not comply with the 1991 Standards, then the private entity must bring those elements into compliance with the 2010 Standards.

Section 36.405 Alterations: Historic Preservation

In the 1991 rule, the Department provided guidance on making alterations to buildings or facilities that are eligible for listing in the National Register of Historic Places under the National Historic Preservation Act or that are designated as historic under State or local law. That provision referenced the 1991 Standards. Because those cross-references to the 1991 Standards are no longer applicable, it is necessary in this final rule to provide new regulatory text. No substantive change in the Department's approach in this area is intended by this revision.

Section 36.406 Standards for New Construction and Alterations

Applicable standards. Section 306 of the ADA, 42 U.S.C. 12186, directs the Attorney General to issue regulations to implement title III that are consistent with the guidelines published by the Access Board. As described in greater detail elsewhere in this Appendix, the Department is a statutory member of the Access Board and was involved significantly in the development of the 2004 ADAAG. Nonetheless, the Department has reviewed the standards and has determined that additional regulatory provisions are necessary to clarify how the Department will apply the 2010 Standards to places of lodging, social service center establishments, housing at a place of education, assembly areas, and medical care facilities. Those provisions are contained in § 36.406(c)–(g). Each of these provisions is discussed below.

Section 36.406(a) adopts the 2004 ADAAG as part of the 2010 Standards and establishes the compliance date and triggering events for the application of those standards to both new construction and alterations. Appendix B of this final rule (Analysis and Commentary on the 2010 ADA Standards for Accessible Design) provides a description of the major changes in the 2010 Standards (as compared to the 1991 ADAAG) and a discussion of the public comments that the Department received on specific sections of the 2004 ADAAG. A number of commenters asked the Department to revise certain provisions in the 2004 ADAAG in a manner that would reduce either the required scoping or specific technical accessibility requirements. As previously stated, the ADA requires the Department to adopt standards consistent with the guidelines adopted by the Access Board. The Department will not adopt any standards that provide less accessibility than is provided under the guidelines contained in the 2004 ADAAG because the guidelines adopted by the Access Board are "minimum guidelines." 42 U.S.C. 12186(c).

In the NPRM, the Department specifically proposed amending § 36.406(a) by dividing it into two sections. Proposed § 36.406(a)(1) specified that new construction and alterations subject to this part shall comply with the 1991 Standards if physical construction of the property commences less than six months after the effective date of the rule. Proposed § 36.406(a)(2) specified that new construction and alterations subject to this part shall comply with the proposed standards if physical construction of the property commences six months or more after the effective date of the rule. The Department also proposed deleting the advisory information now published in a table at § 36.406(b).

Compliance date. When the ADA was enacted, the compliance dates for various provisions were delayed in order to provide time for covered entities to become familiar with their new obligations. Titles II and III of the ADA generally became effective on January 26, 1992, six months after the regulations were published. *See* 42 U.S.C. 12131 note; 42 U.S.C. 12181 note. New construction under title II and alterations under either title II or title III had to comply with the design standards on that date. *See* 42 U.S.C. 12131 note; 42 U.S.C. 12183(a)(2). For new construction under title III, the requirements applied to facilities designed and constructed for first occupancy after January 26, 1993—18 months after the 1991 Standards were published by the Department. *See* 42 U.S.C. 12183(a)(1).

The Department received numerous comments on the issue of effective date, many of them similar to those received in response to the ANPRM. A substantial number of commenters advocated a minimum of 18 months from publication of the final rule to the effective date for application of the standards to new construction, consistent with the time period used for implementation of the 1991 Standards. Many of these commenters argued that the 18-month period was necessary to minimize the likelihood of having to redesign projects already in the design and permitting stages at the time that the final rule is published. According to these commenters, large projects take several years from design to occupancy, and can be subject to delays from obtaining zoning, site approval, third-party design approval (*i.e.,* architectural review), and governmental permits. To the extent the new standards necessitate changes in any previous submissions or permits already issued, businesses might have to expend significant funds and incur delays due to redesign and resubmission.

Some commenters also expressed concern that a six-month period would be hard to implement given that many renovations are planned around retail selling periods, holidays, and other seasonal concerns. For example, hotels plan renovations during their slow periods, retail establishments avoid renovations during the major holiday selling periods, and businesses in certain parts of the country cannot do any major construction during parts of the winter.

Some commenters argued that chain establishments need additional time to redesign their "master facility" designs for replication at multiple locations, taking into account both the new standards and applicable State and local accessibility requirements.

Other commenters argued for extending the effective date from six months to a minimum of 12 months for many of the same reasons, and one commenter argued that there should be a tolling of the effective date for those businesses that are in the midst of the permitting process if the necessary permits are delayed due to legal challenges or other circumstances outside the business's control.

Several commenters took issue with the Department's characterization of the 2004 ADAAG and the 1991 Standards as two similar rules. These commenters argued that many provisions in the 2004 ADAAG represent a "substantial and significant" departure from the 1991 Standards and that it will take a great deal of time and money to identify all the changes and implement them. In particular, they were concerned that small businesses lacked the internal resources to respond quickly to the new changes and that they would have to hire outside experts to assist them. One commenter expressed concern that regardless of familiarity with the 2004 ADAAG, since the 2004 ADAAG standards are organized in an entirely different manner from the 1991 Standards, and contain, in the commenter's view, extensive changes, it will make the shift from the old to the new standards quite complicated.

Several commenters also took issue with the Department's proffered rationale that by adopting a six-month effective date, the Department was following the precedent of other Federal agencies that have adopted the 2004 ADAAG for facilities whose accessibility they regulate. These commenters argued that the Department's title III regulation applies to a much broader range and number of facilities and programs than the other Federal agencies (*i.e.,* Department of Transportation and the General Services Administration) and that those agencies regulate accessibility primarily in either governmental facilities or facilities operated by quasi-governmental authorities.

Several commenters representing the travel, vacation, and golf industries argued that the Department should adopt a two-year effective date for new construction. In addition to many of the arguments made by commenters in support of an 18-month effective date, these commenters also argued that a two-year time frame would allow States with DOJ-certified building codes to have the time to amend their codes to meet the 2004 ADAAG so that design professionals can work from compatible codes and standards.

Several commenters recommended treating alterations differently than new construction, arguing for a one-year effective date for alterations. Another commenter representing building officials argued that a minimum of a six-month phase-in for alterations was sufficient, since a very large percentage of alteration projects "are of a scale that they should be able to accommodate the phase-in."

In contrast, many commenters argued that the proposed six-month effective date should be retained in the final rule.

The Department has been persuaded by concerns raised by some of the commenters that the six month compliance date proposed in the NPRM for application of the 2010 Standards may be too short for certain projects that are already in the midst of the

design and permitting process. The Department has determined that for new construction and alterations, compliance with the 2010 Standards will not be required until 18 months from the date the final rule is published. This is consistent with the amount of time given when the 1991 regulation was published. Since many State and local building codes contain provisions that are consistent with 2004 ADAAG, the Department has decided that public accommodations that choose to comply with the 2010 Standards as defined in § 36.104 before the compliance date will still be considered in compliance with the ADA. However, public accommodations that choose to comply with the 2010 Standards in lieu of the 1991 Standards prior to the compliance date described in this rule must choose one or the other standard, and may not rely on some of the requirements contained in one standard and some of the requirements contained in the other standard.

Triggering event. In the NPRM, the Department proposed using the start of physical construction as the triggering event for applying the proposed standards to new construction under title III. This triggering event parallels that for the alterations provisions (*i.e.,* the date on which construction begins), and would apply clearly across all types of covered public accommodations. The Department also proposed that for prefabricated elements, such as modular buildings and amusement park rides and attractions, or installed equipment, such as ATMs, the start of construction means the date on which the site preparation begins. Site preparation includes providing an accessible route to the element.

The Department's NPRM sought public comment on how to define the start of construction and the practicality of applying commencement of construction as a triggering event. The Department also requested input on whether the proposed definition of the start of construction was sufficiently clear and inclusive of different types of facilities. The Department also sought input about facilities subject to title III for which commencement of construction would be ambiguous or problematic.

The Department received numerous comments recommending that the Department adopt a two-pronged approach to defining the triggering event. In those cases where permits are required, the Department should use "date of permit application" as the effective date triggering event, and if no permit is required, the Department should use "start of construction." A number of these commenters argued that the date of permit application is appropriate because the applicant would have to consider the applicable State and Federal accessibility standards in order to submit the designs usually required with the application. Moreover, the date of permit application is a typical triggering event in other code contexts, such as when jurisdictions introduce an updated building code. Some commenters expressed concern that using the date of "start of construction" was problematic because the date can be affected by factors that are outside the control of the owner. For example, an owner can plan construction to start before the new standards take effect and therefore use the 1991 Standards in the design. If permits are not issued in a timely manner, then the construction could be delayed until after the effective date, and then the project would have to be redesigned. This problem would be avoided if the permit application date was the triggering event. Two commenters expressed concern that the term "start of construction" is ambiguous, because it is unclear whether start of construction means the razing of structures on the site to make way for a new facility or means site preparation, such as regrading or laying the foundation.

One commenter recommended using the "signing date of a construction contract," and an additional commenter recommended that the new standards apply only to "buildings permitted after the effective date of the regulations."

One commenter stated that for facilities that fall outside the building permit requirements (ATMs, prefabricated saunas, small sheds), the triggering event should be the date of installation, rather than the date the space for the facility is constructed.

The Department is persuaded by the comments to adopt a two-pronged approach to defining the triggering event for new construction and alterations. The final rule states that in those cases where permits are required, the triggering event shall be the date when the last application for a building permit application or permit extension is certified to be complete by a State, county, or local government, or in those jurisdictions where the government does not certify completion of applications, the date when the last application for a building permit or permit extension is received by the State, county, or local government. If no permits are required, then the triggering event shall be the "start of physical construction or alterations." The Department has also added clarifying language related to the term "start of physical construction or alterations" to make it clear that "start of physical construction or alterations" is not intended to mean the date of ceremonial groundbreaking or the date a structure is razed to make it possible for construction of a facility to take place.

Amusement rides. Section 234 of the 2010 Standards provides accessibility guidelines for newly designed and constructed amusement rides. The amusement ride provisions do not provide a "triggering event" for new construction or alteration of an amusement ride. An industry commenter requested that the triggering event of "first use" as noted in the Advisory note to section 234.1 of the 2004 ADAAG be included in the final rule. The Advisory note provides that "[a] custom designed and constructed ride is new upon its first use, which is the first time amusement park patrons take the ride." The Department declines to treat amusement rides differently than other types of new construction and alterations and under the final rule, they are subject to § 36.406(a)(3). Thus, newly constructed and altered amusement rides shall comply with the 2010 Standards if the start of physical construction or the alteration is on or after 18 months from the publication date of this rule. The Department also notes that section 234.4.2 of the 2010 Standards only applies where the structural or operational characteristics of an amusement ride are altered. It does not apply in cases where the only change to a ride is the theme.

Noncomplying new construction and alterations. The element-by-element safe harbor referenced in § 36.304(d)(2) has no effect on new or altered elements in existing facilities that were subject to the 1991 Standards on the date that they were constructed or altered, but do not comply with the technical and scoping specifications for those elements in the 1991 Standards. Section 36.406(a)(5) of the final rule sets forth the rules for noncompliant new construction or alterations in facilities that were subject to the requirements of this part. Under those provisions, noncomplying new construction and alterations constructed or altered after the effective date of the applicable ADA requirements and before March 15, 2012 shall, before March 15, 2012, be made accessible in accordance with either the 1991 Standards or the 2010 Standards. Noncomplying new construction and alterations constructed or altered after the effective date of the applicable ADA requirements and before March 15, 2012, shall, on or after March 15, 2012, be made accessible in accordance with the 2010 Standards.

Section 36.406(b) Application of Standards to Fixed Elements

The final rule contains a new § 36.406(b) that clarifies that the requirements established by this section, including those contained in the 2004 ADAAG, prescribe the requirements necessary to ensure that fixed or built-in elements in new or altered facilities are accessible to individuals with disabilities. Once the construction or alteration of a facility has been completed, all other aspects of programs, services, and activities conducted in that facility are subject to the operational requirements established elsewhere in this final rule. Although the Department has often chosen to use the requirements of the 1991 Standards as a guide to determining when and how to make equipment and furnishings accessible, those coverage determinations fall within the discretionary authority of the Department.

The Department is also clarifying that the advisory notes, appendix notes, and figures that accompany the 1991 and 2010 Standards do not establish separately enforceable requirements unless otherwise specified in the text of the standards. This clarification has been made to address concerns expressed by ANPRM commenters who mistakenly believed that the advisory notes in the 2004 ADAAG established requirements beyond those established in the text of the guidelines (*e.g.,* Advisory 504.4 suggests, but does not require, that covered entities provide visual contrast on stair tread nosings to make them more visible to individuals with low vision). The Department received no comments on this provision in the NPRM.

Section 36.406(c) Places of Lodging

In the NPRM, the Department proposed a new definition for public accommodations that are "places of lodging" and a new § 36.406(c) to clarify the scope of coverage for places of public accommodation that meet this definition. For many years the Department has received inquiries from members of the public seeking clarification of ADA coverage of rental accommodations in timeshares, condominium hotels, and mixed-use and corporate hotel facilities that operate as places of public accommodation (as that term is now defined in § 36.104). These facilities, which have attributes of both residential dwellings and transient lodging facilities, have become increasingly popular since the ADA's enactment in 1990 and make up the majority of new hotel construction in some vacation destinations. The hybrid residential and lodging characteristics of these new types of facilities, as well as their ownership characteristics, complicate determinations of ADA coverage, prompting questions from both industry and individuals with disabilities. While the Department has interpreted the ADA to encompass these hotel-like facilities when they are used to provide transient lodging, the regulation previously has specifically not addressed them. In the NPRM, the Department proposed a new § 36.406(c), entitled "Places of Lodging," which was intended to clarify that places of lodging, including certain timeshares, condominium hotels, and mixed-use and corporate hotel facilities, shall comply with the provisions of the proposed standards, including, but not limited to, the requirements for transient lodging in sections 224 and 806 of the 2004 ADAAG.

The Department's NPRM sought public input on this proposal. The Department received a substantial number of comments on these issues from industry representatives, advocates for persons with disabilities, and individuals. A significant focus of these comments was on how the Department should define and regulate vacation rental units in timeshares, vacation communities, and condo-hotels where the units are owned and controlled by individual owners and rented out some portion of time to the public, as compared to traditional hotels and motels that are owned, controlled, and rented to the public by one entity.

Scoping and technical requirements applicable to "places of lodging." In the NPRM, the Department asked for public comment on its proposal in § 36.406(c) to apply to places of lodging the scoping and technical requirements for transient lodging, rather than the scoping and technical requirements for residential dwelling units.

Commenters generally agreed that the transient lodging requirements should apply to places of lodging. Several commenters stated that the determination as to which requirements apply should be made based on the intention for use at the time of design and construction. According to these commenters, if units are intended for transient rentals, then the transient lodging standards should apply, and if they are intended to be used for residential purposes, the residential standards should apply. Some commenters agreed with the application of transient lodging standards to places of lodging in general, but disagreed about the characterization of certain types of facilities as covered places of lodging.

The Department agrees that the scoping and technical standards applicable to transient lodging should apply to facilities that contain units that meet the definition of "places of lodging."

Scoping for timeshare or condominium hotels. In the NPRM, the Department sought comment on the appropriate basis for determining scoping for a timeshare or condominium-hotel. A number of commenters indicated that scoping should be based on the usage of the facility. Only those units used for short-term stays should be counted for application of the transient lodging standards, while units sold as residential properties should be treated as residential units not subject to the ADA. One commenter stated that scoping should be based on the maximum number of sleeping units available for public rental. Another commenter pointed out that unlike traditional hotels and motels, the number of units available for rental in a facility or development containing individually owned units is not fixed over time. Owners have the right to participate in a public rental program some, all, or none of the time, and individual owner participation changes from year to year.

The Department believes that the determination for scoping should be based on the number of units in the project that are designed and constructed with the intention that their owners may participate in a transient lodging rental program. The Department cautions that it is not the number of owners that actually exercise their right to participate in the program that determines the scoping. Rather it is the units that could be placed into an on-site or off-site transient lodging rental program. In the final rule, the Department has added a provision to § 36.406(c)(3), which states that units intended to be used exclusively for residential purposes that are contained in facilities that also meet the definition of place of lodging are not covered by the transient lodging standards. Title III of the ADA does not apply to units designed and constructed with the intention that they be rented or sold as exclusively residential units. Such units are covered by the Fair Housing Act (FHAct), which contains requirements for certain features of accessible and adaptable design both for units and for public and common use areas. All units designed and constructed with the intention that they may be used for both residential and transient lodging purposes are covered by the ADA and must be counted for determining the required number of units that must meet the transient lodging standards in the 2010 Standards. Public use and common use areas in facilities containing units subject to the ADA also must meet the 2010 Standards. In some developments, units that may serve as residential units some of the time and rental units some of the time will have to meet both the FHAct and the ADA requirements. For example, all of the units in a vacation condominium facility whose owners choose to rent to the public when they are not using the units themselves would be counted for the purposes of determining the appropriate number of units that must comply with the 2010 Standards. In a newly constructed condominium that has three floors with units dedicated to be sold solely as residential housing and three floors with units that may be used as residences or hotel units, only the units on the three latter floors would be counted for applying the 2010 Standards. In a newly constructed timeshare development containing 100 units, all of which may be made available to the public through an exchange or rental program, all 100 units would be counted for purposes of applying the 2010 Standards.

One commenter also asked the Department for clarification of how to count individually owned "lock-off units." Lock-off units are units that are multi-bedroom but can be "locked off" into two separate units, each having individual external access. This commenter requested that the Department state in the final rule that individually owned lock-off units do not constitute multiple guest rooms for purposes of calculating compliance with the scoping requirements for accessible units, since for the most part the lock-off units are used as part of a larger accessible unit, and portions of a unit not locked off would constitute both an accessible one-bedroom unit or an accessible two-bedroom unit with the lock-off unit.

It is the Department's view that lock-off units that are individually owned that can be temporarily converted into two units do not constitute two separate guest rooms for purposes of calculating compliance with the scoping requirements.

One commenter asked the Department how developers should scope units where buildings are constructed in phases over a span of years, recommending that the scoping be based on the total number of units expected to be constructed at the project and not on a building-by-building basis or on a phase-by-phase basis. The Department does not think scoping should be based on planned number of units, which may or may not be actually constructed over a period of years. However, the Department recognizes that resort developments may contain buildings and facilities that are of all sizes from single-unit cottages to facilities with hundreds of units. The Department believes it would be appropriate to allow designers, builders, and developers to aggregate the units in facilities with 50 or fewer units that are subject to a single permit application and that are on a common site or that are constructed at the same time for the purposes of applying the scoping requirements in table 224.2. Facilities with more than 50 units should be scoped individually in accordance with the table. The regulation has been revised to reflect this application of the scoping requirements.

One commenter also asked the Department to use the title III regulation to declare that timeshares subject to the transient lodging standards are exempt from the design and construction requirements of the FHAct. The coverage of the FHAct is set by Congress and interpreted by regulations issued by the Department of Housing and Urban

Development. The Department has no authority to exempt anyone from coverage of the FHAct.

Application of ADA to places of lodging that contain individually owned units. The Department believes that regardless of ownership structure for individual units, rental programs (whether they are on- or off-site) that make transient lodging guest rooms available to the public must comply with the general nondiscrimination requirements of the ADA. In addition, as provided in § 36.406(c), newly constructed facilities that contain accommodations intended to be used for transient lodging purposes must comply with the 2010 Standards.

In the NPRM, the Department asked for public comment on several issues related to ensuring the availability of accessible units in a rental program operated by a place of lodging. The Department sought input on how it could address a situation in which a new or converted facility constructs the required number of accessible units, but the owners of those units choose not to participate in the rental program; whether the facility has an obligation to encourage or require owners of accessible units to participate in the rental program; and whether the facility developer, the condominium association, or the hotel operator has an obligation to retain ownership or control over a certain number of accessible units to avoid this problem.

In the NPRM, the Department sought public input on how to regulate scoping for a timeshare or condominium-rental facility that decides, after the sale of units to individual owners, to begin a rental program that qualifies the facility as a place of lodging, and how the condominium association, operator, or developer should determine which units to make accessible.

A number of commenters expressed concerns about the ability of the Department to require owners of accessible units to participate in the rental program, to require developers, condo associations, or homeowners associations to retain ownership of accessible units, and to impose accessibility requirements on individual owners who choose to place inaccessible units into a rental program after purchase. These commenters stated that individuals who purchase accessible vacation units in condominiums, individual vacation homes, and timeshares have ownership rights in their units and may choose lawfully to make their units available to the public some, all, or none of the time. Commenters advised the Department that the Securities and Exchange Commission takes the position that if condominium units are offered in connection with participation in a required rental program for any part of the year, require the use of an exclusive rental agent, or impose conditions otherwise restricting the occupancy or rental of the unit, then that offering will be viewed as an offering of securities in the form of an investment (rather than a real estate offering). SEC Release No. 33–5347, Guidelines as to the Applicability of the Federal Securities Laws to Offers and Sales of Condominiums or Units in a Real Estate Development (Jan. 4, 1973). Consequently, most condominium developers do not impose such restrictions at the time of sale. Moreover, owners who choose to rent their units as a short-term vacation rental can select any rental or management company to lease and manage their unit, or they may rent them out on their own. They also may choose never to lease those units. Thus, there are no guarantees that at any particular time, accessible units will be available for rental by the public. According to this commenter, providing incentives for owners of accessible units to place their units in the rental program will not work, because it does not guarantee the availability of the requisite number of rooms dispersed across the development, and there is not any reasonable, identifiable source of funds to cover the costs of such incentives.

A number of commenters also indicated that it potentially is discriminatory as well as economically infeasible to require that a developer hold back the accessible units so that the units can be maintained in the rental program year-round. One commenter pointed out that if a developer did not sell the accessible condominiums or timeshares in the building inventory, the developer would be subject to a potential ADA or FHAct complaint because persons with disabilities who wanted to buy accessible units rather than rent them each year would not have the option to purchase them. In addition, if a developer held back accessible units, the cost of those units would have to be spread across all the buyers of the inaccessible units, and in many cases would make the project financially infeasible. This would be especially true for smaller projects. Finally, this commenter argued that requiring units to be part of the common elements that are owned by all of the individual unit owners is infeasible because the common ownership would result in pooled rental income, which would transform the owners into participants in a rental pool, and thus turn the sale of the condominiums into the sale of securities under SEC Release 33–5347.

Several commenters noted that requiring the operator of the rental program to own the accessible units is not feasible either because the operator of the rental program would have to have the funds to invest in the purchase of all of the accessible units, and it would not have a means of recouping its investment. One commenter stated that in Texas, it is illegal for on-site rental programs to own condominium units. Another commenter noted that such a requirement might lead to the loss of on-site rental programs, leaving owners to use individual third-party brokers, or rent the units privately. One commenter acknowledged that individual owners cannot be required to place their units in a rental pool simply to offer an accessible unit to the public, since the owners may be purchasing units for their own use. However, this commenter recommended that owners who choose to place their units in a rental pool be required to contribute to a fund that would be used to renovate units that are placed in the rental pool to increase the availability of accessible units. One commenter argued that the legal entity running the place of lodging has an obligation to retain control over the required number of accessible units to ensure that they are available in accordance with title III.

A number of commenters also argued that the Department has no legal authority to require individual owners to engage in barrier removal where an existing development adds a rental program. One commenter stated that Texas law prohibits the operator of on-site rental program from demanding that alterations be made to a particular unit. In addition, under Texas law, condominium declarations may not require some units and not others to make changes, because that would lead to unequal treatment of units and owners, which is not permissible.

One commenter stated that since it was not possible for operators of rental programs offering privately owned condominiums to comply with accessible scoping, the Department should create exemptions from the accessible scoping, especially for existing facilities. In addition, this commenter stated that if an operator of an on-site rental program were to require renovations as a condition of participation in the rental program, unit owners might just rent their units through a different broker or on their own, in which case such requirements would not apply.

A number of commenters argued that if a development decides to create a rental program, it must provide accessible units. Otherwise the development would have to ensure that units are retrofitted. A commenter argued that if an existing building is being converted, the Department should require that if alterations of the units are performed by an owner or developer prior to sale of the units, then the alterations requirements should apply, in order to ensure that there are some accessible units in the rental pool. This commenter stated that because of the proliferation of these type of developments in Hawaii, mandatory alteration is the only way to guarantee the availability of accessible units in the long run. In this commenter's view, since conversions almost always require makeover of existing buildings, this will not lead to a significant expense.

The Department agrees with the commenters that it would not be feasible to require developers to hold back or purchase accessible units for the purposes of making them available to the public in a transient lodging rental program, nor would it be feasible to require individual owners of accessible units to participate in transient lodging rental programs.

The Department recognizes that places of lodging are developed and financed under myriad ownership and management structures and agrees that there will be circumstances where there are legal barriers to requiring compliance with either the alterations requirements or the requirements related to barrier removal. The Department has added an exception to § 36.406(c), providing that in existing facilities that meet the definition of places of lodging, where the guest rooms are not owned or substantially controlled by the entity that owns, leases, or operates the overall facility and the physical features of the guest room interiors are controlled by their individual owners, the units are not subject to the alterations requirement, even where the owner rents the

unit out to the public through a transient lodging rental program. In addition, the Department has added an exception to the barrier removal requirements at § 36.304(g) providing that in existing facilities that meet the definition of places of lodging, where the guest rooms are not owned or substantially controlled by the entity that owns, leases, or operates the overall facility and the physical features of the guest room interiors are controlled by their individual owners, the units are not subject to the barrier removal requirement. The Department notes, however, that there are legal relationships for some timeshares and cooperatives where the ownership interests do not convey control over the physical features of units. In those cases, it may be the case that the facility has an obligation to meet the alterations or barrier removal requirements or to maintain accessible features.

Section 36.406(d) Social Service Center Establishments

In the NPRM, the Department proposed a new § 36.406(d) requiring group homes, halfway houses, shelters, or similar social service center establishments that provide temporary sleeping accommodations or residential dwelling units to comply with the provisions of the 2004 ADAAG that apply to residential facilities, including, but not limited to, the provisions in sections 233 and 809.

The NPRM explained that this proposal was based on two important changes in the 2004 ADAAG. First, for the first time, residential dwelling units are explicitly covered in the 2004 ADAAG in section 233. Second, the 2004 ADAAG eliminates the language contained in the 1991 Standards addressing scoping and technical requirements for homeless shelters, group homes, and similar social service center establishments. Currently, such establishments are covered in section 9.5 of the transient lodging section of the 1991 Standards. The deletion of section 9.5 creates an ambiguity of coverage that must be addressed.

The NPRM explained the Department's belief that transferring coverage of social service center establishments from the transient lodging standards to the residential facilities standards would alleviate conflicting requirements for social service providers. The Department believes that a substantial percentage of social service providers are recipients of Federal financial assistance from the Department of Housing and Urban Development (HUD). The Department of Health and Human Services (HHS) also provides financial assistance for the operation of shelters through the Administration for Children and Families programs. As such, they are covered both by the ADA and section 504. UFAS is currently the design standard for new construction and alterations for entities subject to section 504. The two design standards for accessibility—the 1991 Standards and UFAS—have confronted many social service providers with separate, and sometimes conflicting, requirements for design and construction of facilities. To resolve these conflicts, the residential facilities standards in the 2004 ADAAG have been coordinated with the section 504 requirements. The transient lodging standards, however, are not similarly coordinated. The deletion of section 9.5 of the 1991 Standards from the 2004 ADAAG presented two options: (1) Require coverage under the transient lodging standards, and subject such facilities to separate, conflicting requirements for design and construction; or (2) require coverage under the residential facilities standards, which would harmonizes the regulatory requirements under the ADA and section 504. The Department chose the option that harmonizes the regulatory requirements: coverage under the residential facilities standards.

In the NPRM, the Department expressed concern that the residential facilities standards do not include a requirement for clear floor space next to beds similar to the requirement in the transient lodging standards; as a result, the Department proposed adding a provision that would require certain social service center establishments that provide sleeping rooms with more than 25 beds to ensure that a minimum of 5 percent of the beds have clear floor space in accordance with section 806.2.3 of the 2004 ADAAG.

The Department requested information from providers who operate homeless shelters, transient group homes, halfway houses, and other social service center establishments, and from the clients of these facilities who would be affected by this proposed change. In the NPRM, the Department asked to what extent conflicts between the ADA and section 504 have affected these facilities and what the effect would be of applying the residential dwelling unit requirements to these facilities, rather than the requirements for transient lodging guest rooms.

Many of the commenters supported applying the residential facilities requirements to social service center establishments stating that even though the residential facilities requirements are less demanding, in some instances, the existence of one clear standard will result in an overall increased level of accessibility by eliminating the confusion and inaction that are sometimes caused by the current existence of multiple requirements. One commenter stated that the residential facilities guidelines were more appropriate because individuals housed in social service center establishments typically stay for a prolonged period of time, and guests of a transient lodging facility typically are not housed to participate in a program or receive services.

One commenter opposed to the proposed section argued for the application of the transient lodging standards to all social service center establishments except those that were "intended as a person's place of abode," referencing the Department's question related to the definition of place of lodging in the title III NPRM. A second commenter stated that the use of transient lodging guidelines would lead to greater accessibility.

The Department continues to be concerned about alleviating the challenges for social service providers that are also subject to section 504 and that would likely be subject to conflicting requirements if the transient lodging standard were applied. Thus, the Department has retained the requirement that social service center establishments comply with the residential dwelling standards. The Department did not receive comments regarding adding a requirement for bathing options, such as a roll-in shower, in social service center establishments operated by public accommodations. The Department did, however, receive comments in support of adding such a requirement regarding public entities under title II. The Department believes that social service center establishments that provide emergency shelter to large transient populations should be able to provide bathing facilities that are accessible to persons with mobility disabilities who need roll-in showers. Because of the transient nature of the population of these large shelters, it will not be feasible to modify bathing facilities in a timely manner when faced with a need to provide a roll-in shower with a seat when requested by an overnight visitor. As a result, the Department has added a requirement that social service center establishments with sleeping accommodations for more than 50 individuals must provide at least one roll-in shower with a seat that complies with the relevant provisions of section 608 of the 2010 Standards. Transfer-type showers are not permitted in lieu of a roll-in shower with a seat, and the exceptions in sections 608.3 and 608.4 for residential dwelling units are not permitted. When separate shower facilities are provided for men and for women, at least one roll-in shower must be provided for each group. This supplemental requirement to the residential facilities standards is in addition to the supplemental requirement that was proposed in the NPRM for clear floor space in sleeping rooms with more than 25 beds.

The Department also notes that while dwelling units at some social service center establishments are also subject to FHAct design and construction requirements that require certain features of adaptable and accessible design, FHAct units do not provide the same level of accessibility that is required for residential facilities under the 2010 Standards. The FHAct requirements, where also applicable, should not be considered a substitute for the 2010 Standards. Rather, the 2010 Standards must be followed in addition to the FHAct requirements.

The Department also notes that while in the NPRM the Department used the term "social service establishment," the final rule uses the term "social service center establishment." The Department has made this editorial change so that the final rule is consistent with the terminology used in the ADA. *See* 42 U.S.C. 12181(7)(K).

Section 36.406(e) Housing at a Place of Education

The Department of Justice and the Department of Education share responsibility for regulation and enforcement of the ADA in postsecondary educational settings, including architectural features. Housing types in educational settings range from traditional residence halls and dormitories to apartment or townhouse-style residences. In

addition to title III of the ADA, universities and schools that are recipients of Federal financial assistance also are subject to section 504, which contains its own accessibility requirements currently through the application of UFAS. Residential housing, including housing in an educational setting, is also covered by the FHAct, which requires newly constructed multifamily housing to include certain features of accessible and adaptable design. Covered entities subject to the ADA must always be aware of, and comply with, any other Federal statutes or regulations that govern the operation of residential properties.

Although the 1991 Standards mention dormitories as a form of transient lodging, they do not specifically address how the ADA applies to dormitories and other types of residential housing provided in an educational setting. The 1991 Standards also do not contain any specific provisions for residential facilities, allowing covered entities to elect to follow the residential standards contained in UFAS. Although the 2004 ADAAG contains provisions for both residential facilities and transient lodging, the guidelines do not indicate which requirements apply to housing provided in an educational setting, leaving it to the adopting agencies to make that choice. After evaluating both sets of standards, the Department concluded that the benefits of applying the transient lodging standards outweighed the benefits of applying the residential facilities standards. Consequently, in the NPRM, the Department proposed a new § 36.406(e) that provided that residence halls or dormitories operated by or on behalf of places of education shall comply with the provisions of the proposed standards for transient lodging, including, but not limited to, the provisions in sections 224 and 806 of the 2004 ADAAG.

Private universities and schools covered by title III as public accommodations are required to make their programs and activities accessible to persons with disabilities. The housing facilities that they provide have varied characteristics. College and university housing facilities typically provide housing for up to one academic year, but may be closed during school vacation periods. In the summer, they often are used for short-term stays of one to three days, a week, or several months. Graduate and faculty housing often is provided year-round in the form of apartments, which may serve individuals or families with children. These housing facilities are diverse in their layout. Some are double-occupancy rooms with a shared toilet and bathing room, which may be inside or outside the unit. Others may contain cluster, suite, or group arrangements where several rooms are located inside a defined unit with bathing, kitchen, and similar common facilities. In some cases, these suites are indistinguishable in features from traditional apartments. Universities may build their own housing facilities or enter into agreements with private developers to build, own, or lease housing to the educational institution or to its students. Academic housing may be located on the campus of the university or may be located in nearby neighborhoods.

Throughout the school year and the summer, academic housing can become program areas in which small groups meet, receptions and educational sessions are held, and social activities occur. The ability to move between rooms—both accessible rooms and standard rooms—in order to socialize, to study, and to use all public use and common use areas is an essential part of having access to these educational programs and activities. Academic housing also is used for short-term transient educational programs during the time students are not in regular residence and may be rented out to transient visitors in a manner similar to a hotel for special university functions.

The Department was concerned that applying the new construction requirements for residential facilities to educational housing facilities could hinder access to educational programs for students with disabilities. Elevators generally are not required under the 2004 ADAAG residential facilities standards unless they are needed to provide an accessible route from accessible units to public use and common use areas, while under the 2004 ADAAG as it applies to other types of facilities, multistory private facilities must have elevators unless they meet very specific exceptions. In addition, the residential facilities standards do not require accessible roll-in showers in bathrooms, while the transient lodging requirements require some of the accessible units to be served by bathrooms with roll-in showers. The transient lodging standards also require that a greater number of units have accessible features for persons with communication disabilities. The transient lodging standards provide for installation of the required accessible features so that they are available immediately, but the residential facilities standards allow for certain features of the unit to be adaptable. For example, only reinforcements for grab bars need to be provided in residential dwellings, but the actual grab bars must be installed under the transient lodging standards. By contrast, the residential facilities standards do require certain features that provide greater accessibility within units, such as usable kitchens and an accessible route throughout the dwelling. The residential facilities standards also require 5 percent of the units to be accessible to persons with mobility disabilities, which is a continuation of the same scoping that is currently required under UFAS and is therefore applicable to any educational institution that is covered by section 504. The transient lodging standards require a lower percentage of accessible sleeping rooms for facilities with large numbers of rooms than is required by UFAS. For example, if a dormitory has 150 rooms, the transient lodging standards would require 7 accessible rooms, while the residential standards would require 8. In a large dormitory with 500 rooms, the transient lodging standards would require 13 accessible rooms, and the residential facilities standards would require 25. There are other differences between the two sets of standards, including requirements for accessible windows, alterations, kitchens, an accessible route throughout a unit, and clear floor space in bathrooms allowing for a side transfer.

In the NPRM, the Department requested public comment on how to scope educational housing facilities, and it asked whether the residential facilities requirements or the transient lodging requirements in the 2004 ADAAG would be more appropriate for housing at places of education and asked how the different requirements would affect the cost of building new dormitories and other student housing. *See* 73 FR 34508, 34545 (June 17, 2008).

The Department received several comments on this issue under title III. One commenter stated that the Department should adopt the residential facilities standards for housing at a place of education. In the commenter's view, the residential facilities standards are congruent with overlapping requirements imposed by HUD, and the residential facilities requirements would ensure dispersion of accessible features more effectively. This commenter also argued that while the increased number of required accessible units for residential facilities as compared to transient lodging may increase the cost of construction or alteration, this cost would be offset by a reduced need later to adapt rooms if the demand for accessible rooms exceeds the supply. The commenter also encouraged the Department to impose a visitability (accessible doorways and necessary clear floor space for turning radius) requirement for both the residential facilities and transient lodging requirements to allow students with mobility impairments to interact and socialize in a fully integrated fashion. Another commenter stated that while dormitories should be treated like residences as opposed to transient lodging, the Department should ensure that "all floors are accessible," thus ensuring community integration and visitability. Another commenter argued that housing at a place of education is comparable to residential housing, and that most of the housing types used by schools do not have the same amenities and services or function like transient lodging and should not be treated as such.

Several commenters focused on the length of stay at this type of housing and suggested that if the facilities are subject to occupancy for greater than 30 days, the residential standards should apply. Another commenter supported the Department's adoption of the transient lodging standards, arguing this will provide greater accessibility and therefore increase opportunities for students with disabilities to participate. One commenter, while supporting the use of transient lodging standards in this area, argued that the Department also should develop regulations relating to the usability of equipment in housing facilities by persons who are blind or visually impaired. Another commenter argued that the Department should not impose the transient lodging requirements on K–12 schools because the cost of adding elevators can be prohibitive, and because there are safety concerns related to evacuating students in wheelchairs living on floors above the ground floor in emergencies causing elevator failures.

The Department has considered the comments recommending the use of the

residential facilities standards and acknowledges that they require certain features that are not included in the transient lodging standards and that should be required for housing provided at a place of education. In addition, the Department notes that since educational institutions often use their academic housing facilities as short-term transient lodging in the summers, it is important that accessible features be installed at the outset. It is not realistic to expect that the educational institution will be able to adapt a unit in a timely manner in order to provide accessible accommodations to someone attending a one-week program during the summer.

The Department has determined that the best approach to this type of housing is to continue to require the application of transient lodging standards but, at the same time, to add several requirements drawn from the residential facilities standards related to accessible turning spaces and work surfaces in kitchens, and the accessible route throughout the unit. This will ensure the maintenance of the transient lodging standard requirements related to access to all floors of the facility, roll-in showers in facilities with more than 50 sleeping rooms, and other important accessibility features not found in the residential facilities standards, but also will ensure usable kitchens and access to all the rooms in a suite or apartment.

The Department has added a new definition to § 36.104, "Housing at a Place of Education," and has revised § 36.406(e) to reflect the accessible features that now will be required in addition to the requirements set forth under the transient lodging standards. The Department also recognizes that some educational institutions provide some residential housing on a year-round basis to graduate students and staff that is comparable to private rental housing but contains no facilities for educational programming. Section 36.406(e)(3) exempts from the transient lodging standards apartments or townhouse facilities that are provided with a lease on a year-round basis exclusively to graduate students or faculty and that do not contain any public use or common use areas available for educational programming; instead, such housing must comply with the requirements for residential facilities in sections 233 and 809 of the 2010 Standards.

The regulatory text uses the term "sleeping room" in lieu of the term "guest room," which is the term used in the transient lodging standards. The Department is using this term because it believes that for the most part, it provides a better description of the sleeping facilities used in a place of education than "guest room." The final rule states in § 36.406(e) that the Department intends the terms to be used interchangeably in the application of the transient lodging standards to housing at a place of education.

Section 36.406(f) Assembly Areas

In the NPRM, the Department proposed § 36.406(f) to supplement the assembly area requirements of the 2004 ADAAG, which the Department is adopting as part of the 2010 Standards. The NPRM proposed at § 36.406(f)(1) to require wheelchair spaces and companion seating locations to be dispersed to all levels of the facility that are served by an accessible route. The Department received no significant comments on this paragraph and has decided to adopt the proposed language with minor modifications.

Section 36.406(f)(1) ensures that there is greater dispersion of wheelchair spaces and companion seats throughout stadiums, arenas, and grandstands than would otherwise be required by sections 221 and 802 of the 2004 ADAAG. In some cases, the accessible route may not be the same route that other individuals use to reach their seats. For example, if other patrons reach their seats on the field by an inaccessible route (*e.g.,* by stairs), but there is an accessible route that complies with section 206.3 of the 2004 ADAAG that could be connected to seats on the field, wheelchair spaces and companion seats must be placed on the field even if that route is not generally available to the public.

Regulatory language that was included in the 2004 ADAAG advisory, but that did not appear in the NPRM, has been added by the Department in § 36.406(f)(2). Section 36.406(f)(2) now requires an assembly area that has seating encircling, in whole or in part, a field of play or performance area, such as an arena or stadium, to place wheelchair spaces and companion seats around the entire facility. This rule, which is designed to prevent a public accommodation from placing wheelchair spaces and companion seats on one side of the facility only, is consistent with the Department's enforcement practices and reflects its interpretation of section 4.33.3 of the 1991 Standards.

In the NPRM, the Department proposed § 36.406(f)(2), which prohibits wheelchair spaces and companion seating locations from being "located on (or obstructed by) temporary platforms * * *." 73 FR 34508, 34557 (June 17, 2008). Through its enforcement actions, the Department discovered that some venues place wheelchair spaces and companion seats on temporary platforms that, when removed, reveal conventional seating underneath, or cover the wheelchair spaces and companion seats with temporary platforms on top of which they place risers of conventional seating. These platforms cover groups of conventional seats and are used to provide groups of wheelchair seats and companion seats.

Several commenters requested an exception to the prohibition of the use of temporary platforms for public accommodations that sell most of their tickets on a season-ticket or other multi-event basis. Such commenters argued that they should be able to use temporary platforms because they know, in advance, that the patrons sitting in certain areas for the whole season do not need wheelchair spaces and companion seats. The Department declines to adopt such an exception. As it explained in detail in the NPRM, the Department believes that permitting the use of movable platforms that seat four or more wheelchair users and their companions have the potential to reduce the number of available wheelchair seating spaces below the level required, thus reducing the opportunities for persons who need accessible seating to have the same choice of ticket prices and amenities that are available to other patrons in the facility. In addition, use of removable platforms may result in instances where last minute requests for wheelchair and companion seating cannot be met because entire sections of accessible seating will be lost when a platform is removed. *See* 73 FR 34508, 34546 (June 17, 2008). Further, use of temporary platforms allows facilities to limit persons who need accessible seating to certain seating areas, and to relegate accessible seating to less desirable locations. The use of temporary platforms has the effect of neutralizing dispersion and other seating requirements (*e.g.,* line of sight) for wheelchair spaces and companion seats. *Cf. Independent Living Resources* v. *Oregon Arena Corp.,* 1 F. Supp. 2d 1159, 1171 (D. Or. 1998) (holding that while a public accommodation may "infill" wheelchair spaces with removable seats when the wheelchair spaces are not needed to accommodate individuals with disabilities, under certain circumstances "[s]uch a practice might well violate the rule that wheelchair spaces must be dispersed throughout the arena in a manner that is roughly proportionate to the overall distribution of seating"). In addition, using temporary platforms to convert unsold wheelchair spaces to conventional seating undermines the flexibility facilities need to accommodate secondary ticket market exchanges as required by § 36.302(f)(7) of the final rule.

As the Department explained in the NPRM, however, this provision was not designed to prohibit temporary seating that increases seating for events (*e.g.,* placing temporary seating on the floor of a basketball court for a concert). Consequently, the final rule, at § 36.406(f)(3), has been amended to clarify that if an entire seating section is on a temporary platform for a particular event, then wheelchair spaces and companion seats may also be in that seating section. However, adding a temporary platform to create wheelchair spaces and companion seats that are otherwise dissimilar from nearby fixed seating and then simply adding a small number of additional seats to the platform would not qualify as an "entire seating section" on the platform. In addition, § 36.406(f)(3) clarifies that facilities may fill in wheelchair spaces with removable seats when the wheelchair spaces are not needed by persons who use wheelchairs.

The Department has been responsive to assembly areas' concerns about reduced revenues due to unused accessible seating. Accordingly, the Department has reduced scoping requirements significantly—by almost half in large assembly areas—and determined that allowing assembly areas to in-fill unsold wheelchair spaces with readily removable temporary individual seats appropriately balances their economic concerns with the rights of individuals with disabilities. *See* section 221.1 of the 2010 Standards.

For stadium-style movie theaters, in § 36.406(f)(4) of the NPRM the Department

proposed requiring placement of wheelchair seating spaces and companion seats on a riser or cross-aisle in the stadium section of the theater that satisfies at least one of the following criteria: (1) It is located within the rear 60 percent of the seats provided in the auditorium; or (2) It is located within the area of the auditorium where the vertical viewing angles are between the 40th and 100th percentile of vertical viewing angles for all seats in that theater as ranked from the first row (1st percentile) to the back row (100th percentile). The vertical viewing angle is the angle between a horizontal line perpendicular to the seated viewer's eye to the screen and a line from the seated viewer's eye to the top of the screen.

The Department proposed this bright-line rule for two reasons: (1) the movie theater industry petitioned for such a rule; and (2) the Department has acquired expertise in the design of stadium-style theaters during its litigation with several major movie theater chains. *See United States.* v. *AMC Entertainment, Inc.,* 232 F. Supp.2d 1092 (C.D. Cal. 2002), *rev'd in part,* 549 F.3d 760 (9th Cir. 2008); *United States* v. *Cinemark USA, Inc.,* 348 F.3d 569 (6th Cir. 2003). Two industry commenters—at least one of whom otherwise supported this rule—requested that the Department explicitly state that this rule does not apply retroactively to existing theaters. Although this provision on its face applies to new construction and alterations, these commenters were concerned that the rule could be interpreted to apply retroactively because of the Department's statements in the NPRM and ANPRM that this bright line rule, although newly articulated, is not a new standard but "merely codifi[es] longstanding Department requirement[s]," 73 FR 34508, 34534 (June 17, 2008), and does not represent a "substantive change from the existing line-of-sight requirements" of section 4.33.3 of the 1991 Standards, 69 FR 58768, 58776 (Sept. 30, 2004).

Although the Department intends for § 36.406(f)(4) of this rule to apply prospectively to new construction and alterations, this rule is not a departure from, and is consistent with, the line-of-sight requirements in the 1991 Standards. The Department has always interpreted the line-of-sight requirements in the 1991 Standards to require viewing angles provided to patrons who use wheelchairs to be comparable to those afforded to other spectators. Section 36.406(f)(4) merely represents the application of these requirements to stadium-style movie theaters.

One commenter from a trade association sought clarification whether § 36.406(f)(4) applies to stadium-style theaters with more than 300 seats, and argued that it should not since dispersion requirements apply in those theaters. The Department declines to limit this rule to stadium-style theaters with 300 or fewer seats; stadium-style theaters of all sizes must comply with this rule. So, for example, stadium-style theaters that must vertically disperse wheelchair spaces and companion seats must do so within the parameters of this rule.

The NPRM included a provision that required assembly areas with more than 5,000 seats to provide at least five wheelchair spaces with at least three companion seats for each of those five wheelchair spaces. The Department agrees with commenters who asserted that group seating is better addressed through ticketing policies rather than design and has deleted that provision from this section of the final rule.

Section 36.406(g) Medical Care Facilities

In the 1991 title III regulation, there was no provision addressing the dispersion of accessible sleeping rooms in medical care facilities. The Department is aware, however, of problems that individuals with disabilities face in receiving full and equal medical care when accessible sleeping rooms are not adequately dispersed. When accessible rooms are not fully dispersed, a person with a disability is often placed in an accessible room in an area that is not medically appropriate for his or her condition, and is thus denied quick access to staff with expertise in that medical specialty and specialized equipment. While the Access Board did not establish specific design requirements for dispersion in the 2004 ADAAG, in response to extensive comments in support of dispersion it added an advisory note, Advisory 223.1 General, encouraging dispersion of accessible rooms within the facility so that accessible rooms are more likely to be proximate to appropriate qualified staff and resources.

In the NPRM, the Department sought additional comment on the issue, asking whether it should require medical care facilities, such as hospitals, to disperse their accessible sleeping rooms, and if so, by what method (by specialty area, floor, or other criteria). All of the comments the Department received on this issue supported dispersing accessible sleeping rooms proportionally by specialty area. These comments from individuals, organizations, and a building code association, argued that it would not be difficult for hospitals to disperse rooms by specialty area, given the high level of regulation to which hospitals are subject and the planning that hospitals do based on utilization trends. Further, comments suggest that without a requirement, it is unlikely that hospitals would disperse the rooms. In addition, concentrating accessible rooms in one area perpetuates segregation of individuals with disabilities, which is counter to the purpose of the ADA.

The Department has decided to require medical care facilities to disperse their accessible sleeping rooms in a manner that is proportionate by type of medical specialty. This does not require exact mathematical proportionality, which at times would be impossible. However, it does require that medical care facilities disperse their accessible rooms by medical specialty so that persons with disabilities can, to the extent practical, stay in an accessible room within the wing or ward that is appropriate for their medical needs. The language used in this rule ("in a manner that is proportionate by type of medical specialty") is more specific than that used in the NPRM ("in a manner that enables patients with disabilities to have access to appropriate specialty services") and adopts the concept of proportionality proposed by the commenters. Accessible rooms should be dispersed throughout all medical specialties, such as obstetrics, orthopedics, pediatrics, and cardiac care.

Subpart F—Certification of State Laws or Local Building Codes

Subpart F contains procedures implementing section 308(b)(1)(A)(ii) of the ADA, which provides that on the application of a State or local jurisdiction, the Attorney General may certify that a State or local building code or similar ordinance meets or exceeds the minimum accessibility requirements of the Act. In enforcement proceedings, this certification will constitute rebuttable evidence that the law or code meets or exceeds the ADA's requirements. In its NPRM, the Department proposed three changes in subpart F that would streamline the process for public entities seeking certification, all of which are adopted in this final rule.

First, the Department proposed deleting the existing § 36.603, which establishes the obligations of a submitting authority that is seeking certification of its code, and issue in its place informal regulatory guidance regarding certification submission requirements. Due to the deletion of § 36.603, §§ 36.604 through 36.608 are renumbered, and § 36.603 in the final rule is modified to indicate that the Assistant Attorney General for the Civil Rights Division (Assistant Attorney General) shall make a preliminary determination of equivalency after "receipt and review of all information relevant to a request filed by a submitting official for certification of a code." Second, the Department proposed that the requirement in renumbered § 36.604 (previously § 36.605) that an informal hearing be held in Washington, DC, if the Assistant Attorney General makes a preliminary determination of equivalency be changed to a requirement that the hearing be held in the State or local jurisdiction charged with administration and enforcement of the code. Third, the Department proposed adding language to renumbered § 36.606 (previously § 36.607) to explain the effect of the 2010 Standards on the codes of State or local jurisdictions that were determined in the past to meet or exceed the 1991 Standards. Once the 2010 Standards take effect, certifications issued under the 1991 Standards would not have any future effect, and States and local jurisdictions with codes certified under the 1991 Standards would need to reapply for certification under the 2010 Standards. With regard to elements of existing buildings and facilities constructed in compliance with a code when a certification of equivalency was in effect, the final rule requires that in any enforcement action this compliance would be treated as rebuttable evidence of compliance with the standards then in effect. The new provision added to § 36.606 may also have implications in determining an entity's eligibility for the element-by-element safe harbor.

No substantive comments were received regarding the Department's proposed changes in subpart F, and no other changes have been made to this subpart in the final rule. The

Department did receive several comments addressing other issues raised in the NPRM that are related to subpart F. Because the 2010 Standards include specific design requirements for recreation facilities and play areas that may be new to many title III facilities, the Department sought comments in the NPRM about how the certification review process would be affected if the State or local jurisdiction allocates the authority to implement the new requirements to State or local agencies that are not ordinarily involved in administering building codes. One commenter, an association of building owners and managers, suggested that because of the increased scope of the 2010 Standards, it is likely that parts of covered elements in the new standards will be under the jurisdiction of multiple State or local agencies. In light of these circumstances, the commenter recommended that the Department allow State or local agencies to seek certification even if only one State or local regulatory agency requests certification. For example, if a State agency that regulates buildings seeks certification of its building code, it should be able to do so, even if another State agency that regulates amusement rides and miniature golf courses does not seek certification.

The Department's discussion of this issue in the NPRM contemplated that all of a State or local government's accessibility requirements for title III facilities would be the subject of a request for certification. Any other approach would require the Department to certify only part of a State or local government's accessibility requirements as compared to the entirety of the revised ADA standards. As noted earlier, the Attorney General is authorized by section 308(b)(1)(A)(ii) of the ADA to certify that a State or local building code meets or exceeds the ADA's minimum accessibility requirements, which are contained in this regulation. The Department has concluded that this is a decision that must be made on a case-by-case basis because of the wide variety of enforcement schemes adopted by the States. Piecemeal certification of laws or codes that do not contain all of the minimum accessibility requirements could fail to satisfy the Attorney General's responsibility to ensure that a State or local building code meets or exceeds the minimum accessibility requirements of the Act before granting certification. However, the Department wants to permit State and local code administrators to have maximum flexibility, so the Department will leave open the possibility for case-by-case review to determine if a State has successfully met the burden of demonstrating that its accessibility codes or other laws meet or exceed the ADA requirements.

The commenter representing building owners and managers also urged the Department to extend the proposed effective date for the final rule. The commenter explained that a six-month phase-in period is inadequate for States to begin and complete a code amendment process. The commenter asserted that the inadequate phase-in period will place entities undertaking new construction and alterations, particularly in those States with certified codes, in a difficult position because State officials will continue to enforce previously certified State or local accessibility requirements that may be in conflict with the new 2010 Standards. The Department received numerous comments on the issue of the effective date, many of them similar to the concerns expressed above, in response to both the NPRM and the ANPRM. *See* Appendix A discussion of compliance dates for new construction and alterations (§ 36.406). The Department has been persuaded by the concerns raised by many commenters addressing the time and costs related to the design process for both new construction and alterations, and has determined that for new construction and alterations, compliance with the 2010 Standards will not be required until 18 months from the date the final rule is published. For more information on the issue of the compliance date, refer to subpart D—New Construction and Alterations.

One commenter, an association of theater owners, recommended that the Department establish a training program for State building inspectors for those States that receive certification to ensure more consistent ADA compliance and to facilitate the review of builders' architectural plans. The commenter also recommended that State building inspectors, once trained, review architectural plans, and after completion and inspection of facilities, be authorized to certify that the inspected building or facility meets both the certified State and the Federal accessibility requirements. Although supportive of the idea of additional training for State and local building code officials regarding ADA compliance, the Department believes that the approach suggested by the commenter of allowing State and local code officials to determine if a covered facility is in compliance with Federal accessibility requirements is not consistent with or permissible under the statutory enforcement scheme established by the ADA. As the Department stated in the NPRM, certification of State and local codes serves, to some extent, to mitigate the absence of a Federal mechanism for conducting at the national level a review of all architectural plans and inspecting all covered buildings under construction to ensure compliance with the ADA. In this regard, certification operates as a bridge between the obligation to comply with the 1991 Standards in new construction and alterations, and the administrative schemes of State and local governments that regulate the design and construction process. By ensuring consistency between State or local codes and Federal accessibility standards, certification has the additional benefit of streamlining the regulatory process, thereby making it easier for those in the design and construction industry to satisfy both State and Federal requirements. The Department notes, however, that although certification has the potential to increase compliance with the ADA, this result, however desirable, is not guaranteed. The ADA contemplated that there could be enforcement actions brought even in States with certified codes, and it provided some protection in litigation to builders who adhered to the provisions of the code certified to be ADA-equivalent. The Department's certification determinations make it clear that to get the benefit of certification, a facility must comply with the applicable code requirements—without relying on waivers or variances. The certified code, however, remains within the authority of the adopting State or local jurisdiction to interpret and enforce: Certification does not transform a State's building code into Federal law. Nor can certification alone authorize State and local building code officials implementing a certified code to do more than they are authorized to do under State or local law, and these officials cannot acquire authority through certification to render binding interpretations of Federal law. Therefore, the Department, while understanding the interest in obtaining greater assurance of compliance with the ADA through the interpretation and enforcement of a certified code by local code officials, declined in the NPRM to confer on local officials the authority not granted to them under the ADA to certify the compliance of individual facilities. The Department in the final rule finds no reason to alter its position on this issue in response to the comments that were received.

The commenter representing theater owners also urged the Department to provide a safe harbor to facilities constructed in compliance with State or local building codes certified under the 1991 Standards. With regard to elements of facilities constructed in compliance with a certified code prior to the effective date of the 2010 Standards, and during the period when a certification of equivalency was in effect, the Department noted in the NPRM that its approach would be consistent with the approach to the safe harbor discussed in subpart C, § 36.304 of the NPRM, with respect to elements in existing facilities constructed in compliance with the 1991 Standards. For example, elements in existing facilities in States with codes certified under the 1991 Standards would be eligible for a safe harbor if they were constructed in compliance with an ADA-certified code. In this scenario, compliance with the certified code would be treated as evidence of compliance with the 1991 Standards for purposes of determining the application of the safe harbor provision to those elements. For more information on safe harbor, refer to subpart C, § 36.304 of the final rule.

One commenter, an advocacy group for the blind, suggested that, similar to the procedures for certifying a State or local building code, the Department should establish a program to certify an entity's obligation to make its goods and services accessible to persons with sensory disabilities. The Department believes that this commenter was suggesting that covered entities should be able to request that the Department review their business operations to determine if they have met their ADA obligations. As noted earlier, subpart F contains procedures implementing section 308(b)(1)(A)(ii) of the ADA, which provides that on the application of a State or local jurisdiction, the Attorney General may certify that a State or local building code or similar ordinance meets or exceeds the minimum accessibility requirements of the ADA. The

only mechanism through which the Department is authorized to ensure a covered entity's compliance with the ADA is the enforcement scheme established under section 308(b)(1)(A)(i) of the ADA. The Department notes, however, that title III of the ADA and its implementing regulation, which includes the standards for accessible design, already require existing, altered, and newly constructed places of public accommodation, such as retail stores, hotels, restaurants, movie theaters, and stadiums, to make their facilities readily accessible to and usable by individuals with disabilities, which includes individuals with sensory disabilities, so that individuals with disabilities have a full and equal opportunity to enjoy the benefits of a public accommodation's goods, services, facilities, privileges and advantages.

Other Issues

Questions Posed in the NPRM Regarding Costs and Benefits of Complying With the 2010 Standards

In the NPRM, the Department requested comments on various cost and benefit issues related to eight requirements in the Department's Initial RIA, that were projected to have incremental costs that exceeded monetized benefits by more than $100 million when using the 1991 Standards as a comparative baseline, *i.e.,* side reach, water closet clearances in single-user toilet rooms with in-swinging doors, stairs, elevators, location of accessible routes to stages, accessible attorney areas and witness stands, assistive listening systems, and accessible teeing grounds, putting greens, and weather shelters at golf courses. 73 FR 34508, 34512 (June 17, 2008). The Department was particularly concerned about how these costs applied to alterations. The Department noted that pursuant to the ADA, the Department does not have statutory authority to modify the 2004 ADAAG and is required instead to issue regulations implementing the ADA that are consistent with the Board's guidelines. In that regard, the Department also requested comment about whether any of these eight elements in the 2010 Standards should be returned to the Access Board for further consideration, in particular as applied to alterations. Many of the comments received by the Department in response to these questions addressed both titles II and III. As a result, the Department's discussion of these comments and its response are collectively presented for both titles.

Side reach. The 1991 Standards at section 4.2.6 establish a maximum side-reach height of 54 inches. The 2010 Standards at section 308.3.1 reduce that maximum height to 48 inches. The 2010 Standards also add exceptions for certain elements to the scoping requirement for operable parts.

The vast majority of comments the Department received were in support of the lower side-reach maximum of 48 inches in the 2010 Standards. Most of these comments, but not all, were received from individuals of short stature, relatives of individuals of short stature, or organizations representing the interests of persons with disabilities, including individuals of short stature. Comments from individuals with disabilities and disability advocacy groups stated that the 48-inch side reach would permit independence in performing many activities of daily living for individuals with disabilities, including individuals of short stature, persons who use wheelchairs, and persons who have limited upper body strength. In this regard, one commenter who is a business owner pointed out that as a person of short stature there were many occasions when he was unable to exit a public restroom independently because he could not reach the door handle. The commenter said that often elevator control buttons are out of his reach, and, if he is alone, he often must wait for someone else to enter the elevator so that he can ask that person to press a floor button for him. Another commenter, who is also a person of short stature, said that he has on several occasions pulled into a gas station only to find that he was unable to reach the credit card reader on the gas pump. Unlike other customers who can reach the card reader, swipe their credit or debit cards, pump their gas, and leave the station, he must use another method to pay for his gas. Another comment from a person of short stature pointed out that as more businesses take steps to reduce labor costs—a trend expected to continue—staffed booths are being replaced with automatic machines for the sale, for example, of parking tickets and other products. He observed that the "ability to access and operate these machines becomes ever more critical to function in society," and, on that basis, urged the Department to adopt the 48-inch side-reach requirement. Another individual commented that persons of short stature should not have to carry with them adaptive tools in order to access building or facility elements that are out of their reach, any more than persons in wheelchairs should have to carry ramps with them in order to gain access to facilities.

Many of the commenters who supported the revised side-reach requirement pointed out that lowering the side-reach requirement to 48 inches would avoid a problem sometimes encountered in the built environment when an element was mounted for a parallel approach at 54 inches, only to find afterwards that a parallel approach was not possible. Some commenters also suggested that lowering the maximum unobstructed side reach to 48 inches would reduce confusion among design professionals by making the unobstructed forward and side-reach maximums the same (the unobstructed forward reach in both the 1991 and 2010 Standards is 48 inches maximum). These commenters also pointed out that the ICC/ANSI A117.1 Standard, which is a private sector model accessibility standard, has included a 48-inch maximum high side-reach requirement since 1998. Many jurisdictions have already incorporated this requirement into their building codes, which these commenters believed would reduce the cost of compliance with the 2010 Standards. Because numerous jurisdictions have already adopted the 48-inch side-reach requirement, the Department's failure to adopt the 48-inch side-reach requirement in the 2010 Standards, in the view of many commenters, would result in a significant reduction in accessibility, and would frustrate efforts that have been made to harmonize private sector model construction and accessibility codes with Federal accessibility requirements. Given these concerns, they overwhelmingly opposed the idea of returning the revised side-reach requirement to the Access Board for further consideration.

The Department also received comments in support of the 48-inch side-reach requirement from an association of professional commercial property managers and operators and from State governmental entities. The association of property managers pointed out that the revised side-reach requirement provided a reasonable approach to "regulating elevator controls and all other operable parts" in existing facilities in light of the manner in which the safe harbor, barrier removal, and alterations obligations will operate in the 2010 Standards. One governmental entity, while fully supporting the 48-inch side-reach requirement, encouraged the Department to adopt an exception to the lower reach range for existing facilities similar to the exception permitted in the ICC/ANSI A117.1 Standard. In response to this latter concern, the Department notes that under the safe harbor, existing facilities that are in compliance with the 1991 Standards, which required a 54-inch side-reach maximum, would not be required to comply with the lower side-reach requirement, unless there is an alteration. *See* § 36.304(d)(2)(i).

A number of commenters expressed either concern with, or opposition to, the 48-inch side-reach requirement and suggested that it be returned to the Access Board for further consideration. These commenters included trade and business associations, associations of retail stores, associations of restaurant owners, retail and convenience store chains, and a model code organization. Several businesses expressed the view that the lower side-reach requirement would discourage the use of their products and equipment by most of the general public. In particular, concerns were expressed by a national association of pay phone service providers regarding the possibility that pay telephones mounted at the lower height would not be used as frequently by the public to place calls, which would result in an economic burden on the pay phone industry. The commenter described the lower height required for side reach as creating a new "barrier" to pay phone use, which would reduce revenues collected from pay phones and, consequently, further discourage the installation of new pay telephones. In addition, the commenter expressed concern that phone service providers would simply decide to remove existing pay phones rather than incur the costs of relocating them at the lower height. With regard to this latter concern, the commenter misunderstood the manner in which the safe harbor and barrier removal obligations under § 36.304 will operate in the revised title III regulation for elements that comply with the 1991 Standards. The Department does not anticipate that wholesale relocation of pay telephones in existing facilities will be required under the final rule where the telephones in existing facilities already are in

compliance with the 1991 Standards. If the pay phones comply with the 1991 Standards, the adoption of the 2010 Standards does not require retrofitting of these elements to reflect incremental changes in the 2010 Standards. *See* § 36.304(d)(2). However, pay telephones that were required to meet the 1991 Standards as part of new construction or alterations, but do not in fact comply with those standards, will need to be brought into compliance with the 2010 Standards as of 18 months from the publication date of this final rule. *See* § 36.406(a)(5).

The Department does not agree with the concerns expressed by the commenter about reduced revenues from pay phones mounted at lower heights. The Department believes that while given the choice some individuals may prefer to use a pay phone that is at a higher height, the availability of some phones at a lower height will not deter individuals from making needed calls.

The 2010 Standards will not require every pay phone to be installed or moved to a lowered height. The table accompanying section 217.2 of the 2010 Standards makes clear that where one or more telephones are provided on a floor, level, or an exterior site, only one phone per floor, level, or exterior site must be placed at an accessible height. Similarly, where there is one bank of phones per floor, level, or exterior site, only one phone per floor, level, or exterior site must be accessible. And if there are two or more banks of phones per floor, level, or exterior site, only one phone per bank must be placed at an accessible height.

Another comment in opposition to the lower reach range requirement was submitted on behalf of a chain of convenience stores with fuel stops. The commenter expressed the concern that the 48-inch side reach "will make it uncomfortable for the majority of the public," including persons of taller stature who would need to stoop to use equipment such as fuel dispensers mounted at the lower height. The commenter offered no objective support for the observation that a majority of the public would be rendered uncomfortable if, as required in the 2010 Standards, at least one of each type of fuel dispenser at a facility was made accessible in compliance with the lower reach range. Indeed, the Department received no comments from any individuals of tall stature expressing concern about accessible elements or equipment being mounted at the 48-inch height.

Several retail, convenience store, restaurant, and amusement park commenters expressed concern about the burden the lower side-reach requirement would place on their businesses in terms of self-service food stations and vending areas if the 48-inch requirement were applied retroactively. The cost of lowering counter height, in combination with the lack of control businesses exercise over certain prefabricated service or vending fixtures, outweighed, they argued, any benefits to persons with disabilities. For this reason, they suggested the lower side-reach requirement be referred back to the Access Board.

These commenters misunderstood the safe harbor and barrier removal obligations that will be in effect under the 2010 Standards. Those existing self-service food stations and vending areas that already are in compliance with the 1991 Standards will not be required to satisfy the 2010 Standards unless they engage in alterations. With regard to prefabricated vending machines and food service components that will be purchased and installed in businesses after the 2010 Standards become effective, the Department expects that companies will design these machines and fixtures to comply with the 2010 Standards in the future, as many have already done in the 10 years since the 48-inch side-reach requirement has been a part of the model codes and standards used by many jurisdictions as the basis for their construction codes.

A model code organization commented that the lower side-reach requirement would create a significant burden if it required entities to lower the mounting height for light switches, environmental controls, and outlets when an alteration did not include the walls where these elements were located, such as when "an area is altered or as a path of travel obligation." The Department believes that the final rule adequately addresses those situations about which the commenter expressed concern by not requiring the relocation of existing elements, such as light switches, environmental controls, and outlets, unless they are altered. Moreover, under § 36.403 of the 1991 rule, costs for altering the path of travel to an altered area of primary function that exceed 20 percent of the overall costs of the alteration will continue to be deemed disproportionate.

The Department has determined that the revised side-reach requirement should not be returned to the Access Board for further consideration based in large part on the views expressed by a majority of the commenters regarding the need for, and importance of, the lower side-reach requirement to ensure access for persons with disabilities.

Alterations and water closet clearances in single-user toilet rooms with in-swinging doors. The 1991 Standards allow a lavatory to be placed a minimum of 18 inches from the water closet centerline and a minimum of 36 inches from the side wall adjacent to the water closet, which precludes side transfers. The 1991 Standards do not allow an in-swinging door in a toilet or bathing room to overlap the required clear floor space at any accessible fixture. To allow greater transfer options, section 604.3.2 of the 2010 Standards prohibits lavatories from overlapping the clear floor space at water closets, except in certain residential dwelling units. Section 603.2.3 of the 2010 Standards maintains the prohibition on doors swinging into the clear floor space or clearance required for any fixture, except that they permit the doors of toilet or bathing rooms to swing into the required turning space, provided that there is sufficient clearance space for the wheelchair outside the door swing. In addition, in single-user toilet or bathing rooms, exception 2 of section 603.2.3 of the 2010 Standards permits the door to swing into the clear floor space of an accessible fixture if a clear floor space that measures at least 30 inches by 48 inches is available outside the arc of the door swing.

The majority of commenters believed that this requirement would increase the number of toilet rooms accessible to individuals with disabilities who use wheelchairs or mobility scooters, and will make it easier for them to transfer. A number of commenters stated that there was no reason to return this provision to the Access Board. Numerous commenters noted that this requirement is already included in other model accessibility standards and many State and local building codes and that the adoption of the 2010 Standards is an important part of harmonization efforts.

Other commenters, mostly trade associations, opposed this requirement, arguing that the added cost to the industry outweighs any increase in accessibility. Two commenters stated that these proposed requirements would add two feet to the width of an accessible single-user toilet room; however, another commenter said the drawings in the proposed regulation demonstrated that there would be no substantial increase in the size of the toilet room. Several commenters stated that this requirement would require moving plumbing fixtures, walls, or doors at significant additional expense. Two commenters wanted the permissible overlap between the door swing and clearance around any fixture eliminated. One commenter stated that these new requirements will result in fewer alterations to toilet rooms to avoid triggering the requirement for increased clearances, and suggested that the Department specify that repairs, maintenance, or minor alterations would not trigger the need to provide increased clearances. Another commenter requested that the Department exempt existing guest room bathrooms and single-user toilet rooms that comply with the 1991 Standards from complying with the increased clearances in alterations.

After careful consideration of these comments, the Department believes that the revised clearances for single-user toilet rooms will allow safer and easier transfers for individuals with disabilities, and will enable a caregiver, aide, or other person to accompany an individual with a disability into the toilet room to provide assistance. The illustrations in Appendix B to this final rule, "Analysis and Commentary on the 2010 ADA Standards for Accessible Design," describe several ways for public entities and public accommodations to make alterations while minimizing additional costs or loss of space. Further, in any isolated instances where existing structural limitations may entail loss of space, the public entity and public accommodation may have a technical infeasibility defense for that alteration. The Department has, therefore, decided not to return this requirement to the Access Board.

Alterations to stairs. The 1991 Standards only require interior and exterior stairs to be accessible when they provide access to levels that are not connected by an elevator, ramp, or other accessible means of vertical access. In contrast, section 210.1 of the 2010 Standards requires all newly constructed stairs that are part of a means of egress to be accessible. However, exception 2 of section 210.1 of the 2010 Standards provides that in alterations, stairs between levels connected by an accessible route need not be accessible, except that handrails shall be provided. Most

commenters were in favor of this requirement for handrails in alterations, and stated that adding handrails to stairs during alterations was not only feasible and not cost prohibitive, but also provided important safety benefits. One commenter stated that making all points of egress accessible increased the number of people who could use the stairs in an emergency. A majority of the commenters did not want this requirement returned to the Access Board for further consideration.

The International Building Code (IBC), which is a private sector model construction code, contains a similar provision, and most jurisdictions enforce a version of the IBC as their building code, thereby minimizing the impact of this provision on public entities and public accommodations. The Department believes that by requiring only the addition of handrails to altered stairs where levels are connected by an accessible route, the costs of compliance for public entities and public accommodations are minimized, while safe egress for individuals with disabilities is increased. Therefore, the Department has decided not to return this requirement to the Access Board.

Alterations to elevators. Under the 1991 Standards, if an existing elevator is altered, only that altered elevator must comply with the new construction requirements for accessible elevators to the maximum extent feasible. It is therefore possible that a bank of elevators controlled by a single call system may contain just one accessible elevator, leaving an individual with a disability with no way to call an accessible elevator and thus having to wait indefinitely until an accessible elevator happens to respond to the call system. In the 2010 Standards, when an element in one elevator is altered, section 206.6.1 will require the same element to be altered in all elevators that are programmed to respond to the same call button as the altered elevator. Almost all commenters favored the proposed requirement. This requirement, according to these commenters, is necessary so a person with a disability need not wait until an accessible elevator responds to his or her call. One commenter suggested that elevator owners also could comply by modifying the call system so the accessible elevator could be summoned independently. One commenter suggested that this requirement would be difficult for small businesses located in older buildings, and one commenter suggested that this requirement be sent back to the Access Board.

After considering the comments, the Department agrees that this requirement is necessary to ensure that when an individual with a disability presses a call button, an accessible elevator will arrive. The IBC contains a similar provision, and most jurisdictions enforce a version of the IBC as their building code, minimizing the impact of this provision on public entities and public accommodations. Public entities and small businesses located in older buildings need not comply with this requirement where it is technically infeasible to do so. Further, as pointed out by one commenter, modifying the call system so the accessible elevator can be summoned independently is another means of complying with this requirement in lieu of altering all other elevators programmed to respond to the same call button. Therefore, the Department has decided not to return this requirement to the Access Board.

Location of accessible routes to stages. The 1991 Standards, at section 4.33.5, require an accessible route to connect the accessible seating and the stage, as well as other ancillary spaces used by performers. The 2010 Standards, at section 206.2.6, provide in addition that where a circulation path directly connects the seating area and the stage, the accessible route must connect directly the accessible seating and the stage, and, like the 1991 Standards, an accessible route must connect the stage with the ancillary spaces used by performers.

In the NPRM, the Department asked operators of auditoria about the extent to which auditoria already provide direct access to stages and whether there were planned alterations over the next 15 years that included accessible direct routes to stages. The Department also asked how to quantify the benefits of this requirement for persons with disabilities, and invited commenters to provide illustrative anecdotal experiences about the requirement's benefits.

The Department received many comments regarding the costs and benefits of this requirement. Although little detail was provided, many industry and governmental entity commenters anticipated that the costs of this requirement would be great and that it would be difficult to implement. They noted that premium seats may have to be removed and that load-bearing walls may have to be relocated. These commenters suggested that the significant costs would deter alterations to the stage area for a great many auditoria. Some commenters suggested that ramps to the front of the stage may interfere with means of egress and emergency exits. Several commenters requested that the requirement apply to new construction only, and one industry commenter requested an exemption for stages used in arenas or amusement parks where there is no audience participation or where the stage is a work area for performers only. One commenter requested that the requirement not apply to temporary stages.

The final rule does not require a direct accessible route to be constructed where a direct circulation path from the seating area to the stage does not exist. Consequently, those commenters who expressed concern about the burden imposed by the revised requirement (*i.e.,* where the stage is constructed with no direct circulation path connecting the general seating and performing area) should note that the final rule will not require the provision of a direct accessible route under these circumstances. The final rule applies to permanent stages, as well as "temporary stages," if there is a direct circulation path from the seating area to the stage. However, the Department recognizes that in some circumstances, such as an alteration to a primary function area, the ability to provide a direct accessible route to a stage may be costly or technically infeasible, and the auditorium owner is not precluded by the revised requirement from asserting defenses available under the regulation. In addition, the Department notes that since section 4.33.5 of the 1991 Standards requires an accessible route to a stage, the safe harbor will apply to existing facilities whose stages comply with the 1991 Standards.

Several governmental entities supported accessible auditoria and the revised requirement. One governmental entity noted that its State building code already required direct access, that it was possible to provide direct access, and that creative solutions had been found to do so.

Many advocacy groups and individual commenters strongly supported the revised requirement, discussing the acute need for direct access to stages, as such access has an impact on a great number of people at important life events, such as graduations and awards ceremonies, at collegiate and competitive performances and other school events, and at entertainment events that include audience participation. Many commenters expressed the belief that direct access is essential for integration mandates to be satisfied, and that separate routes are stigmatizing and unequal. The Department agrees with these concerns.

Commenters described the impact felt by persons in wheelchairs who are unable to access the stage at all when others are able to do so. Some of these commenters also discussed the need for the performers and production staff who use wheelchairs to have direct access to the stage, and they provided a number of examples that illustrated the importance of the rule proposed in the NPRM. Personal anecdotes were provided in comments and at the Department's public hearing on the NPRM. One mother spoke passionately and eloquently about the unequal treatment experienced by her daughter, who uses a wheelchair, at awards ceremonies and band concerts. Her daughter was embarrassed and ashamed to be carried by her father onto a stage at one band concert. When the venue had to be changed for another concert to an accessible auditorium, the band director made sure to comment that he was unhappy with the switch. Rather than endure the embarrassment and indignities, her child dropped out of band the following year.

Another father commented about how he was unable to speak from the stage at a PTA meeting at his child's school. Speaking from the floor limited his line of sight and his participation. Several examples were provided of children who could not participate on stage during graduation, awards programs, or special school events, such as plays and festivities. One student did not attend his college graduation because he would not be able to get on stage. Another student was unable to participate in the class Christmas programs or end-of-year parties unless her father could attend and lift her onto the stage. These commenters did not provide a method to quantify the benefits that would accrue by having direct access to stages. One commenter stated, however, that "the cost of dignity and respect is without measure."

Many industry commenters and governmental entities suggested that the

requirement be sent back to the Access Board for further consideration. One industry commenter mistakenly noted that some international building codes do not incorporate the requirement and that, therefore, there is a need for further consideration. However, the Department notes that both the 2003 and 2006 editions of the IBC include scoping provisions that are almost identical to this requirement and that these editions of the model code are the most frequently used. Many individuals and advocacy group commenters requested that the requirement be adopted without further delay. These commenters spoke of the acute need for direct access to stages and the amount of time it would take to resubmit the requirement to the Access Board. Several commenters noted that the 2004 ADAAG tracks recent model codes, and that there is thus no need for further consideration. The Department agrees that no further delay is necessary and therefore has decided it will not return the requirement to the Access Board for further consideration.

Assistive listening systems. The 1991 Standards at sections 4.33.6 and 4.33.7 require assistive listening systems (ALS) in assembly areas and prescribe general performance standards for ALS systems. In the NPRM, the Department proposed adopting the technical specifications in the 2004 ADAAG for ALS that are intended to ensure better quality and effective delivery of sound and information for persons with hearing impairments, especially those using hearing aids. The Department noted in the NPRM that since 1991, advancements in ALS and the advent of digital technology have made these systems more amenable to uniform standards, which, among other things, should ensure that a certain percentage of required ALS systems are hearing-aid compatible. 73 FR 34508, 34513 (June 17, 2008). The 2010 Standards at section 219 provide scoping requirements and at section 706 address receiver jacks, hearing aid compatibility, sound pressure level, signal-to-noise ratio, and peak clipping level. The Department requested comments specifically from arena and assembly area administrators on the cost and maintenance issues associated with ALS, and asked generally about the costs and benefits of ALS, and asked whether, based upon the expected costs of ALS, the issue should be returned to the Access Board for further consideration.

Commenters from advocacy organizations noted that persons who develop significant hearing loss often discontinue their normal routines and activities, including meetings, entertainment, and large group events, due to a sense of isolation caused by the hearing loss or embarrassment. Individuals with longstanding hearing loss may never have participated in group activities for many of the same reasons. Requiring ALS may allow individuals with disabilities to contribute to the community by joining in government and public events, and through increased economic activity associated with community activities and entertainment. Making public events and entertainment accessible to persons with hearing loss also brings families and other groups that include persons with hearing loss into more community events and activities, thus exponentially increasing the benefit from ALS.

Many commenters noted that when a person has significant hearing loss, that person may be able to hear and understand information in a quiet situation with the use of hearing aids or cochlear implants; however, as background noise increases and the distance between the source of the sound and the listener grows, and especially where there is distortion in the sound, an ALS becomes essential for basic comprehension and understanding. Commenters noted that among the 31 million Americans with hearing loss, and with a projected increase to over 78 million Americans with hearing loss by 2030, the benefit from ALS is huge and growing. Advocates for persons with disabilities and individuals commented that they appreciated the improvements in the 2004 ADAAG standards for ALS, including specifications for the ALS systems and performance standards. They noted that providing neckloops that translate the signal from the ALS transmitter to a frequency that can be heard on a hearing aid or cochlear implant are much more effective than separate ALS system headsets, which sometimes create feedback, often malfunction, and may create distractions for others seated nearby. Comments from advocates and users of ALS systems consistently noted that the Department's regulation should, at a minimum, be consistent with the 2004 ADAAG. Although there were requests for adjustments in the scoping requirements from advocates seeking increased scoping requirements, and from large venue operators seeking fewer requirements, there was no significant concern expressed by commenters about the technical specifications for ALS in the 2004 ADAAG.

Some commenters from trade associations and large venue owners criticized the scoping requirements as too onerous, and one commenter asked for a remand to the Access Board for new scoping rules. However, one State agency commented that the 2004 ADAAG largely duplicates the requirements in the 2006 IBC and the 2003 ANSI codes, which means that entities that comply with those standards would not incur additional costs associated with ADA compliance.

According to one State office of the courts, the costs to install either an infrared system or an FM system at average-sized facilities, including most courtrooms covered by title II, would be between $500 and $2,000, which the agency viewed as a small price in comparison to the benefits of inclusion. Advocacy organizations estimated wholesale costs of ALS systems at about $250 each, and individual neckloops to link the signal from the ALS transmitter to hearing aids or cochlear implants at less than $50 per unit. Many commenters pointed out that if a facility already is using induction neckloops, it would already be in compliance already and would not have any additional installation costs. One major city commented that annual maintenance is about $2,000 for the entire system of performance venues in the city. A trade association representing very large venues estimated annual maintenance and upkeep expenses, including labor and replacement parts, to be at most about $25,000 for a very large professional sports stadium.

One commenter suggested that the scoping requirements for ALS in the 2004 ADAAG were too stringent and that the Department should refer them back to the Access Board for further review and consideration. Others commented that the requirement for new ALS systems should mandate multichannel receivers capable of receiving audio description for persons who are blind, in addition to a channel for amplification for persons who are hard of hearing. Some commenters suggested that the Department should require a set schedule and protocol of mandatory maintenance. Department regulations already require maintenance of accessible features at § 36.211(a) of the title III regulation, which obligates a title III entity to maintain ALS in good working order. The Department recognizes that maintenance of ALS is key to its usability. Necessary maintenance will vary dramatically from venue to venue based upon a variety of factors including frequency of use, number of units, quality of equipment, and other items. Accordingly, the Department has determined that it is not appropriate to mandate details of maintenance, but notes that failure to maintain ALS would violate § 36.211(a) of this rule.

The NPRM asked whether the Department should return the issue of ALS requirements to the Access Board for further review. The Department has received substantial feedback on the technical and scoping requirements for ALS and is convinced that these requirements are reasonable—especially in light of the fact that the requirements largely duplicate those in the 2006 IBC and the 2003 ANSI codes already adopted in many States—and that the benefits justify the requirements. In addition, the Department believes that the new specifications will make ALS work more effectively for more persons with disabilities, which, together with a growing population of new users, will increase demand for ALS, thus mooting criticism from some large venue operators about insufficient demand. Thus, the Department has determined that it is unnecessary to refer this issue back to the Access Board for reconsideration.

Accessible teeing grounds, putting greens, and weather shelters. The Department's NPRM sought public input on the proposed requirements for accessible golf courses. These requirements specifically relate to accessible routes within the boundaries of the courses, as well as the accessibility of golfing elements (*e.g.,* teeing grounds, putting greens, weather shelters).

In the NPRM, the Department sought information from the owners and operators of golf courses, both public and private, on the extent to which their courses already have golf car passages, and, if so, whether they intended to avail themselves of the proposed accessible route exception for golf car passages. 73 FR 34508, 34513 (June 17, 2008).

Most commenters expressed support for the adoption of an accessible route requirement that includes an exception permitting golf car passage as all or part of

an accessible route. Comments in favor of the proposed standard came from golf course owners and operators, individuals, organizations, and disability rights groups, while comments opposing adoption of the golf course requirements generally came from golf courses and organizations representing the golf course industry.

The majority of commenters expressed the general viewpoint that nearly all golf courses provide golf cars and have either well-defined paths or permit golf cars to drive on the course where paths are not present—and thus meet the accessible route requirement. Several commenters disagreed with the assumption in the Initial RIA that virtually every tee and putting green on an existing course would need to be regraded in order to provide compliant accessible routes. According to one commenter, many golf courses are relatively flat with little slope, especially those heavily used by recreational golfers. This commenter concurred with the Department that it is likely that most existing golf courses have a golf car passage to tees and greens, thereby substantially minimizing the cost of bringing an existing golf course into compliance with the proposed standards. One commenter reported that golf course access audits found that the vast majority of public golf courses would have little difficulty in meeting the proposed golf course requirements. In the view of some commenters, providing access to golf courses would increase golf participation by individuals with disabilities.

The Department also received many comments requesting clarification of the term "golf car passage." For example, one commenter requesting clarification of the term "golf car passage" argued that golf courses typically do not provide golf car paths or pedestrian paths onto the actual teeing grounds or greens, many of which are higher or lower than the car path. This commenter argued that if golf car passages were required to extend onto teeing grounds and greens in order to qualify for an exception, then some golf courses would have to substantially regrade teeing grounds and greens at a high cost.

After careful consideration of the comments, the Department has decided to adopt the 2010 Standards specific to golf facilities. The Department believes that in order for individuals with mobility disabilities to have an opportunity to play golf that is equal to golfers without disabilities, it is essential that golf courses provide an accessible route or accessible golf car passage to connect accessible elements and spaces within the boundary of the golf course, including teeing grounds, putting greens, and weather shelters.

Public Comments on Other NPRM Issues

Equipment and furniture. Equipment and furniture are covered under the Department's ADA regulations, including under the provision requiring modifications in policies, practices, and procedures and the provision requiring barrier removal. *See* 28 CFR 36.302, 36.304. The Department has not issued specific regulatory guidance on equipment and furniture, but proposed such regulations in 1991. The Department decided not to establish specific equipment requirements at that time because the requirements could be addressed under other sections of the regulation and because there were no appropriate accessibility standards applicable to many types of equipment at that time. *See* 28 CFR part 36, app. B (2009) ("Proposed Section 36.309 Purchase of Furniture and Equipment").

In the NPRM, the Department announced its intention not to regulate equipment, proposing instead to continue with the current approach. The Department received numerous comments objecting to this decision and urging the Department to issue equipment and furniture regulations. Based on these comments, the Department has decided that it needs to revisit the issuance of equipment and furniture regulations, and it intends to do so in future rulemaking.

Among the commenters' key concerns, many from the disability community objected to the Department's earlier decision not to issue equipment regulations, especially for medical equipment. These groups recommended that the Department list by name certain types of medical equipment that must be accessible, including exam tables (that lower to 15 inches above the floor or lower), scales, medical and dental chairs, and radiologic equipment (including mammography equipment). These commenters emphasized that the provision of medically-related equipment and furniture also should be specifically regulated since they are not included in the 2004 ADAAG (while depositories, change machines, fuel dispensers, and ATMs are) and because of their crucial role in the provision of healthcare. Commenters described how the lack of accessible medical equipment negatively affects the health of individuals with disabilities. For example, some individuals with mobility disabilities do not get thorough medical care because their health providers do not have accessible examination tables or scales.

Commenters also said that the Department's stated plan to assess the financial impact of free-standing equipment on businesses was not necessary, as any regulations could include a financial-balancing test. Other commenters representing persons who are blind or have low vision urged the Department to mandate accessibility for a wide range of equipment—including household appliances (stoves, washers, microwaves, and coffee makers), audiovisual equipment (stereos and DVD players), exercise machines, vending equipment, ATMs, computers at Internet cafes or hotel business centers, reservations kiosks at hotels, and point-of-sale devices—through speech output and tactile labels and controls. They argued that modern technology allows such equipment to be made accessible at minimal cost. According to these commenters, the lack of such accessibility in point-of-sale devices is particularly problematic because it forces blind individuals to provide personal or sensitive information (such as personal identification numbers) to third parties, which exposes them to identity fraud. Because the ADA does not apply directly to the manufacture of products, the Department lacks the authority to issue design requirements for equipment designed exclusively for use in private homes. *See* Department of Justice, Americans with Disabilities Act, *ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities,* III–4.4200, available at *http://www.ada.gov/taman3.html.* To the extent that equipment intended for such use is used by a covered entity to facilitate a covered service or activity, that covered entity must make the equipment accessible to the extent that it can. *See id.:* 28 CFR part 36, app. B (2009) ("Proposed Section 36.309 Purchase of Furniture and Equipment").

Some commenters urged the Department to require swimming pool operators to provide aquatic wheelchairs for the use of persons with disabilities when the swimming pool has a sloped entry. If there is a sloped entry, a person who uses a wheelchair would require a wheelchair designed for use in the water in order to gain access to the pool since taking a personal wheelchair into water would rust and corrode the metal on the chair and damage any electrical components of a power wheelchair. Providing an aquatic wheelchair made of non-corrosive materials and designed for access into the water will protect the water from contamination and avoid damage to personal wheelchairs or other mobility aids.

Additionally, many commenters urged the Department to regulate the height of beds in accessible hotel guest rooms and to ensure that such beds have clearance at the floor to accommodate a mechanical lift. These commenters noted that in recent years, hotel beds have become higher as hotels use thicker mattresses, thereby making it difficult or impossible for many individuals who use wheelchairs to transfer onto hotel beds. In addition, many hotel beds use a solid-sided platform base with no clearance at the floor, which prevents the use of a portable lift to transfer an individual onto the bed. Consequently, individuals who bring their own lift to transfer onto the bed cannot independently get themselves onto the bed. Some commenters suggested various design options that might avoid these situations.

The Department intends to provide specific guidance relating to both hotel beds and aquatic wheelchairs in a future rulemaking. For the present, the Department reminds covered entities that they have the obligation to undertake reasonable modifications to their current policies and procedures and to undertake barrier removal or provide alternatives to barrier removal to make their facilities accessible to persons with disabilities. In many cases, providing aquatic wheelchairs or adjusting hotel bed heights may be necessary to comply with those requirements.

Commenters from the business community objected to the lack of clarity from the NPRM as to which equipment must be accessible and how to make it accessible. Several commenters urged the Department to clarify that equipment located in a public accommodation need not meet the technical specifications of ADAAG so long as the service provided by the equipment can be provided by alternative means, such as an

employee. For example, the commenters suggested that a self-service check-in kiosk in a hotel need not comply with the reach range requirement so long as a guest can check in at the front desk nearby. Several commenters argued that the Department should not require that point-of-sale devices be accessible to individuals who are blind or have low vision (although complying with accessible route and reach range was acceptable), especially until the Department adopts specific standards governing such access.

The Department has decided not to add specific scoping or technical requirements for equipment and furniture in this final rule. Other provisions of the regulation, including those requiring reasonable modifications of policies, practices, or procedures, readily achievable barrier removal, and effective communication will require the provision of accessible equipment in appropriate circumstances. Because it is clear that many commenters want the Department to provide additional specific requirements for accessible equipment, the Department plans to initiate a rulemaking to address these issues in the near future.

Accessible golf cars. An accessible golf car means a device that is designed and manufactured to be driven on all areas of a golf course, is independently usable by individuals with mobility disabilities, has a hand-operated brake and accelerator, carries golf clubs in an accessible location, and has a seat that both swivels and raises to put the golfer in a standing or semi-standing position. The 1991 regulation contained no language specifically referencing accessible golf cars. After considering the comments addressing the ANPRM's proposed requirement that golf courses make at least one specialized golf car available for the use of individuals with disabilities, and the safety of accessible golf cars and their use on golf course greens, the Department stated in the NPRM that it would not issue regulations specific to golf cars.

The Department received many comments in response to its decision to propose no new regulation specific to accessible golf cars. The majority of commenters urged the Department to require golf courses to provide accessible golf cars. These comments came from individuals, disability advocacy and recreation groups, a manufacturer of accessible golf cars, and representatives of local government. Comments supporting the Department's decision not to propose a new regulation came from golf course owners, associations, and individuals.

Many commenters argued that while the existing title III regulation covered the issue, the Department should nonetheless adopt specific regulatory language requiring golf courses to provide accessible golf cars. Some commenters noted that many local governments and park authorities that operate public golf courses have already provided accessible golf cars. Experience indicates that such golf cars may be used without damaging courses. Some argued that having accessible golf cars would increase golf course revenue by enabling more golfers with disabilities to play the game. Several commenters requested that the Department adopt a regulation specifically requiring each golf course to provide one or more accessible golf cars. Other commenters recommended allowing golf courses to make "pooling" arrangements to meet demands for such cars. A few commenters expressed support for using accessible golf cars to accommodate golfers with and without disabilities. Commenters also pointed out that the Departments of the Interior and Defense have already mandated that golf courses under their jurisdictional control must make accessible golf cars available unless it can be demonstrated that doing so would change the fundamental nature of the game.

While an industry association argued that at least two models of accessible golf cars meet the specifications recognized in the field, and that accessible golf cars cause no more damage to greens or other parts of golf courses than players standing or walking across the course, other commenters expressed concerns about the potential for damage associated with the use of accessible golf cars. Citing safety concerns, golf organizations recommended that an industry safety standard be developed.

Although the Department declines to add specific scoping or technical requirements for golf cars to this final rule, the Department expects to address requirements for accessible golf cars in future rulemaking. In the meantime, the Department believes that golfers with disabilities who need accessible golf cars are protected by other existing provisions in the title III regulation, including those requiring reasonable modifications of policies, practices, or procedures, and readily achievable barrier removal.

Web site accessibility. Many commenters expressed disappointment that the NPRM did not specifically require title III-covered entities to make their Web sites, through which they offer goods and services, accessible to individuals with disabilities. Commenters urged the Department to require specifically that entities that provide goods or services on the Internet make their Web sites accessible, regardless of whether or not these entities also have a "bricks and mortar" location. The commenters explained that such clarification was needed because of the current ambiguity caused by court decisions as to whether web-only businesses are covered under title III. Commenters argued that the cost of making Web sites accessible through Web site design is minimal, yet critical, to enabling individuals with disabilities to benefit from the goods and services an entity offers through its Web site. The Internet has become an essential tool for many Americans and, when accessible, provides individuals with disabilities great independence. Commenters recommended that, at a minimum, the Department require covered entities to meet the Electronic and Information Technology Accessibility Standards issued pursuant to section 508. Under section 508 of the Rehabilitation Act of 1973, Federal agencies are required to make their Web sites accessible. 29 U.S.C. 794(d); 36 CFR Part 1194.

The Department agrees that the ability to access the goods and services offered on the Internet through the Web sites of public accommodations is of great importance to individuals with disabilities, particularly those who are blind or who have low vision. When the ADA was enacted in 1990, the Internet was unknown to most of the public. Today, the Internet plays a critical role in daily life for personal, civic, commercial, and business purposes. In light of the growing importance of eBcommerce, ensuring nondiscriminatory access to the goods and services offered through the Web sites of covered entities can play a significant role in fulfilling the goals of the ADA.

Although the language of the ADA does not explicitly mention the Internet, the Department has taken the position that title III covers access to Web sites of public accommodations. The Department has issued guidance on the ADA as applied to the Web sites of public entities, which includes the availability of standards for Web site accessibility. *See Accessibility of State and Local Government Websites to People with Disabilities* (June 2003), available at *www.ada.gov/websites2.htm.* As the Department stated in that publication, an agency (and similarly a public accommodation) with an inaccessible Web site also may meet its legal obligations by providing an accessible alternative for individuals to enjoy its goods or services, such as a staffed telephone information line. However, such an alternative must provide an equal degree of access in terms of hours of operation and range of options and programs available. For example, if retail goods or bank services are posted on an inaccessible Web site that is available 24 hours a day, 7 days a week to individuals without disabilities, then the alternative accessible method must also be available 24 hours a day, 7 days a week. Additional guidance is available in the Web Content Accessibility Guidelines (WCAG), available at *http://www.w3.org/TR/WAI-WEBCONTENT* (last visited June 24, 2010), which are developed and maintained by the Web Accessibility Initiative, a subgroup of the World Wide Web Consortium (W3C®).

The Department did not issue proposed regulations as part of its NPRM, and thus is unable to issue specific regulatory language on Web site accessibility at this time. However, the Department expects to engage in rulemaking relating to Web site accessibility under the ADA in the near future.

Multiple chemical sensitivities. The Department received comments from a number of individuals asking the Department to add specific language to the final rule addressing the needs of individuals with chemical sensitivities. These commenters expressed concern that the presence of chemicals interferes with their ability to participate in a wide range of activities. These commenters also urged the Department to add multiple chemical sensitivities to the definition of a disability.

The Department has determined not to include specific provisions addressing multiple chemical sensitivities in the final rule. In order to be viewed as a disability under the ADA, an impairment must substantially limit one or more major life activities. An individual's major life

activities of respiratory or neurological functioning may be substantially limited by allergies or sensitivity to a degree that he or she is a person with a disability. When a person has this type of disability, a covered entity may have to make reasonable modifications in its policies and practices for that person. However, this determination is an individual assessment and must be made on a case-by-case basis.

■ 22. Redesignate Appendix B to part 36 as Appendix C to part 36 and add Appendix B to part 36 to read as follows:

Appendix B to Part 36—Analysis and Commentary on the 2010 ADA Standards for Accessible Design

Appendix B to Part 36

Analysis and Commentary on the 2010 ADA Standards for Accessible Design

The following is a discussion of substantive changes in the scoping and technical requirements for new construction and alterations resulting from the adoption of new ADA Standards for Accessible Design (2010 Standards) in the final rules for title II (28 CFR part 35) and title III (28 CFR part 36) of the Americans with Disabilities Act (ADA). The full text of the 2010 Standards is available for review at *http://www.ada.gov.*

In the Department's revised ADA title II regulation, 28 CFR 35.104 Definitions, the Department defines the term "2010 Standards" to mean the 2010 ADA Standards for Accessible Design. The 2010 Standards consist of the 2004 ADA Accessibility Guidelines (ADAAG) and the requirements contained in 28 CFR 35.151.

In the Department's revised ADA title III regulation, 28 CFR 36.104 Definitions, the Department defines the term "2010 Standards" to mean the 2010 ADA Standards for Accessible Design. The 2010 Standards consist of the 2004 ADA Accessibility Guidelines (ADAAG) and the requirements contained in 28 CFR part 36 subpart D.

This summary addresses selected substantive changes between the 1991 ADA Standards for Accessible Design (1991 Standards) codified at 28 CFR part 36, app. A (2009) and the 2010 Standards.

Editorial changes are not discussed. Scoping and technical requirements are discussed together, where appropriate, for ease of understanding the requirements. In addition, this document addresses selected public comments received by the Department in response to its September 2004 Advance Notice of Proposed Rulemaking (ANPRM) and its June 2008 Notice of Proposed Rulemaking (NPRM).

The ANPRM and NPRM issued by the Department concerning the proposed 2010 Standards stated that comments received by the Access Board in response to its development of the ADAAG upon which the 2010 Standards are based would be considered in the development of the final Standards. Therefore, the Department will not restate here all of the comments and responses to them issued by the Access Board. The Department is supplementing the Access Board's comments and responses with substantive comments and responses here. Comments and responses addressed by the Access Board that also were separately submitted to the Department will not be restated in their entirety here.

Section-by-Section Analysis With Public Comments

Application and Administration

102 Dimensions for Adults and Children

Section 2.1 of the 1991 Standards stated that the specifications were based upon adult dimensions and anthropometrics. The 1991 Standards did not provide specific requirements for children's elements or facilities.

Section 102 of the 2010 Standards states that the technical requirements are based on adult dimensions and anthropometrics. In addition, technical requirements are also provided based on children's dimensions and anthropometrics for drinking fountains, water closets and other elements located in toilet compartments, lavatories and sinks, dining surfaces, and work surfaces.

103 Equivalent Facilitation

This section acknowledges that nothing in these requirements prevents the use of designs, products, or technologies as alternatives to those prescribed, provided that the alternatives result in substantially equivalent or greater accessibility and usability.

A commenter encouraged the Department to include a procedure for determining equivalent facilitation. The Department believes that the responsibility for determining and demonstrating equivalent facilitation properly rests with the covered entity. The purpose of allowing for equivalent facilitation is to encourage flexibility and innovation while still ensuring access. The Department believes that establishing potentially cumbersome bureaucratic provisions for reviewing requests for equivalent facilitation is inappropriate.

104 Conventions

Dimensions. Section 104.1 of the 2010 Standards notes that dimensions not stated as a "maximum" or "minimum" are absolute. Section 104.1.1 of the 2010 Standards provides that all dimensions are subject to conventional industry tolerances except where the requirement is stated as a range with specific minimum and maximum end points. A commenter stated that the 2010 Standards restrict the application of construction tolerances only to those few requirements that are expressed as an absolute dimension.

This is an incorrect interpretation of sections 104.1 and 104.1.1 of the 2010 Standards. Construction and manufacturing tolerances apply to absolute dimensions as well as to dimensions expressed as a maximum or minimum. When the requirement states a specified range, such as in section 609.4 where grab bars must be installed between 33 inches and 36 inches above the finished floor, that range provides an adequate tolerance. Advisory 104.1.1 gives further guidance about tolerances.

Section 104.2 of the 2010 Standards provides that where the required number of elements or facilities to be provided is determined by calculations of ratios or percentages and remainders or fractions result, the next greater whole number of such elements or facilities shall be provided. Where the determination of the required size or dimension of an element or facility involves ratios or percentages, rounding down for values less than one-half is permissible.

A commenter stated that it is customary in the building code industry to round up rather than down for values less than one-half. As noted here, where the 2010 Standards provide for scoping, any resulting fractional calculations will be rounded to the next whole number. The Department is retaining the portion of section 104.2 that permits rounding down for values less than one-half where the determination of the required size or dimension of an element or facility involves ratios or percentages. Such practice is standard with the industry, and is in keeping with model building codes.

105 Referenced Standards

Section 105 lists the industry requirements that are referenced in the 2010 Standards. This section also clarifies that where there is a difference between a provision of the 2010 Standards and the referenced requirements, the provision of the 2010 Standards applies.

106 Definitions

Various definitions have been added to the 2010 Standards and some definitions have been deleted.

One commenter asked that the term public right-of-way be defined; others asked that various terms and words defined by the 1991 Standards, but which were eliminated from the 2010 Standards, plus other words and terms used in the 2010 Standards, be defined.

The Department believes that it is not necessary to add definitions to this text because section 106.3 of the 2010 Standards provides that the meanings of terms not specifically defined in the 2010 Standards, in the Department's ADA regulations, or in referenced standards are to be defined by collegiate dictionaries in the sense that the context implies. The Department believes that this provision adequately addresses these commenters' concerns.

Scoping and Technical Requirements

202 Existing Buildings and Facilities

Alterations. Under section 4.1.6(1)(c) of the 1991 Standards if alterations to single elements, when considered together, amount to an alteration of a room or space in a building or facility, the entire room or space would have to be made accessible. This requirement was interpreted to mean that if a covered entity chose to alter several elements in a room there would come a point when so much work had been done that it would be considered that the entire room or space would have to be made accessible. Under section 202.3 of the 2010 Standards entities can alter as many elements within a room or space as they like without triggering a requirement to make the entire room or space accessible based on the alteration of individual elements. This does not, however, change the requirement that if the intent was to alter the entire room or space, the entire

room or space must be made accessible and comply with the applicable requirements of Chapter 2 of the 2010 Standards.

Alterations to Primary Function Areas. Section 202.4 restates a current requirement under title III, and therefore represents no change for title III facilities or for those title II facilities that have elected to comply with the 1991 Standards. However, under the revised title II regulation, state and local government facilities that have previously elected to comply with the Uniform Federal Accessibility Standards (UFAS) instead of the 1991 Standards will no longer have that option, and thus will now be subject to the path of travel requirement. The path of travel requirement provides that when a primary function area of an existing facility is altered, the path of travel to that area (including restrooms, telephones, and drinking fountains serving the area) must also be made accessible, but only to the extent that the cost of doing so does not exceed twenty percent (20%) of the cost of the alterations to the primary function area. The UFAS requirements for a substantial alteration, though different, may have covered some of the items that will now be covered by the path of travel requirement.

Visible Alarms in Alterations to Existing Facilities. The 1991 Standards, at sections 4.1.3(14) and 4.1.6(1)(b), and sections 202.3 and 215.1 of the 2010 Standards require that when existing elements and spaces of a facility are altered, the alterations must comply with new construction requirements. Section 215.1 of the 2010 Standards adds a new exception to the scoping requirement for visible alarms in existing facilities so that visible alarms must be installed only when an existing fire alarm system is upgraded or replaced, or a new fire alarm system is installed.

Some commenters urged the Department not to include the exception and to make visible alarms a mandatory requirement for all spaces, both existing and new. Other commenters said that the exception will make the safety of individuals with disabilities dependent upon the varying age of existing fire alarm systems. Other commenters suggested that including this requirement, even with the exception, will result in significant cost to building owners and operators.

The Department believes that the language of the exception to section 215.1 of the 2010 Standards strikes a reasonable balance between the interests of individuals with disabilities and those of the business community. If undertaken at the time a system is installed, whether in a new facility or in a planned system upgrade, the cost of adding visible alarms is reasonable. Over time, existing facilities will become fully accessible to individuals who are deaf or hard of hearing, and will add minimal costs to owners and operators.

203 General Exceptions

Limited Access Spaces and Machinery Spaces. The 1991 Standards, at section 4.1.1, contain an exception that exempts "non-occupiable" spaces that have limited means of access, such as ladders or very narrow passageways, and that are visited only by service personnel for maintenance, repair, or occasional monitoring of equipment, from all accessibility requirements. Sections 203.4 and 203.5 of the 2010 Standards expand this exception by removing the condition that the exempt spaces be "non-occupiable," and by separating the other conditions into two independent exceptions: one for spaces with limited means of access, and the other for machinery spaces. More spaces are exempted by the exception in the 2010 Standards.

203, 206 and 215 Employee Work Areas

Common Use Circulation Paths in Employee Work Areas. The 1991 Standards at section 4.1.1(3), and the 2010 Standards at section 203.9, require employee work areas in new construction and alterations *only* to be designed and constructed so that individuals with disabilities can approach, enter, and exit the areas. Section 206.2.8 of the 2010 Standards requires accessible common use circulation paths within employee work areas unless they are subject to exceptions in sections 206.2.8, 403.5, 405.5, and 405.8. The ADA, 42 U.S.C. 12112 (b)(5)(A) and (B), requires employers to make reasonable accommodations in the workplace for individuals with disabilities, which may include modifications to work areas when needed. Providing increased access in the facility at the time of construction or alteration will simplify the process of providing reasonable accommodations when they are needed.

The requirement for accessible common use circulation paths will not apply to existing facilities pursuant to the readily achievable barrier removal requirement. The Department has consistently taken the position that barrier removal requirements do not apply to areas used exclusively by employees because the purpose of title III is to ensure that access is provided to clients and customers. *See* Appendix B to the 1991 regulation implementing title III, 28 CFR part 36.

Several exceptions to section 206.2.8 of the 2010 Standards exempt common use circulation paths in employee work areas from the requirements of section 402 where it may be difficult to comply with the technical requirements for accessible routes due to the size or function of the area:

- Employee work areas, or portions of employee work areas, that are less than 300 square feet and are elevated 7 inches or more above the ground or finish floor, where elevation is essential to the function of the space, are exempt.
- Common use circulation paths within employee work areas that are less than 1,000 square feet and are defined by permanently installed partitions, counters, casework, or furnishings are exempt. Kitchens in quick service restaurants, cocktail bars, and the employee side of service counters are frequently covered by this exception.
- Common use circulation paths within exterior employee work areas that are fully exposed to the weather are exempt. Farms, ranches, and outdoor maintenance facilities are covered by this exception.

The 2010 Standards in sections 403.5 and 405.8 also contain exceptions to the technical requirements for accessible routes for circulation paths in employee work areas:

- Machinery and equipment are permitted to reduce the clear width of common use circulation paths where the reduction is essential to the function of the work performed. Machinery and equipment that must be placed a certain way to work properly, or for ergonomics or to prevent workplace injuries are covered by this exception.
- Handrails are not required on ramps, provided that they can be added in the future.

Commenters stated that the requirements set out in the 2010 Standards for accessible common use circulation paths in employee work areas are inappropriate, particularly in commercial kitchens, storerooms, and behind cocktail bars where wheelchairs would not be easily accommodated. These commenters further urged the Department not to adopt a requirement that circulation paths in employee work areas be at least 36 inches wide, including those at emergency exits.

These commenters misunderstand the scope of the provision. Nothing in the 2010 Standards requires all circulation paths in non-exempt areas to be accessible. The Department recognizes that building codes and fire and life safety codes, which are adopted by all of the states, require *primary* circulation paths in facilities, including employee work areas, to be at least 36 inches wide for purposes of emergency egress. Accessible routes also are at least 36 inches wide. Therefore, the Department anticipates that covered entities will be able to satisfy the requirement to provide accessible circulation paths by ensuring that their required *primary* circulation paths are accessible.

Individual employee work stations, such as a grocery checkout counter or an automobile service bay designed for use by one person, do not contain common use circulation paths and are not required to comply. Other work areas, such as stockrooms that typically have narrow pathways between shelves, would be required to design only one accessible circulation path into the stockroom. It would not be necessary to make each circulation path in the room accessible. In alterations it may be technically infeasible to provide accessible common use circulation paths in some employee work areas. For example, in a stock room of a department store significant existing physical constraints, such as having to move walls to avoid the loss of space to store inventory, may mean that it is technically infeasible (*see* section 106.5 "Defined Terms" of the 2010 Standards) to make even the primary common use circulation path in that stock room wide enough to be accessible. In addition, the 2010 Standards include exceptions for common use circulation paths in employee work areas where it may be difficult to comply with the technical requirements for accessible routes due to the size or function of the areas. The Department believes that these exceptions will provide the flexibility necessary to ensure that this requirement does not interfere with legitimate business operations.

Visible Alarms. Section 215.3 of the 2010 Standards provides that where employee work areas in newly constructed facilities have audible alarm coverage they are

required to have wiring systems that are capable of supporting visible alarms that comply with section 702 of the 2010 Standards. The 1991 Standards, at section 4.1.1(3), require visible alarms to be provided where audible fire alarm systems are provided, but do not require areas used only by employees as work areas to be equipped with accessibility features. As applied to office buildings, the 1991 Standards require visible alarms to be provided in public and common use areas such as hallways, conference rooms, break rooms, and restrooms, where audible fire alarm systems are provided.

Commenters asserted that the requirements of section 215.3 of the 2010 Standards would be burdensome to meet. These commenters also raised concerns that all employee work areas within existing buildings and facilities must be equipped with accessibility features.

The commenters' concerns about section 215.3 of the 2010 Standards represent a misunderstanding of the requirements applicable to employee work areas.

Newly constructed buildings and facilities merely are required to provide wiring so that visible alarm systems can be added as needed to accommodate employees who are deaf or hard of hearing. This is a minimal requirement without significant impact.

The other issue in the comments represents a misunderstanding of the Department's existing regulatory requirements. Employee common use areas in covered facilities (*e.g.,* locker rooms, break rooms, cafeterias, toilet rooms, corridors to exits, and other common use spaces) were required to be accessible under the 1991 Standards; areas in which employees actually perform their jobs are required to enable a person using a wheelchair or mobility device to approach, enter, and exit the area. The 2010 Standards require increased access through the accessible common use circulation path requirement, but neither the 1991 Standards nor the 2010 Standards require employee work stations to be accessible. Access to specific employee *work stations* is governed by title I of the ADA.

205 and 309 Operable Parts

Section 4.1.3, and more specifically sections 4.1.3(13), 4.27.3, and 4.27.4 of the 1991 Standards, require operable parts on accessible elements, along accessible routes, and in accessible rooms and spaces to comply with the technical requirements for operable parts, including height and operation. The 1991 Standards, at section 4.27.3, contain an exception, "* * * where the use of special equipment dictates otherwise or where electrical and communications systems receptacles are not normally intended for use by building occupants," from the technical requirement for the height of operable parts. Section 205.1 of the 2010 Standards divides this exception into three exceptions covering operable parts intended only for use by service or maintenance personnel, electrical or communication receptacles serving a dedicated use, and floor electrical receptacles. Operable parts covered by these new exceptions are exempt from all of the technical requirements for operable parts in section 309. The 2010 Standards also add exceptions that exempt certain outlets at kitchen counters; heating, ventilating and air conditioning diffusers; redundant controls provided for a single element, other than light switches; and exercise machines and equipment from all of the technical requirements for operable parts. Exception 7, in section 205.1 of the 2010 Standards, exempts cleats and other boat securement devices from the accessible height requirement. Similarly, section 309.4 of the 2010 Standards exempts gas pump nozzles, but only from the technical requirement for activating force.

Reach Ranges. The 1991 Standards set the maximum height for side reach at 54 inches above the floor. The 2010 Standards, at section 308.3, lower that maximum height to 48 inches above the finish floor or ground. The 2010 Standards also add exceptions, as discussed above, to the scoping requirement for operable parts for certain elements that, among other things, will exempt them from the reach range requirements in section 308.

The 1991 Standards, at sections 4.1.3, 4.27.3, and 4.2.6, and the 2010 Standards, at sections 205.1, 228.1, 228.2, 308.3, and 309.3, require operable parts of accessible elements, along accessible routes, and in accessible rooms and spaces to be placed within the forward or side-reach ranges specified in section 308. The 2010 Standards also require at least five percent (5%) of mailboxes provided in an interior location and at least one of each type of depository, vending machine, change machine, and gas pump to meet the technical requirements for a forward or a side reach.

Section 4.2.6 of the 1991 Standards specifies a maximum 54-inch high side reach and a minimum 9-inch low side reach for an unobstructed reach depth of 10 inches maximum. Section 308.3.1 of the 2010 Standards specifies a maximum 48-inch high side reach and a minimum 15-inch low side reach where the element being reached for is unobstructed. Section 308.3.1, Exception 1, permits an obstruction that is no deeper than 10 inches between the edge of the clear floor or ground space and the element that the individual with a disability is trying to reach. Changes in the side-reach range for new construction and alterations in the 2010 Standards will affect a variety of building elements such as light switches, electrical outlets, thermostats, fire alarm pull stations, card readers, and keypads.

Commenters were divided in their views about the changes to the unobstructed side-reach range. Disability advocacy groups and others, including individuals of short stature, supported the modifications to the proposed reach range requirements. Other commenters stated that the new reach range requirements will be burdensome for small businesses to comply with. These comments argued that the new reach range requirements restrict design options, especially in residential housing.

The Department continues to believe that data submitted by advocacy groups and others provides compelling evidence that lowered reach range requirements will better serve significantly greater numbers of individuals with disabilities, including individuals of short stature, persons with limited upper body strength, and others with limited use of their arms and fingers. The change to the side-reach range was developed by the Access Board over a prolonged period in which there was extensive public participation. This process did not produce any significant data to indicate that applying the new unobstructed side-reach range requirement in new construction or during alterations would impose a significant burden.

206 and Chapter 4 Accessible Routes

Slope. The 2010 Standards provide, at section 403.3, that the cross slope of walking surfaces not be steeper than 1:48. The 1991 Standards' cross slope requirement was that it not exceed 1:50. A commenter recommended increasing the cross slope requirement to allow a maximum of ½ inch per foot (1:24) to prevent imperfections in concrete surfaces from ponding water. The Department continues to believe that the requirement that a cross slope not be steeper than 1:48 adequately provides for water drainage in most situations. The suggested changes would double the allowable cross slope and create a significant impediment for many wheelchair users and others with a mobility disability.

Accessible Routes from Site Arrival Points and Within Sites. The 1991 Standards, at sections 4.1.2(1) and (2), and the 2010 Standards, at sections 206.2.1 and 206.2.2, require that at least one accessible route be provided within the site from site arrival points to an accessible building entrance and that at least one accessible route connect accessible facilities on the same site. The 2010 Standards also add two exceptions that exempt site arrival points and accessible facilities within a site from the accessible route requirements where the only means of access between them is a vehicular way that does not provide pedestrian access.

Commenters urged the Department to eliminate the exception that exempts site arrival points and accessible facilities from the accessible route requirements where the only means of access between them is a vehicular way not providing pedestrian access. The Department declines to accept this recommendation because the Department believes that its use will be limited. If it can be reasonably anticipated that the route between the site arrival point and the accessible facilities will be used by pedestrians, regardless of whether a pedestrian route is provided, then this exception will not apply. It will apply only in the relatively rare situations where the route between the site arrival point and the accessible facility dictates vehicular access—for example, an office complex on an isolated site that has a private access road, or a self-service storage facility where all users are expected to drive to their storage units.

Another commenter suggested that the language of section 406.1 of the 2010 Standards is confusing because it states that curb ramps on accessible routes shall comply with 406, 405.2 through 405.5, and 405.10. The 1991 Standards require that curb ramps be provided wherever an accessible route crosses a curb.

The Department declines to change this language because the change is purely

editorial, resulting from the overall changes in the format of the 2010 Standards. It does not change the substantive requirement. In the 2010 Standards all elements on a required accessible route must be accessible; therefore, if the accessible route crosses a curb, a curb ramp must be provided.

Areas of Sport Activity. Section 206.2.2 of the 2010 Standards requires at least one accessible route to connect accessible buildings, facilities, elements, and spaces on the same site. Advisory section 206.2.2 adds the explanation that an accessible route must connect the boundary of each area of sport activity (*e.g.,* courts and playing fields, whether indoor or outdoor). Section 206.2.12 of the 2010 Standards further requires that in court sports the accessible route must directly connect both sides of the court.

Limited-Use/Limited-Application Elevators, Destination-Oriented Elevators and Private Residence Elevators. The 1991 Standards, at section 4.1.3(5), and the 2010 Standards, at sections 206.2 and 206.6, include exceptions to the scoping requirement for accessible routes that exempt certain facilities from connecting each story with an elevator. If a facility is exempt from the scoping requirement, but nonetheless installs an elevator, the 1991 Standards require the elevator to comply with the technical requirements for elevators. The 2010 Standards add a new exception that allows a facility that is exempt from the scoping requirement to install a limited-use/limited-application (LULA) elevator. LULA elevators are also permitted in the 1991 Standards and the 2010 Standards as an alternative to platform lifts. The 2010 Standards also add a new exception that permits private residence elevators in multi-story dwelling and transient lodging units. The 2010 Standards contain technical requirements for LULA elevators at section 408 and private residence elevators at section 409.

Section 407.2.1.4 of the 2010 Standards includes an exception to the technical requirements for locating elevator call buttons for destination-oriented elevators. The advisory at section 407.2.1.4 describes lobby controls for destination-oriented elevator systems. Many elevator manufacturers have recently developed these new "buttonless" elevator control systems. These new, more efficient elevators are usually found in high-rise buildings that have several elevators. They require passengers to enter their destination floor on an entry device, usually a keypad, in the elevator lobby. The system then sends the most efficient car available to take all of the passengers going to the sixth floor, for example, only to the sixth floor, without making stops at the third, fourth, and fifth floors on the way to the sixth floor. The challenge for individuals who are blind or have low vision is how to know which elevator car to enter, after they have entered their destination floor into the keypad.

Commenters requested that the Department impose a moratorium on the installation of destination-oriented elevators arguing that this new technology presents wayfinding challenges for persons who are blind or have low vision.

Section 407.2.1.5 of the 2010 Standards allows destination-oriented elevators to not provide call buttons with visible signals to indicate when each call is registered and when each call is answered *provided* that visible and audible signals, compliant with 407.2.2 of the 2010 Standards, indicating which elevator car to enter, are provided. This will require the responding elevator car to automatically provide audible and visible communication so that the system will always verbally and visually indicate which elevator car to enter.

As with any new technology, all users must have time to become acquainted with how to use destination-oriented elevators. The Department will monitor the use of this new technology and work with the Access Board so that there is not a decrease in accessibility as a result of permitting this new technology to be installed.

Accessible Routes to Tiered Dining Areas in Sports Facilities. The 1991 Standards, at sections 4.1.3(1) and 5.4, and section 206.2.5 of the 2010 Standards require an accessible route to be provided to all dining areas in new construction, including raised or sunken dining areas. The 2010 Standards add a new exception for tiered dining areas in sports facilities. Dining areas in sports facilities are typically integrated into the seating bowl and are tiered to provide adequate lines of sight for individuals with disabilities. The new exception requires accessible routes to be provided to at least 25 percent (25%) of the tiered dining areas in sports facilities. Each tier must have the same services and the accessible routes must serve the accessible seating.

Accessible Routes to Press Boxes. The 1991 Standards, at sections 4.1.1(1) and 4.1.3(1), cover all areas of newly constructed facilities required to be accessible, and require an accessible route to connect accessible entrances with all accessible spaces and elements within the facility. Section 201.1 of the 2010 Standards requires that all areas of newly designed and constructed buildings and facilities and altered portions of existing buildings and facilities be accessible. Sections 206.2.7(1) and (2) of the 2010 Standards add two exceptions that exempt small press boxes that are located in bleachers with entrances on only one level, and small press boxes that are free-standing structures elevated 12 feet or more above grade, from the accessible route requirement when the aggregate area of all press boxes in a sports facility does not exceed 500 square feet. The Department anticipates that this change will significantly reduce the economic impact on smaller sports facilities, such as those associated with high schools or community colleges.

Public Entrances. The 1991 Standards, at sections 4.1.3(8) and 4.1.6(1)(h), require at least fifty percent (50%) of public entrances to be accessible. Additionally, the 1991 Standards require the number of accessible public entrances to be equivalent to the number of exits required by applicable building and fire codes. With very few exceptions, building and fire codes require at least two exits to be provided from spaces within a building and from the building itself. Therefore, under the 1991 Standards where two public entrances are planned in a newly constructed facility, both entrances are required to be accessible.

Instead of requiring accessible entrances based on the number of public entrances provided or the number of exits required (whichever is greater), section 206.4.1 of the 2010 Standards requires at least sixty percent (60%) of public entrances to be accessible. The revision is intended to achieve the same result as the 1991 Standards. Thus, under the 2010 Standards where two public entrances are planned in a newly constructed facility, both entrances must be accessible.

Where multiple public entrances are planned to serve different site arrival points, the 1991 Standards, at section 4.1.2(1), and section 206.2.1 of the 2010 Standards require at least one accessible route to be provided from each type of site arrival point provided, including accessible parking spaces, accessible passenger loading zones, public streets and sidewalks, and public transportation stops, to an accessible public entrance that serves the site arrival point.

Commenters representing small businesses recommended retaining the 1991 requirement for fifty percent (50%) of public entrances of covered entities to be accessible. These commenters also raised concerns about the impact upon existing facilities of the new sixty percent (60%) requirement.

The Department believes that these commenters misunderstand the 1991 Standards. As explained above, the requirements of the 1991 Standards generally require more than fifty percent (50%) of entrances in small facilities to be accessible. Model codes require that most buildings have more than one means of egress. Most buildings have more than one entrance, and the requirements of the 1991 Standards typically resulted in these buildings having more than one accessible entrance. Requiring at least sixty percent (60%) of public entrances to be accessible is not expected to result in a substantial increase in the number of accessible entrances compared to the requirements of the 1991 Standards. In some very large facilities this change may result in fewer accessible entrances being required by the 2010 Standards. However, the Department believes that the realities of good commercial design will result in more accessible entrances being provided for the convenience of all users.

The 1991 Standards and the 2010 Standards also contain exceptions that limit the number of accessible entrances required in alterations to existing facilities. When entrances to an existing facility are altered and the facility has an accessible entrance, the entrance being altered is not required to be accessible, unless a primary function area also is altered and then an accessible path of travel must be provided to the primary function area to the extent that the cost to do so is not disproportionate to the overall cost of the alteration.

Alterations to Existing Elevators. When a single space or element is altered, the 1991 Standards, at sections 4.1.6(1)(a) and (b), require the space or element to be made accessible. When an element in one elevator is altered, the 2010 Standards, at section 206.6.1, require the same element to be

altered in all elevators that are programmed to respond to the same call button as the altered elevator.

The 2010 Standards, at sections 407.2.1–407.4.7.1.2, also contain exceptions to the technical requirements for elevators when existing elevators are altered that minimize the impact of this change.

Commenters expressed concerns about the requirement that when an element in one elevator is altered, the 2010 Standards, at section 206.6.1, will require the same element to be altered in all elevators that are programmed to respond to the same call button as the altered elevator. Commenters noted that such a requirement is burdensome and will result in costly efforts without significant benefit to individuals with disabilities.

The Department believes that this requirement is necessary to ensure that when an individual with a disability presses a call button, an accessible elevator will arrive. Without this requirement, individuals with disabilities would have to wait unnecessarily for an accessible elevator to make its way to them arbitrarily. The Department also believes that the effort required to meet this provision is minimal in the majority of situations because it is typical to upgrade all of the elevators in a bank at the same time.

Accessible Routes in Dwelling Units with Mobility Features. Sections 4.34.1 and 4.34.2 of the UFAS require the living area, kitchen and dining area, bedroom, bathroom, and laundry area, where provided, in covered dwelling units with mobility features to be on an accessible route. Where covered dwelling units have two or more bedrooms, at least two bedrooms are required to be on an accessible route.

The 2010 Standards at sections 233.3.1.1, 809.1, 809.2, 809.2.1, and 809.4 will require all spaces and elements within dwelling units with mobility features to be on an accessible route. These changes exempt unfinished attics and unfinished basements from the accessible route requirement. Section 233.3.5 of the 2010 Standards also includes an exception to the dispersion requirement that permits accessible single-story dwelling units to be constructed, where multi-story dwelling units are one of the types of units provided.

Location of Accessible Routes. Section 4.3.2(1) of the 1991 Standards requires accessible routes connecting site arrival points and accessible building entrances to coincide with general circulation paths, to the maximum extent feasible. The 2010 Standards require all accessible routes to coincide with or be located in the same general area as general circulation paths. Additionally, a new provision specifies that where a circulation path is interior, the required accessible route must also be located in the interior of the facility. The change affects a limited number of buildings. Section 206.3 of the 2010 Standards requires all accessible routes to coincide with or be located in the same general area as general circulation paths. Designing newly constructed interior accessible routes to coincide with or to be located in the same area as general circulation paths will not typically present a difficult design challenge and is expected to impose limited design constraints. The change will have no impact on exterior accessible routes. The 1991 Standards and the 2010 Standards also require accessible routes to be located in the interior of the facility where general circulation paths are located in the interior of the facility. The revision affects a limited number of buildings.

Location of Accessible Routes to Stages. The 1991 Standards at section 4.33.5 require an accessible route to connect the accessible seating and the performing area. Section 206.2.6 of the 2010 Standards requires the accessible route to directly connect the seating area and the accessible seating, stage, and all areas of the stage, where a circulation path directly connects the seating area and the stage. Both the 1991 Standards and the 2010 Standards also require an accessible route to connect the stage and ancillary areas, such as dressing rooms, used by performers. The 2010 Standards do not require an additional accessible route to be provided to the stage. Rather, the changes specify where the accessible route to the stage, which is required by the 1991 Standards, must be located.

207 Accessible Means of Egress

General. The 1991 Standards at sections 4.1.3(9); 4.1.6(1)(g); and 4.3.10 establish scoping and technical requirements for accessible means of egress. Section 207.1 of the 2010 Standards reference the International Building Code (IBC) for scoping and technical requirements for accessible means of egress.

The 1991 Standards require the same number of accessible means of egress to be provided as the number of exits required by applicable building and fire codes. The IBC requires at least one accessible means of egress and at least two accessible means of egress where more than one means of egress is required by other sections of the building code. The changes in the 2010 Standards are expected to have minimal impact since the model fire and life safety codes, which are adopted by all of the states, contain equivalent requirements with respect to the number of accessible means of egress.

The 1991 Standards require areas of rescue assistance or horizontal exits in facilities with levels above or below the level of exit discharge. Areas of rescue assistance are spaces that have direct access to an exit, stair, or enclosure where individuals who are unable to use stairs can go to call for assistance and wait for evacuation. The 2010 Standards incorporate the requirements established by the IBC. The IBC requires an evacuation elevator designed with standby power and other safety features that can be used for emergency evacuation of individuals with disabilities in facilities with four or more stories above or below the exit discharge level, and allows exit stairways and evacuation elevators to be used as an accessible means of egress in conjunction with areas of refuge or horizontal exits. The change is expected to have minimal impact since the model fire and life safety codes, adopted by most states, already contain parallel requirements with respect to evacuation elevators.

The 1991 Standards exempt facilities equipped with a supervised automatic sprinkler system from providing areas of rescue assistance, and also exempt alterations to existing facilities from providing an accessible means of egress. The IBC exempts buildings equipped with a supervised automatic sprinkler system from certain technical requirements for areas of refuge, and also exempts alterations to existing facilities from providing an accessible means of egress.

The 1991 and 2010 Standards require signs that provide direction to or information about functional spaces to meet certain technical requirements. The 2010 Standards, at section 216.4, address exit signs. This section is consistent with the requirements of the IBC. Signs used for means of egress are covered by this scoping requirement. The requirements in the 2010 Standards require tactile signs complying with sections 703.1, 703.2 and 703.5 at doors at exit passageways, exit discharge, and at exit stairways. Directional exit signs and signs at areas of refuge required by section 216.4.3 must have visual characters and features complying with section 703.5.

Standby Power for Platform Lifts. The 2010 Standards at section 207.2 require standby power to be provided for platform lifts that are permitted to serve as part of an accessible means of egress by the IBC. The IBC permits platform lifts to serve as part of an accessible means of egress in a limited number of places where platform lifts are allowed in new construction. The 1991 Standards, at 4.1.3(5) Exception 4(a) through (d), and the 2010 Standards, at sections 206.7.1 through 206.7.10, similarly limit the places where platform lifts are allowed in new construction.

Commenters urged the Department to reconsider provisions that would require standby power to be provided for platform lifts. Concerns were raised that ensuring standby power would be too burdensome. The Department views this issue as a fundamental life safety issue. Lift users face the prospect of being trapped on the lift in the event of a power failure if standby power is not provided. The lack of standby power could be life-threatening in situations where the power failure is associated with a fire or other emergency. The use of a platform lift is generally only one of the options available to covered entities. Covered entities that are concerned about the costs associated with maintaining standby power for a lift may wish to explore design options that would incorporate the use of a ramp.

208 and 502 Parking Spaces

General. Where parking spaces are provided, the 1991 Standards, at sections 4.1.2(5)(a) and (7) and 7(a), and the 2010 Standards, at section 208.1, require a specified number of the parking spaces to be accessible. The 2010 Standards, at section 208, include an exception that exempts parking spaces used exclusively for buses, trucks, delivery vehicles, law enforcement vehicles, or for purposes of vehicular impound, from the scoping requirement for parking spaces, provided that when these lots are accessed by the public the lot has an accessible passenger loading zone.

The 2010 Standards require accessible parking spaces to be identified by signs that display the International Symbol of Accessibility. Section 216.5, Exceptions 1 and 2, of the 2010 Standards exempt certain accessible parking spaces from this signage requirement. The first exception exempts sites that have four or fewer parking spaces from the signage requirement. Residential facilities where parking spaces are assigned to specific dwelling units are also exempted from the signage requirement.

Commenters stated that the first exception, by allowing a small parking lot with four or fewer spaces not to post a sign at its one accessible space, is problematic because it could allow all drivers to park in accessible parking spaces. The Department believes that this exception provides necessary relief for small business entities that may otherwise face the prospect of having between twenty-five percent (25%) and one hundred percent (100%) of their limited parking area unavailable to their customers because they are reserved for the exclusive use of persons whose vehicles display accessible tags or parking placards. The 2010 Standards still require these businesses to ensure that at least one of their available parking spaces is designed to be accessible.

A commenter stated that accessible parking spaces must be clearly marked. The Department notes that section 502.6 of the 2010 Standards provides that accessible parking spaces must be identified by signs that include the International Symbol of Accessibility. Also, section 502.3.3 of the 2010 Standards requires that access aisles be marked so as to discourage parking in them.

Access Aisle. Section 502.3 of the 2010 Standards requires that an accessible route adjoin each access aisle serving accessible parking spaces. The accessible route connects each access aisle to accessible entrances.

Commenters questioned why the 2010 Standards would permit an accessible route used by individuals with disabilities to coincide with the path of moving vehicles. The Department believes that the 2010 Standards appropriately recognize that not all parking facilities provide separate pedestrian routes. Section 502.3 of the 2010 Standards provides the flexibility necessary to permit designers and others to determine the most appropriate location of the accessible route to the accessible entrances. If all pedestrians using the parking facility are expected to share the vehicular lanes, then the ADA permits covered entities to use the vehicular lanes as part of the accessible route. The advisory note in section 502.3 of the 2010 Standards, however, calls attention to the fact that this practice, while permitted, is not ideal. Accessible parking spaces must be located on the shortest accessible route of travel to an accessible entrance. Accessible parking spaces and the required accessible route should be located where individuals with disabilities do not have to cross vehicular lanes or pass behind parked vehicles to have access to an accessible entrance. If it is necessary to cross a vehicular lane because, for example, local fire engine access requirements prohibit parking immediately adjacent to a building, then a marked crossing running perpendicular to the vehicular route should be included as part of the accessible route to an accessible entrance.

Van Accessible Parking Spaces. The 1991 Standards, at sections 4.1.2(5)(b), 4.6.3, 4.6.4, and 4.6.5, require one in every eight accessible parking spaces to be van accessible. Section 208.2.4 of the 2010 Standards requires one in every six accessible parking spaces to be van accessible.

A commenter asked whether automobiles other than vans may park in van accessible parking spaces. The 2010 Standards do not prohibit automobiles other than vans from using van accessible parking spaces. The Department does not distinguish between vehicles that are actual "vans" versus other vehicles such as trucks, station wagons, sport utility vehicles, etc. since many vehicles other than vans may be used by individuals with disabilities to transport mobility devices.

Commenters' opinions were divided on this point. Facility operators and others asked for a reduction in the number of required accessible parking spaces, especially the number of van accessible parking spaces, because they claimed these spaces often are not used. Individuals with disabilities, however, requested an increase in the scoping requirements for these parking spaces.

The Department is aware that a strong difference of opinion exists between those who use such spaces and those who must provide or maintain them. Therefore, the Department did not increase the total number of accessible spaces required. The only change was to increase the proportion of spaces that must be accessible to vans and other vehicles equipped to transport mobility devices.

Direct Access Entrances From Parking Structures. Where levels in a parking garage have direct connections for pedestrians to another facility, the 1991 Standards, at section 4.1.3(8)(b)(i), require at least one of the direct connections to be accessible. The 2010 Standards, at section 206.4.2, require all of these direct connections to be accessible.

209 and 503 Passenger Loading Zones and Bus Stops

Passenger Loading Zones at Medical Care and Long-Term Care Facilities. Sections 6.1 and 6.2 of the 1991 Standards and section 209.3 of the 2010 Standards require medical care and long-term care facilities, where the period of stay exceeds 24 hours, to provide at least one accessible passenger loading zone at an accessible entrance. The 1991 Standards also require a canopy or roof overhang at this passenger loading zone. The 2010 Standards do not require a canopy or roof overhang.

Commenters urged the Department to reinstate the requirement for a canopy or roof overhang at accessible passenger loading zones at medical care and long-term care facilities. While the Department recognizes that a canopy or roof overhang may afford useful protection from inclement weather conditions to everyone using a facility, it is not clear that the absence of such protection would impede access by individuals with disabilities. Therefore, the Department declined to reinstate that requirement.

Passenger Loading Zones. Where passenger loading zones are provided, the 1991 Standards, at sections 4.1.2(5) and 4.6.6, require at least one passenger loading zone to be accessible. Sections 209.2.1 and 503 of the 2010 Standards, require facilities such as airport passenger terminals that have long, continuous passenger loading zones to provide one accessible passenger loading zone in every continuous 100 linear feet of loading zone space. The 1991 Standards and the 2010 Standards both include technical requirements for the vehicle pull-up space (96 inches wide minimum and 20 feet long minimum). Accessible passenger loading zones must have an access aisle that is 60 inches wide minimum and extends the full length of the vehicle pull-up space. The 1991 Standards permit the access aisle to be on the same level as the vehicle pull-up space, or on the sidewalk. The 2010 Standards require the access aisle to be on the same level as the vehicle pull-up space and to be marked so as to discourage parking in the access aisle.

Commenters expressed concern that certain covered entities, particularly airports, cannot accommodate the requirements of the 2010 Standards to provide passenger loading zones, and urged a revision that would require one accessible passenger loading zone located in reasonable proximity to each building entrance served by the curb.

Commenters raised a variety of issues about the requirements at section 503 of the 2010 Standards stating that the requirements for an access aisle, width, length, and marking of passenger loading zones are not clear, do not fully meet the needs of individuals with disabilities, may run afoul of state or local requirements, or may not be needed because many passenger loading zones are typically staffed by doormen or valet parkers. The wide range of opinions expressed in these comments indicates that this provision is controversial. However, none of these comments provided sufficient data to enable the Department to determine that the requirement is not appropriate.

Valet Parking and Mechanical Access Parking Garages. The 1991 Standards, at sections 4.1.2(5)(a) and (e), and sections 208.2, 209.4, and 209.5 of the 2010 Standards require parking facilities that provide valet parking services to have an accessible passenger loading zone. The 2010 Standards extend this requirement to mechanical access parking garages. The 1991 Standards contained an exception that exempted valet parking facilities from providing accessible parking spaces. The 2010 Standards eliminate this exception. The reason for not retaining the provision is that valet parking is a service, not a facility type.

Commenters questioned why the exception for valet parking facilities from providing accessible parking spaces was eliminated. The provision was eliminated because valet parkers may not have the skills necessary to drive a vehicle that is equipped to be accessible, including use of hand controls, or when a seat is not present to accommodate a driver using a wheelchair. In that case, permitting the individual with a disability to self-park may be a required reasonable modification of policy by a covered entity.

210 and 504 Stairways

The 1991 Standards require stairs to be accessible only when they provide access to floor levels not otherwise connected by an accessible route (*e.g.,* where the accessible route is provided by an elevator, lift, or ramp). The 2010 Standards, at sections 210.1 and 504, require all newly constructed stairs that are part of a means of egress to comply with the requirements for accessible stairs, which include requirements for accessible treads, risers, and handrails. In existing facilities, where floor levels are connected by an accessible route, only the handrail requirement will apply when the stairs are altered. Exception 2 to section 210.1 of the 2010 Standards permits altered stairs to not comply with the requirements for accessible treads and risers where there is an accessible route between floors served by the stairs.

Most commenters were in favor of this requirement for handrails in alterations and stated that adding handrails to stairs during alterations would be feasible and not costly while providing important safety benefits. The Department believes that it strikes an appropriate balance by focusing the expanded requirements on new construction. The 2010 Standards apply to stairs which are part of a required means of egress. Few stairways are not part of a means of egress. The 2010 Standards are consistent with most building codes which do not exempt stairways when the route is also served by a ramp or elevator.

211 and 602 Drinking Fountains

Sections 4.1.3(10) and 4.15 of the 1991 Standards and sections 211 and 602 of the 2010 Standards require drinking fountains to be provided for persons who use wheelchairs and for others who stand. The 1991 Standards require wall and post-mounted cantilevered drinking fountains mounted at a height for wheelchair users to provide clear floor space for a forward approach with knee and toe clearance and free standing or built-in drinking fountains to provide clear floor space for a parallel approach. The 2010 Standards require drinking fountains mounted at a height for wheelchair users to provide clear floor space for a forward approach with knee and toe clearance, and include an exception for a parallel approach for drinking fountains installed at a height to accommodate very small children. The 2010 Standards also include a technical requirement for drinking fountains for standing persons.

212 and 606 Kitchens, Kitchenettes, Lavatories, and Sinks

The 1991 Standards, at sections 4.24, and 9.2.2(7), contain technical requirements for sinks and only have specific scoping requirements for sinks in transient lodging. Section 212.3 of the 2010 Standards requires at least five percent (5%) of sinks in each accessible space to comply with the technical requirements for sinks. The technical requirements address clear floor space, height, faucets, and exposed pipes and surfaces. The 1991 Standards, at section 4.24, and the 2010 Standards, at section 606, both require the clear floor space at sinks to be positioned for a forward approach and knee and toe clearance to be provided under the sink. The 1991 Standards, at section 9.2.2(7), allow the clear floor space at kitchen sinks and wet bars in transient lodging guest rooms with mobility features to be positioned for either a forward approach with knee and toe clearance or for a parallel approach.

The 2010 Standards include an exception that permits the clear floor space to be positioned for a parallel approach at kitchen sinks in any space where a cook top or conventional range is not provided, and at a wet bar.

A commenter stated that it is unclear what the difference is between a sink and a lavatory, and that this is complicated by requirements that apply to sinks (five percent (5%) accessible) and lavatories (at least one accessible). The term "lavatory" generally refers to the specific type of plumbing fixture required for hand washing in toilet and bathing facilities. The more generic term "sink" applies to all other types of sinks located in covered facilities.

A commenter recommended that the mounting height of sinks and lavatories should take into consideration the increased use of three-wheeled scooters and some larger wheelchairs. The Department is aware that the use of three-wheeled scooters and larger wheelchairs may be increasing and that some of these devices may require changes in space requirements in the future. The Access Board is funding research to obtain data that may be used to develop design guidelines that provide access to individuals using these mobility devices.

213, 603, 604, and 608 Toilet and Bathing Facilities, Rooms, and Compartments

General. Where toilet facilities and bathing facilities are provided, they must comply with section 213 of the 2010 Standards.

A commenter recommended that all accessible toilet facilities, toilet rooms, and compartments should be required to have signage indicating that such spaces are restricted solely for the use of individuals with disabilities. The Department believes that it is neither necessary nor appropriate to restrict the use of accessible toilet facilities. Like many other facilities designed to be accessible, accessible toilet facilities can and do serve a wide range of individuals with and without disabilities.

A commenter recommended that more than one wheelchair accessible compartment be provided in toilet rooms serving airports and train stations because these compartments are likely to be occupied by individuals with luggage and persons with disabilities often take longer to use them. The Access Board is examining airport terminal accessibility as part of an ongoing effort to facilitate accessibility and promote effective design. As part of these efforts, the Access Board will examine requirements for accessible toilet compartments in larger airport restrooms. The Department declines to change the scoping for accessible toilet compartments at this time.

Ambulatory Accessible Toilet Compartments. Section 213.3.1 of the 2010 Standards requires multi-user men's toilet rooms, where the total of toilet compartments and urinals is six or more, to contain at least one ambulatory accessible compartment. The 1991 Standards count only toilet stalls (compartments) for this purpose. The 2010 Standards establish parity between multi-user women's toilet rooms and multi-user men's toilet rooms with respect to ambulatory accessible toilet compartments.

Urinals. Men's toilet rooms with only one urinal will no longer be required to provide an accessible urinal under the 2010 Standards. Such toilet rooms will still be required to provide an accessible toilet compartment.

Commenters urged that the exception be eliminated. The Department believes that this change will provide flexibility to many small businesses and it does not alter the requirement that all common use restrooms must be accessible.

Multiple Single-User Toilet Rooms. Where multiple single-user toilet rooms are clustered in a single location, fifty percent (50%), rather than the one hundred percent (100%) required by the 1991 Standards, are required to be accessible by section 213.2, Exception 4 of the 2010 Standards. Section 216.8 of the 2010 Standards requires that accessible single-user toilet rooms must be identified by the International Symbol of Accessibility where all single-user toilet rooms are not accessible.

Hospital Patient Toilet Rooms. An exception was added in section 223.1 of the 2010 Standards to allow toilet rooms that are part of critical or intensive care patient sleeping rooms to no longer be required to provide mobility features.

Water Closet Location and Rear Grab Bar. Section 604.2 of the 2010 Standards allows greater flexibility for the placement of the centerline of wheelchair accessible and ambulatory accessible water closets. Section 604.5.2, Exception 1 permits a shorter grab bar on the rear wall where there is not enough wall space due to special circumstances (*e.g.,* when a lavatory or other recessed fixture is located next to the water closet and the wall behind the lavatory is recessed so that the lavatory does not overlap the required clear floor space at the water closet). The 1991 Standards contain no exception for grab bar length, and require the water closet centerline to be exactly 18 inches from the side wall, while the 2010 Standards requirement allows the centerline to be between 16 and 18 inches from the side wall in wheelchair accessible toilet compartments and 17 to 19 inches in ambulatory accessible toilet compartments.

Water Closet Clearance. Section 604.3 of the 2010 Standards represents a change in the accessibility requirements where a lavatory is installed adjacent to the water closet. The 1991 Standards allow the nearest side of a lavatory to be placed 18 inches minimum from the water closet centerline and 36 inches minimum from the side wall adjacent to the water closet. However, locating the lavatory so close to the water closet prohibits many individuals with disabilities from using a side transfer. To allow greater transfer options, including side transfers, the 2010 Standards prohibit lavatories from overlapping the clear floor space at water closets, except in covered residential dwelling units.

A majority of commenters, including persons who use wheelchairs, strongly

agreed with the requirement to provide enough space for a side transfer. These commenters believed that the requirement will increase the usability of accessible single-user toilet rooms by making side transfers possible for many individuals who use wheelchairs and would have been unable to transfer to a water closet using a side transfer even if the water closet complied with the 1991 Standards. In addition, many commenters noted that the additional clear floor space at the side of the water closet is also critical for those providing assistance with transfers and personal care for persons with disabilities. Numerous comments noted that this requirement is already included in other model accessibility standards and many state and local building codes and its adoption in the 2010 Standards is a important part of harmonization efforts. The Department agrees that the provision of enough clear floor space to permit side transfers at water closets is an important feature that must be provided to ensure access for persons with disabilities in toilet and bathing facilities. Furthermore, the adoption of this requirement closely harmonizes with the model codes and many state and local building codes.

Other commenters urged the Department not to adopt section 604.3 of the 2010 Standards claiming that it will require single-user toilet rooms to be two feet wider than the 1991 Standards require, and this additional requirement will be difficult to meet. Multiple commentators also expressed concern that the size of single-user toilet rooms would be increased but they did not specify how much larger such toilet rooms would have to be in their estimation. In response to these concerns, the Department developed a series of single-user toilet room floor plans demonstrating that the total square footage between representative layouts complying with the 1991 Standards and the 2010 Standards are comparable. The Department believes the floor plan comparisons clearly show that size differences between the two Standards are not substantial and several of the 2010 Standards-compliant plans do not require additional square footage compared to the 1991 Standards plans. These single-user toilet room floor plans are shown below.

Several commenters concluded that alterations of single-user toilet rooms should be exempt from the requirements of section 604.3 of the 2010 Standards because of the significant reconfiguration and reconstruction that would be required, such as moving plumbing fixtures, walls, and/or doors at significant additional expense. The Department disagrees with this conclusion since it fails to take into account several key points. The 2010 Standards contain provisions for in-swinging doors, 603.2.3, Exception 2, and recessed fixtures adjacent to water closets, 604.5.2, Exception 1. These provisions give flexibility to create more compact room designs and maintain required clearances around fixtures. As with the 1991 Standards, any alterations must comply to the extent that it is technically feasible to do so.

The requirements at section 604.3.2 of the 2010 Standards specify how required clearance around the water closet can overlap with specific elements and spaces. An exception that applies only to covered residential dwelling units permits a lavatory to be located no closer than 18 inches from the centerline of the water closet. The requirements at section 604.3.2 of the 2010 Standards increase accessibility for individuals with disabilities. One commenter expressed concern about other items that might overlap the clear floor space, such as dispensers, shelves, and coat hooks on the side of the water closet where a wheelchair would be positioned for a transfer. Section 604.3.2 of the 2010 Standards allows items such as associated grab bars, dispensers, sanitary napkin disposal units, coat hooks, and shelves to overlap the clear floor space. These are items that typically do not affect the usability of the clear floor space.

Toilet Room Doors. Sections 4.22.2 and 4.22.3 of the 1991 Standards and Section 603.2.3 of the 2010 Standards permit the doors of all toilet or bathing rooms with in-swinging doors to swing into the required turning space, but not into the clear floor space required at any fixture. In single-user toilet rooms or bathing rooms, Section 603.2.3 Exception 2 of the 2010 Standards permits the door to swing into the clear floor space of an accessible fixture if a clear floor space that measures at least 30 inches by 48 inches is provided outside of the door swing.

Several commenters expressed reservations about Exception 2 of Section 603.2.3. Concerns were raised that permitting doors of single-user toilet or bathing rooms with in-swinging doors to swing into the clearance around any fixture will result in inaccessibility to individuals using larger wheelchairs and scooters. Additionally, a commenter stated that the exception would require an unacceptable amount of precision maneuvering by individuals who use standard size wheelchairs. The Department believes that this provision achieves necessary flexibility while providing a minimum standard for maneuvering space. The standard does permit additional maneuvering space to be provided, if needed.

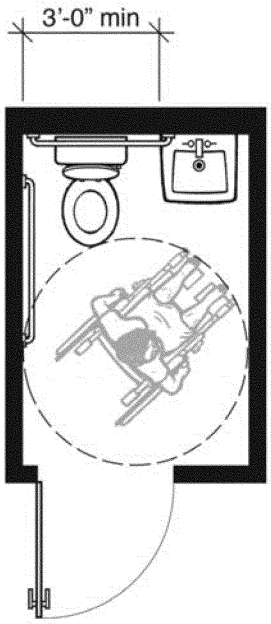
In the NPRM, the Department provided a series of plan drawings illustrating comparisons of the minimum size single-user toilet rooms. These floor plans showed typical examples that met the minimum requirements of the proposed ADA Standards. A commenter was of the opinion that the single-user toilet plans shown in the NPRM demonstrated that the new requirements will not result in a substantial increase in room size. Several other commenters representing industry offered criticisms of the single-user toilet floor plans to support their assertion that a 2010 Standards-compliant single-user toilet room will never be smaller and will likely be larger than such a toilet room required under the 1991 Standards. Commenters also asserted that the floor plans prepared by the Department were of a very basic design which could be accommodated in a minimal sized space whereas the types of facilities their customers demand would require additional space to be added to the rooms shown in the floor plans. The Department recognizes that there are many design choices that can affect the size of a room or space. Choices to install additional features may result in more space being needed to provide sufficient clear floor space for that additional feature to comply. However, many facilities that have these extra features also tend to have ample space to meet accessibility requirements. Other commenters asserted that public single-user toilet rooms always include a closer and a latch on the entry door, requiring a larger clear floor space than shown on the push side of the door shown in Plan 1B. The Department acknowledges that in instances where a latch is provided and a closer is required by other regulations or codes, the minimum size of a room with an out-swinging door may be slightly larger than as shown in Plan 1C.

Additional floor plans of single-user toilet rooms are now included in further response to the commentary received.

BILLING CODE 4410–13–P

Comparison of Single-User Toilet Room Layouts

1991 Standards

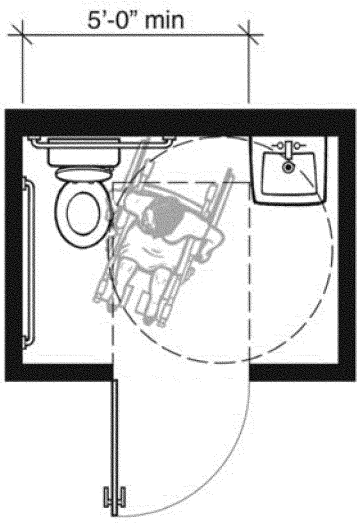


Plan-1A: 1991 Standards Minimum with Out-Swinging Door

5'-0" x 7'-3" • 36.25 Square Feet

This plan shows a typical example of a single-user toilet room that meets the minimum requirements of the 1991 Standards. The size of this space is determined by the minimum width required for the water closet and lavatory between the side walls, the minimum wheelchair turning space, and the space required for the out-swinging door. A lavatory with knee space can overlap the clear floor space required for the water closet provided that at least 36 inches of clearance is maintained between the side wall next to the water closet and the lavatory (see section 4.16.2 and Fig. 28 of the 1991 Standards). A wheelchair turning space meeting section 4.2.3 of the 1991 Standards must be provided. The size of this room requires that the entry door swing out. The room would be larger if the door were in-swinging.

2010 Standards



Plan-1B: 2010 Standards Minimum with Out-Swinging Door

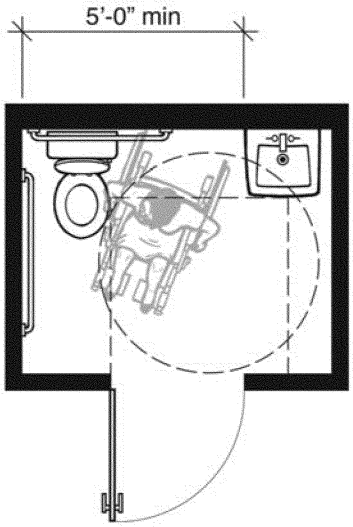
7'-0" x 5'-0" • 35.00 Square Feet

This plan shows a typical example of a single-user toilet room that meets the minimum requirements of the 2010 Standards. Features include: five-foot minimum width between the side wall of the water closet and the lavatory; 60-inch minimum circular wheelchair turning space; and 36-inch by 48-inch clear maneuvering space for the out-swinging entry door. Section 604.3.1 of the 2010 Standards requires a floor clearance at a water closet that is a minimum of 60 inches wide by 56 inches deep regardless of approach. Section 604.3.2 prohibits any other plumbing fixtures from being located in this clear space, except in residential dwelling units. The 2010 Standards, at section 304.3, allows the turning space to extend into toe and knee space provided beneath fixtures and other elements. Required maneuvering space for the entry door (inside the room) must be clear of all fixtures. If the door had both a closer and latch, section 404.2.4.1 and Figure 404.2.4.1(c) require additional space on the latch side.

This layout is three point five percent (3.5%) smaller than the accompanying Plan-1A: 1991 Standards Minimum with Out-Swinging Door example.

Comparison of Single-User Toilet Room Layouts

2010 Standards



Plan-1C: 2010 Standards Minimum with Out-Swinging Door

(entry door has both closer and latch)

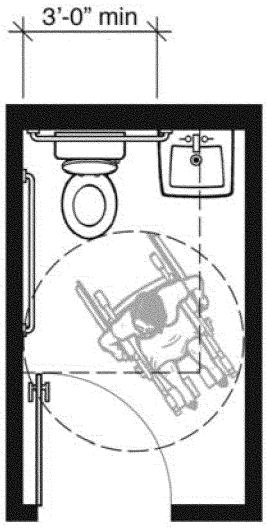
7'-0" x 5'-6" • 38.50 Square Feet

This plan shows the same typical features of a single-user toilet room that meets the minimum requirements of the 2010 Standards as Plan-1B does except the entry door has both a closer and latch. Because the door has both a closer and latch, a minimum additional foot of maneuvering space is required on the latch side (see section 404.2.4.1 and Figure 404.2.4.1(c) of the 2010 Standards).

This layout is six point two percent (6.2%) larger than the accompanying Plan-1A: 1991 Standards Minimum with Out-Swinging Door example.

Comparison of Single-User Toilet Room Layouts

1991 Standards

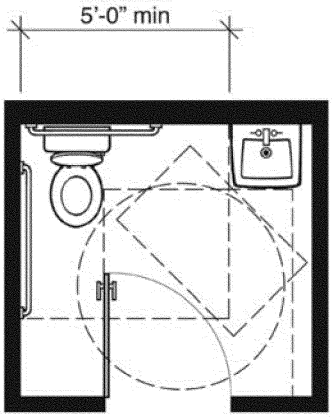


Plan-2A: 1991 Standards Minimum with In-Swinging Door

5'-0" x 8'-6" • 42.50 Square Feet

This plan shows a typical example of a single-user toilet room that meets the minimum requirements of the 1991 Standards. Depending on the width of the hallway and other circulation issues, it can be preferable to swing the entry door into the toilet room. Businesses and public entities typically prefer to have an in-swinging door. The in-swinging door increases overall room size because it cannot swing over the required clear floor space at any accessible fixture, (see section 4.22.2 of the 1991 Standards). This increases the room depth from Plan-1A. The door is permitted to swing over the required turning space shown as a 60-inch circle.

2010 Standards



Plan-2B: 2010 Standards Minimum with In-Swinging Door

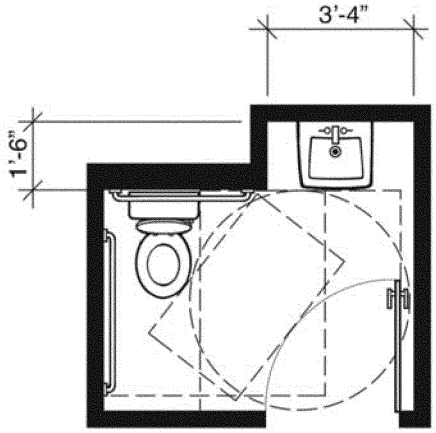
7'-0" x 6'-6" • 45.50 Square Feet

This plan shows a typical example of a single-user toilet room that meets the minimum requirements of the 2010 Standards when the entry door swings into the room. In the 2010 Standards an exception allows the entry door to swing over the clear floor spaces and clearances required at the fixtures if a clear floor space complying with section 305.3 (minimum 30 inches by 48 inches) is provided outside the arc of the door swing, section 603.3.3 exception 2. The required maneuvering space for the door, section 404.2.4.1 and Figure 404.2.4.1(a), also is a factor in room size. This clear space cannot be obstructed by the plumbing fixtures. Note that this layout provides more space for turning when the door is closed than Plan-1B.

This layout is seven percent (7%) larger than the accompanying Plan-2A: 1991 Standards Minimum with In-Swinging Door example.

Comparison of Single-User Toilet Room Layouts

2010 Standards



Plan-2C: 2010 Standards Minimum with In-Swinging Door

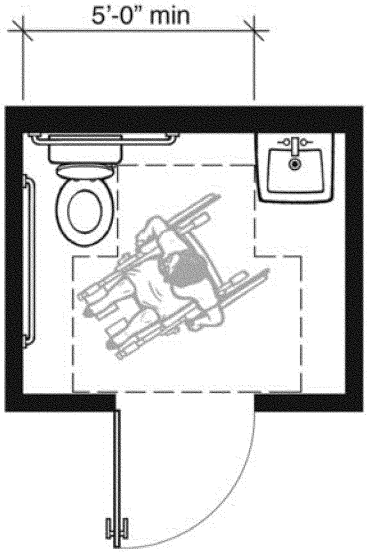
7'-0" x 6'-6" • 40.00 Square Feet
(plumbing chase not included)

This plan shows the same typical features of a single-user toilet room that meets the minimum requirements of the 2010 Standards as Plan-2B when the entry door swings into the room. Note that this layout also provides more space for turning when the door is closed than Plan-1B.

This layout is six point two five percent (6.25%) smaller than the accompanying Plan-2A: 1991 Standards Minimum with In-Swinging Door example.

Comparison of Single-User Toilet Room Layouts

1991 Standards and 2010 Standards



Plan-3: Meets Both 1991 Standards and 2010 Standards

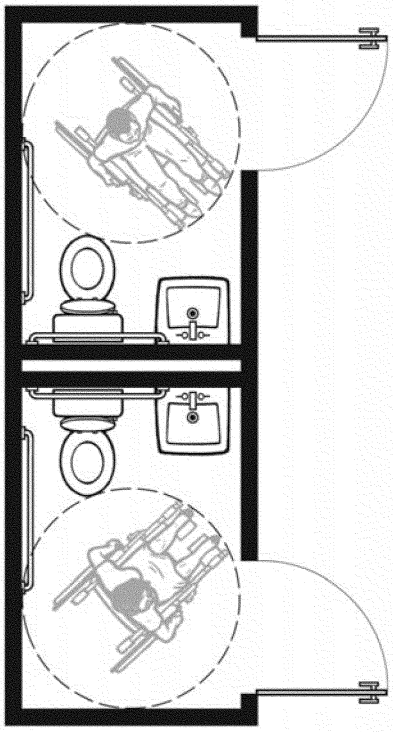
7'-0" x 5'-9" • 40.25 Square Feet

This plan shows an example of a single-user toilet room that meets the minimum requirements of both the 1991 Standards and 2010 Standards. A T-shaped turning space has been used (see Fig. 3(a) of the 1991 Standards and Figure 304.3.2 of the 2010 Standards) to maintain a compact room size. An out-swinging door also minimizes the overall layout depth and cannot swing over the required clear floor space or clearance at any accessible plumbing fixture.

This layout is eleven percent (11%) larger than the Plan-1A: 1991 Standards Minimum with Out-Swinging Door example shown at the beginning of these plan comparisons.

Comparison of Single-User Toilet Room "Pairs" With Fixtures Side-by-Side

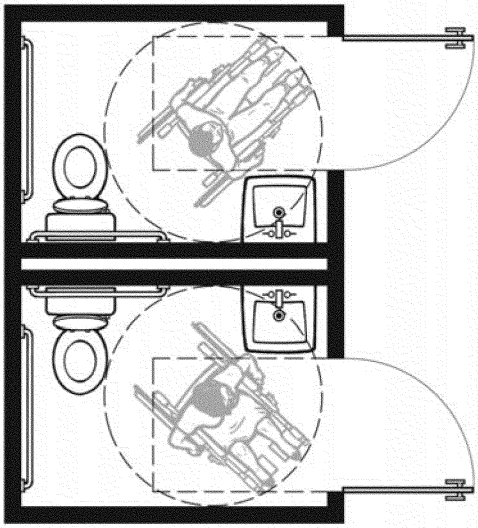
1991 Standards



Plan-1A Pair: 1991 Standards with Out-Swinging Doors

Two 5'-0" x 7'-3" Rooms – 72.50 Square Feet Total

2010 Standards



Plan-1B Pair: 2010 Standards with Out-Swinging Doors

Two 7'-0" x 5'-0" Rooms – 70.00 Square Feet Total

These plans show men's/women's room configurations using Plans 1A and 1B.

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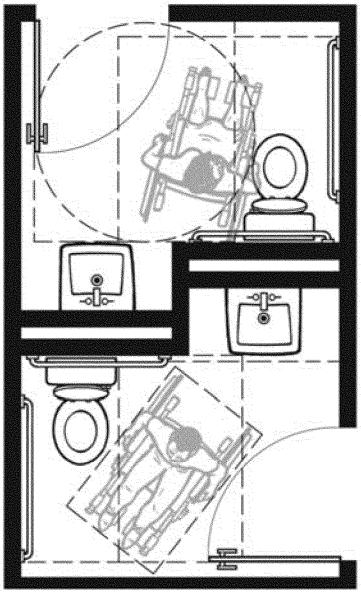
Comparison of Single-User Toilet Room "Pairs" With Fixtures Side-by-Side

2010 Standards



Plan-2C Pair: 2010 Standards with In-Swinging Doors

Two 7'-2" x 6'-6" Rooms - 82.00 Square Feet Total

This plan shows a men's/women's room configuration using Plan 2C.

BILLING CODE 4410–13–C

Toilet Paper Dispensers. The provisions for toilet paper dispensers at section 604.7 of the 2010 Standards require the dispenser to be located seven inches minimum and nine inches maximum in front of the water closet measured to the centerline of the dispenser. The paper outlet of the dispenser must be located 15 inches minimum and 48 inches maximum above the finish floor. In the 1991 Standards the location of the toilet paper dispenser is determined by the centerline and forward edge of the dispenser. In the 2010 Standards the mounting location of the toilet paper dispenser is determined by the centerline of the dispenser and the location of the outlet for the toilet paper.

One commenter discussed the difficulty of using large roll toilet paper dispensers and dispensers with two standard size rolls stacked on top of each other. The size of the large dispensers can block access to the grab bar and the outlet for the toilet paper can be too low or too high to be usable. Some dispensers also control the delivery of the toilet paper which can make it impossible to get the toilet paper. Toilet paper dispensers that control delivery or do not allow continuous paper flow are not permitted by the 1991 Standards or the 2010 Standards. Also, many of the large roll toilet paper dispensers do not comply with the 2010 Standards since their large size does not allow them to be mounted 12 inches above or 1½ inches below the side grab bar as required by section 609.3.

Shower Spray Controls. In accessible bathtubs and shower compartments, sections 607.6 and 608.6 of the 2010 Standards require shower spray controls to have an on/off control and to deliver water that is 120 °F (49 °C) maximum. Neither feature was required by the 1991 Standards, but may be required by plumbing codes. Delivering water that is no hotter than 120 °F (49 °C) will require controlling the maximum temperature at each accessible shower spray unit.

Shower Compartments. The 1991 Standards at sections 4.21 and 9.1.2 and the 2010 Standards at section 608 contain technical requirements for transfer-type and roll-in shower compartments. The 2010 Standards provide more flexibility than the 1991 Standards as follows:

- Transfer-type showers are exactly 36 inches wide by 36 inches long.
- The 1991 Standards and the 2010 Standards permit a ½-inch maximum curb in transfer-type showers. The 2010 Standards add a new exception that permits a 2-inch maximum curb in transfer-type showers in alterations to existing facilities, where recessing the compartment to achieve a ½-inch curb will disturb the structural reinforcement of the floor slab.
- Roll-in showers are 30 inches wide minimum by 60 inches long minimum. Alternate roll-in showers are 36 inches wide by 60 inches long minimum, and have a 36-inch minimum wide opening on the long side of the compartment. The 1991 Standards require alternate roll-in showers in a portion of accessible transient lodging guest rooms, but provision of this shower type in other facilities is generally permitted as an equivalent facilitation. The 1991 Standards require a seat to be provided adjacent to the opening; and require the controls to be located on the side adjacent to the seat. The 2010 Standards permit alternate roll-in showers to be used in any facility, only require a seat in transient lodging guest rooms, and allow location of controls on the back wall opposite the seat as an alternative.

Commenters raised concerns that adding a new exception that permits a 2-inch maximum curb in transfer-type showers in alterations to existing facilities, where recessing the compartment to achieve a ½-inch curb will disturb the structural reinforcement of the floor slab, will impair the ability of individuals with disabilities to use transfer-type showers.

The exception in section 608.7 of the 2010 Standards permitting a 2-inch maximum curb in transfer-type showers is allowed only in existing facilities where provision of a ½-inch high threshold would disturb the structural reinforcement of the floor slab. Whenever this exception is used the least high threshold that can be used should be provided, up to a maximum height of 2 inches. This exception is intended to provide some flexibility where the existing structure precludes full compliance.

Toilet and Bathing Rooms. Section 213 of the 2010 Standards sets out the scoping requirements for toilet and bathing rooms.

Commenters recommended that section 213, Toilet Facilities and Bathing Facilities, of the 2010 Standards include requirements that unisex toilet and bathing rooms be provided in certain facilities. These commenters suggested that unisex toilet and bathing rooms are most useful as companion care facilities.

Model plumbing and building codes require single-user (unisex or family) toilet facilities in certain occupancies, primarily assembly facilities, covered malls, and transportation facilities. These types of toilet rooms provide flexibility for persons needing privacy so that they can obtain assistance from family members or persons of the opposite sex. When these facilities are provided, both the 1991 Standards and 2010 Standards require that they be accessible. The 2010 Standards do not scope unisex toilet facilities because plumbing codes generally determine the number and type of plumbing fixtures to be provided in a particular occupancy and often determine whether an occupancy must provide separate sex facilities in addition to single-user facilities. However, the scoping at section 213.2.1 of the 2010 Standards coordinates with model plumbing and building code requirements which will permit a small toilet room with two water closets or one water closet and one urinal to be considered a single-user toilet room provided that the room has a privacy latch. In this way, a person needing assistance from a person of the opposite sex can lock the door to use the facility while temporarily inconveniencing only one other potential user. These provisions strike a reasonable balance and impose less impact on covered entities.

A commenter recommended that in shower compartments rectangular seats as provided in section 610.3.1 of the 2010 Standards should not be permitted as a substitute for L-shaped seats as provided in 610.3.2.

The 2010 Standards do not indicate a preference for either rectangular or L-shaped seats in shower compartments. L-shaped seats in transfer and certain roll-in showers have been used for many years to provide users with poor balance additional support because they can position themselves in the corner while showering.

214 and 611 Washing Machines and Clothes Dryers

Sections 214.2 (washing machines) and 214.3 (clothes dryers) of the 2010 Standards specify the number of each type of these machines required to be accessible (one to two depending upon the total number of machines provided) and section 611 specifies the technical requirements. An exception will permit the maximum height for the tops of these machines to be 2 inches higher than the general requirement for maximum high reach over an obstruction.

A commenter objected to the scoping provision for accessible washing machines and clothes dryers stating that the probability is low that more than one accessible machine would be needed at the same time in the laundry facility of a place of transient lodging.

The scoping in this provision is based on the relative size of the facility. The Department assumes that the size of the facility (and, therefore, the number of accessible machines provided) will be determined by the covered entity's assessment of the demand for laundry facilities. The Department declines to assume that persons with disabilities will have less use for accessible facilities in transient lodging than in other public accommodations.

216 and 703 Signs

The following types of signs, though they are not specifically subject to the 1991 Standards requirement for signs, will now be explicitly exempted by sections 216 and 703 of the 2010 Standards. These types of signs include: seat and row designations in assembly areas; occupant names, building addresses; company names and logos; signs in parking facilities (except those identifying accessible parking spaces and means of egress); and exterior signs identifying permanent rooms and spaces that are not located at the door to the space they serve. This requirement also clarifies that the exception for temporary signs applies to signs used for seven days or less.

The 2010 Standards retain the option to provide one sign where both visual and tactile characters are provided or two signs, one with visual, and one with tactile characters.

217 and 704 Telephones

Drive-up Public Telephones. Where public telephones are provided, the 1991 Standards, at section 4.1.3(17)(a), and section 217.2 of the 2010 Standards, require a certain number of telephones to be wheelchair accessible. The 2010 Standards add a new exception that exempts drive-up public telephones.

Text Telephones (TTY). Section 4.1.3(17) of the 1991 Standards requires a public TTY to be provided if there are four or more public pay telephones at a site and at least one is in an interior location. Section 217.4.2 of the 2010 Standards requires that a building or facility provide a public TTY on each floor that has four or more public telephones, and in each telephone bank that has four or more telephones. Additionally, section 217.4.4 of the 2010 Standards requires that at least one public TTY be installed where four or more public pay telephones are provided on an exterior site. Section 217.4.5 of the 2010 Standards also requires that a public TTY be provided where at least one public pay telephone is provided at a public rest stop, emergency roadside stop, or service plaza. Section 217.4.6 of the 2010 Standards also requires that a public TTY be provided at each location where at least one public pay

telephone is provided serving a hospital emergency room, a hospital recovery room, or a hospital waiting room. Section 217.4.7 of the 2010 Standards also requires that, in addition to the requirements for a public TTY to be provided at each location where at least four or more public pay telephones are provided at a bank of pay telephones and where at least one public pay telephone is provided on a floor or in a public building, where at least one public pay telephone serves a particular entrance to a bus or rail facility at least one public TTY must serve that entrance. In airports, in addition to the requirements for the provision of a public TTY at phone banks, on floors, and in public buildings with pay phones, where four or more public pay phones are located in a terminal outside the security areas, in a concourse within the security areas, or a baggage claim area in a terminal at least one public TTY must be provided. Section 217.4.8 of the 2010 Standards also requires that a TTY be provided in at least one secured area where at least one pay telephone is provided in a secured area used only by detainees or inmates and security personnel in detention and correctional facilities.

Wheelchair Accessible Telephones

Section 217.2 of the 2010 Standards requires that where public telephones are provided wheelchair accessible telephones complying with section 704.2 must be provided in accordance with Table 217.2.

A commenter stated that requiring installation of telephones within the proposed reach range requirements would adversely impact public and telephone owners and operators. According to the commenter, individuals without disabilities will not use telephones that are installed within the reach range requirements because they may be inconvenienced by having to stoop to operate these telephones, and, therefore, owners and operators will lose revenue due to less use of public telephones.

This comment misunderstands the scoping requirements for wheelchair accessible telephones. Section 217.2 of the 2010 Standards provides that where one or more single units are provided, only one unit per floor, level, or exterior site is required to be wheelchair accessible. However, where banks of telephones are provided, only one telephone in each bank is required to be wheelchair accessible. The Department believes these scoping requirements for wheelchair accessible telephones are reasonable and will not result in burdensome obligations or lost revenue for owners and operators.

218 and 810 Transportation Facilities

Detectable Warnings. Detectable warnings provide a distinctively textured surface of truncated domes. The 1991 Standards at sections 4.1.3(15), 4.7.7, 4.29.2, 4.29.5, 4.29.6, and 10.3.1(8) require detectable warnings at curb ramps, hazardous vehicular areas, reflecting pools, and transit platform edges. The 2010 Standards at sections 218, 810.5, 705.1, and 705.2 only require detectable warnings at transit platform edges. The technical specifications for the diameter and spacing of the truncated domes have also been changed. The 2010 Standards also delete the requirement for the material used to contrast in resiliency or sound-on-cane contact from adjoining walking surfaces at interior locations.

The 2010 Standards apply to detectable warnings on developed sites. They do not apply to the public right-of-way. Scoping for detectable warnings at all locations other than transit platform edges has been eliminated from the 2010 Standards. However, because detectable warnings have been shown to significantly benefit individuals with disabilities at transit platform edges, the 2010 Standards provide scoping and technical requirements for detectable warnings at transit platform edges.

219 and 706 Assistive Listening Systems

Signs. Section 216.10 of the 2010 Standards requires each covered assembly area to provide signs at each auditorium to inform patrons that assistive listening systems are available. However, an exception to this requirement permits assembly areas that have ticket offices or ticket windows to display the required signs at the ticket window.

A commenter recommended eliminating the exception at 216.10 because, for example, people who buy tickets through the mail, by subscription, or on-line may not need to stop at a ticket office or window upon arrival at the assembly area. The Department believes that an individual's decision to purchase tickets before arriving at a performance does not limit the discretion of the assembly operator to use the ticket window to provide other services to its patrons. The Department retained the exception at 216.10 to permit the venue operator some flexibility in determining how to meet the needs of its patrons.

Audible Communication. The 1991 Standards, at section 4.1.3(19)(b), require assembly areas, where audible communication is integral to the use of the space, to provide an assistive listening system if they have an audio amplification system or an occupant load of 50 or more people and have fixed seating. The 2010 Standards at section 219 require assistive listening systems in spaces where communication is integral to the space and audio amplification is provided and in courtrooms.

The 1991 Standards require receivers to be provided for at least four percent (4%) of the total number of fixed seats. The 2010 Standards, at section 219.3, revise the percentage of receivers required according to a table that correlates the required number of receivers to the seating capacity of the facility. Small facilities will continue to provide receivers for four percent (4%) of the seats. The required percentage declines as the size of the facility increases. The changes also require at least twenty-five percent (25%), but no fewer than two, of the receivers to be hearing-aid compatible. Assembly areas served by an induction loop assistive listening system will not have to provide hearing-aid compatible receivers.

Commenters were divided in their opinion of this change. The Department believes that the reduction in the required number of assistive listening systems for larger assembly areas will meet the needs of individuals with disabilities. The new requirement to provide hearing-aid compatible receivers should make assistive listening systems more usable for people who have been underserved until now.

Concerns were raised that the requirement to provide assistive listening systems may have an adverse impact on restaurants. This comment misunderstands the scope of coverage. The 2010 Standards define the term "assembly area" to include facilities used for entertainment, educational, or civic gatherings. A restaurant would fall within this category only if it is presenting programs to educate or entertain diners, and it provides an audio amplification system.

Same Management or Building. The 2010 Standards add a new exception that allows multiple assembly areas that are in the same building and under the same management, such as theaters in a multiplex cinema and lecture halls in a college building, to calculate the number of receivers required based on the total number of seats in all the assembly areas, instead of each assembly area separately, where the receivers are compatible with the assistive listening systems used in each of the assembly areas.

Mono Jacks, Sound Pressure, Etc. Section 4.33.7 of the 1991 Standards does not contain specific technical requirements for assistive listening systems. The 2010 Standards at section 706 require assistive listening systems to have standard mono jacks and will require hearing-aid compatible receivers to have neck loops to interface with telecoils in hearing aids. The 2010 Standards also specify sound pressure level, signal-to-noise ratio, and peak clipping level. Currently available assistive listening systems typically meet these technical requirements.

220 and 707 Automatic Teller Machines and Fare Machines

Section 707 of the 2010 Standards adds specific technical requirements for speech output, privacy, tactilely-discernible input controls, display screens, and Braille instructions to the general accessibility requirements set out in the 1991 Standards. Machines shall be speech enabled and exceptions are provided that cover when audible tones are permitted, when advertisements or similar information are provided, and where speech synthesis cannot be supported. The 1991 Standards require these machines to be accessible to and independently usable by persons with visual impairments, but do not contain any technical specifications.

221 Assembly Areas

Wheelchair Spaces/Companion Seats. Owners of large assembly areas have historically complained to the Department that the requirement for one percent (1%) of seating to be wheelchair seating is excessive and that wheelchair seats are not being sold. At the same time, advocates have traditionally argued that persons who use wheelchairs will increasingly participate in activities at assembly areas once they become accessible and that at least one percent (1%) of seats should be accessible.

The 1991 Standards, at sections 4.1.3(19)(a) and 4.33.3, require assembly areas to provide

wheelchair and companion seats. In assembly areas with a capacity of more than five hundred seats, accessible seating at a ratio of one percent (1%) (plus one seat) of the number of traditional fixed seats must be provided. The 2010 Standards, at section 221.2, require assembly areas with 501 to 5000 seats to provide at least six wheelchair spaces and companion seats plus one additional wheelchair space for each additional 150 seats (or fraction thereof) between 501 through 5000. In assembly areas with more than 5000 seats at least 36 wheelchair spaces and companion seats plus one additional wheelchair space for each 200 seats (or fraction thereof) more than 5000 are required. See sections 221.1 and 221.2 of the 2010 Standards.

Commenters questioned why scoping requirements for large assembly areas are being reduced. During the development of the 2004 ADAAG, industry providers, particularly those representing larger stadium-style assembly areas, supplied data to the Access Board demonstrating the current scoping requirements for large assembly areas often exceed the demand. Based on the data provided to the Access Board, the Department believes the reduced scoping requirements will adequately meet the needs of individuals with disabilities, while balancing concerns of the industry.

Commenters representing assembly areas supported the reduced scoping. One commenter asked that scoping requirements for larger assembly areas be reduced even further. Although the commenter referenced data demonstrating that wheelchair spaces in larger facilities with seating capacities of 70,000 or more may not be used by individuals with disabilities, the data was not based on actual results, but was calculated at least in part based on probability assumptions. The Department is not convinced that further reductions should be made based upon those projections and that further reductions would not substantially limit accessibility at assembly areas for persons who use wheelchairs.

Section 221.2.1.3 of the 2010 Standards clarifies that the scoping requirements for wheelchair spaces and companion seats are to be applied separately to general seating areas and to each luxury box, club box, and suite in arenas, stadiums, and grandstands. In assembly areas other than arenas, stadiums, and grandstands, the scoping requirements will not be applied separately. Thus, in performing arts facilities with tiered boxes designed for spatial and acoustical purposes, the scoping requirement is to be applied to the seats in the tiered boxes. The requisite number of wheelchair spaces and companion seats required in the tiered boxes are to be dispersed among at least twenty percent (20%) of the tiered boxes. For example, if a performing arts facility has 20 tiered boxes with 10 fixed seats in each box, for a total of 200 seats, at least five wheelchair spaces and companion seats must be provided in the boxes, and they must be dispersed among at least four of the 20 boxes.

Commenters raised concerns that the 2010 Standards should clarify requirements for scoping of seating areas and that requiring accessible seating in each luxury box, club box, and suite in arenas, stadiums and grandstands could result in no wheelchair and companion spaces available for individuals with disabilities in the general seating area(s). These comments appear to misunderstand the requirements. The 2010 Standards require each luxury box, club box, and suite in an arena, stadium or grandstand to be accessible and to contain wheelchair spaces and companion seats as required by sections 221.2.1.1, 221.2.1.2 and 221.3. In addition, the remaining seating areas not located in boxes must also contain the number of wheelchair and companion seating locations specified in the 2010 Standards based on the total number of seats in the entire facility excluding luxury boxes, club boxes and suites.

Wheelchair Space Overlap in Assembly Areas. Section 4.33.3 of the 1991 Standards and the 2010 Standards, at sections 402, 403.5.1, 802.1.4, and 802.1.5, require walkways that are part of an accessible route to have a 36-inch minimum clear width. Section 802.1.5 of the 2010 Standards specifically prohibits accessible routes from overlapping wheelchair spaces. This change is consistent with the technical requirements for accessible routes, since the clear width of accessible routes cannot be obstructed by any object. The 2010 Standards also specifically prohibit wheelchair spaces from overlapping circulation paths. An advisory note clarifies that this prohibition applies only to the circulation path width required by applicable building codes and fire and life safety codes since the codes prohibit obstructions in the required width of assembly aisles.

Section 802.1.5 of the 2010 Standards provides that where a main circulation path is located in front of a row of seats that contains a wheelchair space and the circulation path is wider than required by applicable building codes and fire and life safety codes, the wheelchair space may overlap the "extra" circulation path width. Where a main circulation path is located behind a row of seats that contains a wheelchair space and the wheelchair space is entered from the rear, the aisle in front of the row may need to be wider in order not to block the required circulation path to the other seats in the row, or a mid-row opening may need to be provided to access the required circulation path to the other seats.

Line of Sight and Dispersion of Wheelchair Spaces in Assembly Areas. Section 4.33.3 of the 1991 Standards requires wheelchair spaces and companion seats to be an integral part of any fixed seating plan in assembly areas and to provide individuals with disabilities a choice of admission prices and lines of sight comparable to those available to other spectators. Section 4.33.3 also requires wheelchair spaces and companion seats to be dispersed in assembly areas with more than 300 seats. Under the 1991 Standards, sports facilities typically located some wheelchair spaces and companion seats on each accessible level of the facility. In 1994, the Department issued official guidance interpreting the requirement for comparable lines of sight in the 1991 Standards to mean wheelchair spaces and companion seats in sports stadia and arenas must provide patrons with disabilities and their companions with lines of sight over standing spectators to the playing field or performance area, where spectators were expected to stand during events. See "Accessible Stadiums," www.ada.gov/stadium.pdf. The Department also interpreted the section 4.33.3 comparable lines of sight requirement to mean that wheelchair spaces and companion seats in stadium-style movie theaters must provide patrons with disabilities and their companions with viewing angles comparable to those provided to other spectators.

Sections 221.2.3 and 802.2 of the 2010 Standards add specific technical requirements for providing lines of sight over seated and standing spectators and also require wheelchair spaces and companion seats (per section 221.3) to provide individuals with disabilities choices of seating locations and viewing angles that are substantially equivalent to, or better than, the choices of seating locations and viewing angles available to other spectators. This applies to all types of assembly areas, including stadium-style movie theaters, sports arenas, and concert halls. These rules are expected to have minimal impact since they are consistent with the Department's longstanding interpretation of the 1991 Standards and technical assistance.

Commenters stated that the qualitative viewing angle language contained in section 221.2.3 is not appropriate for an enforceable regulatory standard unless the terms of such language are defined. Other commenters requested definitions for viewing angles, an explanation for precisely how viewing angles are measured, and an explanation for precisely how to evaluate whether one viewing angle is better than another viewing angle. The Department is convinced that the regulatory language in the 2010 Standards is sufficient to provide a performance-based standard for designers, architects, and other professionals to design facilities that provide comparable lines of sight for wheelchair seating in assembly areas, including viewing angles. The Department believes that as a general rule, the vast variety of sizes and configurations in assembly areas requires it to establish a performance standard for designers to adapt to the specific circumstances of the venue that is being designed. The Department has implemented more explicit requirements for stadium-style movie theaters in 28 CFR 36.406(f) and 35.151(g) of the final regulations based on experience and expertise gained after several major enforcement actions.

Another commenter inquired as to what determines whether a choice of seating locations or viewing angles is better than that available to all other spectators. The answer to this question varies according to each assembly area that is being designed, but designers and venue operators understand which seats are better and that understanding routinely drives design choices made to maximize profit and successful operation of the facility, among other things. For example, an "equivalent or better" line of sight in a major league football stadium would be different than for a 350-seat lecture hall. This performance standard is based upon the underlying principle of equal opportunity for

a good viewing experience for everyone, including persons with disabilities. The Department believes that for each specific facility that is designed, the owner, operator, and design professionals will be able to distinguish easily between seating locations and the quality of the associated lines of sight from those seating locations in order to decide which ones are better than others. The wheelchair locations do not have to be exclusively among the seats with the very best lines of sight nor may they be exclusively among the seats with the worst lines of sight. Rather, wheelchair seating locations should offer a choice of viewing experiences and be located among the seats where most of the audience chooses to sit.

Section 4.33.3 of the 1991 Standards requires wheelchair spaces and companion seating to be offered at a choice of admission prices, but section 221.2.3.2 of the 2010 Standards no longer requires wheelchair spaces and companion seats to be dispersed based on admission prices. Venue owners and operators commented during the 2004 ADAAG rulemaking process that pricing is not always established at the design phase and may vary from event to event within the same facility, making it difficult to determine where to place wheelchair seats during the design and construction phase. Their concern was that a failure by the venue owner or operator to provide a choice of ticket prices for wheelchair seating as required by the 1991 Standards governing new construction could somehow unfairly subject parties involved in the design and construction to liability unknowingly.

Sections 221.2.3.2 and 221.3 of the 2010 Standards require wheelchair spaces and companion seats to be vertically dispersed at varying distances from the screen, performance area, or playing field. The 2010 Standards, at section 221.2.3.2, also require wheelchair spaces and companion seats to be located in each balcony or mezzanine served by an accessible route. The final regulations at 28 CFR 35.151(g)(1) and 36.406(f)(1) also require assembly areas to locate wheelchair spaces and companion seats at all levels of the facility that include seating and that are served by an accessible route. The Department interprets that requirement to mean that wheelchair and companion seating must be provided in a particular area even if the accessible route may not be the same route that other individuals use to reach their seats. For example, if other patrons reach their seats on the field by an inaccessible route (e.g., by stairs), but there is an accessible route that complies with section 206.3 that could be connected to seats on the field, accessible seats must be placed on the field even if that route is not generally available to the public. The 2010 Standards, at section 221.2.3.2, provide an exception for vertical dispersion in assembly areas with 300 or fewer seats if the wheelchair spaces and companion seats provide viewing angles that are equivalent to, or better than, the average viewing angle provided in the facility.

Section 221.3 of the 2010 Standards requires wheelchair spaces and companion seats to be dispersed horizontally. In addition, 28 CFR 35.151(g)(2) and 36.406(f)(2) require assembly areas that have seating around the field of play or performance area to place wheelchair spaces and companion seating all around that field of play or performance area.

Stadium-Style Movie Theaters

Pursuant to 28 CFR 35.151(g) and 36.406(f), in addition to other obligations, stadium-style movie theaters must meet horizontal and vertical dispersion requirements set forth in sections 221.2.3.1 and 221.2.3.2 of the 2010 Standards; placement of wheelchair and companion seating must be on a riser or cross-aisle in the stadium section of the theater; and placement of such seating must satisfy at least one of the following criteria: (i) It is located within the rear sixty percent (60%) of the seats provided in the auditorium; or (ii) it is located within the area of the auditorium where the vertical viewing angles are between the 40th and 100th percentile of vertical viewing angles for all seats in that theater as ranked from the first row (1st percentile) to the back row (100th percentile). The line-of-sight requirements recognize the importance to the movie-going experience of viewing angles, and the final regulations ensure that movie patrons with disabilities are provided views of the movie screen comparable to other theater patrons. Some commenters supported regulatory language that would require stadium-style theaters to meet standards of accessibility equal to those of non-stadium-style theaters, with larger theaters being required to provide accessible seating locations and viewing angles equal to those offered to individuals without disabilities.

One commenter noted that stadium-style movie theaters, sports arenas, music venues, theaters, and concert halls each pose unique conditions that require separate and specific standards to accommodate patrons with disabilities, and recommended that the Department provide more specific requirements for sports arenas, music venues, theaters, and concert halls. The Department has concluded that the 2010 Standards will provide sufficient flexibility to adapt to the wide variety of assembly venues covered.

Companion Seats. Section 4.33.3 of the 1991 Standards required at least one fixed companion seat to be provided next to each wheelchair space. The 2010 Standards at sections 221.3 and 802.3 permit companion seats to be movable. Several commenters urged the Department to ensure that companion seats are positioned in a manner that places the user at the same shoulder height as their companions using mobility devices. The Department recognizes that some facilities have created problems by locating the wheelchair space and companion seat on different floor elevations (often a difference of one riser height). Section 802.3.1 of the 2010 Standards addresses this problem by requiring the wheelchair space and the companion seat to be on the same floor elevation. This solution should prevent any vertical discrepancies that are not the direct result of differences in the sizes and configurations of wheelchairs.

Designated Aisle Seats. Section 4.1.3(19)(a) of the 1991 Standards requires one percent (1%) of fixed seats in assembly areas to be designated aisle seats with either no armrests or folding or retractable armrests on the aisle side of the seat. The 2010 Standards, at sections 221.4 and 802.4, base the number of required designated aisle seats on the total number of aisle seats, instead of on all of the seats in an assembly area as the 1991 Standards require. At least five percent (5%) of the aisle seats are required to be designated aisle seats and to be located closest to accessible routes. This option will almost always result in fewer aisle seats being designated aisle seats compared to the 1991 Standards. The Department is aware that sports facilities typically locate designated aisle seats on, or as near to, accessible routes as permitted by the configuration of the facility.

One commenter recommended that section 221.4, Designated Aisle Seats, be changed to require that aisle seats be on an accessible route, and be integrated and dispersed throughout an assembly area. Aisle seats, by their nature, typically are located within the general seating area, and integration occurs almost automatically. The issue of dispersing aisle seats or locating them on accessible routes is much more challenging. During the separate rulemaking on the 2004 ADAAG the Access Board specifically requested public comment on the question of whether aisle seats should be required to be located on accessible routes. After reviewing the comments submitted during the 2004 Access Board rulemaking, the Access Board concluded that this could not be done without making significant and costly changes in the design of most assembly areas. However, section 221.4 of the 2004 ADAAG required that designated aisle seats be the aisle seats closest to accessible routes. The Department proposed the same provision and concurs in the Access Board's conclusion and declines to implement further changes.

Team or Player Seating Areas. Section 221.2.1.4 of the 2010 Standards requires that at least one wheelchair space compliant with section 802.1 be provided in each team or player seating area serving areas of sport activity. For bowling lanes, the requirement for a wheelchair space in player seating areas is limited to lanes required to be accessible.

Lawn Seating. The 1991 Standards, at section 4.1.1(1), require all areas of newly constructed facilities to be accessible, but do not contain a specific scoping requirement for lawn seating in assembly areas. The 2010 Standards, at section 221.5, specifically require lawn seating areas and exterior overflow seating areas without fixed seats to connect to an accessible route.

Aisle Stairs and Ramps in Assembly Areas. Sections 4.1.3 and 4.1.3(4) of the 1991 Standards require that interior and exterior stairs connecting levels that are not connected by an elevator, ramp, or other accessible means of vertical access must comply with the technical requirements for stairs set out in section 4.9 of the 1991 Standards. Section 210.1 of the 2010 Standards requires that stairs that are part of a means of egress shall comply with section 504's technical requirements for stairs. The 1991 Standards do not contain any exceptions for aisle stairs in assembly areas. Section 210.1, Exception 3 of the 2010 Standards adds a new exception that exempts

aisle stairs in assembly areas from section 504's technical requirements for stairs, including section 505's technical requirements for handrails.

Section 4.8.5 of the 1991 Standards exempts aisle ramps that are part of an accessible route from providing handrails on the side adjacent to seating. The 2010 Standards, at section 405.1, exempt aisle ramps adjacent to seating in assembly areas and not serving elements required to be on an accessible route, from complying with all of section 405's technical requirements for ramps. Where aisle ramps in assembly areas serve elements required to be on an accessible route, the 2010 Standards require that the aisle ramps comply with section 405's technical requirements for ramps. Sections 505.2 and 505.3 of the 2010 Standards provide exceptions for aisle ramp handrails. Section 505.2 states that in assembly areas, a handrail may be provided at either side or within the aisle width when handrails are not provided on both sides of aisle ramps. Section 505.3 states that, in assembly areas, handrails need not be continuous in aisles serving seating.

222 and 803 Dressing, Fitting, and Locker Rooms

Dressing rooms, fitting rooms, and locker rooms are required to comply with the accessibility requirements of sections 222 and 803 of the 2010 Standards. Where these types of rooms are provided in clusters, five percent (5%) but at least one room in each cluster must comply. Some commenters stated that clothing and retail stores would have to expand and reconfigure accessible dressing, fitting and locker rooms to meet the changed provision for clear floor space alongside the end of the bench. Commenters explained that meeting the new requirement would result in a loss of sales and inventory space. Other commenters also expressed opposition to the changed requirement in locker rooms for similar reasons.

The Department reminds the commenters that the requirements in the 2010 Standards for the clear floor space to be beside the short axis of the bench in an accessible dressing, fitting, or locker room apply only to new construction and alterations. The requirements for alterations in the 2010 Standards at section 202.3 do not include the requirement from the 1991 Standards at section 4.1.6(1)(c) that if alterations to single elements, when considered together, amount to an alteration of a room or space in a building or facility, the entire space shall be made accessible. Therefore, under the 2010 Standards, the alteration requirements only apply to specific elements or spaces that are being altered. So providing the clear floor space at the end of the bench as required by the 2010 Standards instead of in front of the bench as is allowed by the 1991 Standards would only be required when the bench in the accessible dressing room is altered or when the entire dressing room area is altered.

224 and 806 Transient Lodging Guest Rooms

Scoping. The minimum number of guest rooms required to be accessible in transient lodging facilities is covered by section 224 of the 2010 Standards. Scoping requirements for guest rooms with mobility features and guest rooms with communication features are addressed at section 224.2 and section 224.4, respectively. Under the 1991 Standards all newly constructed guest rooms with mobility features must provide communication features. Under the 2010 Standards, in section 224.5, at least one guest room with mobility features must also provide communication features. Additionally, not more than ten percent (10%) of the guest rooms required to provide mobility features and also equipped with communication features can be used to satisfy the minimum number of guest rooms required to provide communication features.

Some commenters opposed requirements for guest rooms accessible to individuals with mobility disabilities stating that statistics provided by the industry demonstrate that all types of accessible guest rooms are unused. They further claimed that the requirements of the 2010 Standards are too burdensome to meet in new construction, and that the requirements will result in a loss of living space in places of transient lodging. Other commenters urged the Department to increase the number of guest rooms required to be accessible. The number of guest rooms accessible to individuals with mobility disabilities and the number accessible to persons who are deaf or who are hard of hearing in the 2010 Standards are consistent with the 1991 Standards and with the IBC. The Department continues to receive complaints about the lack of accessible guest rooms throughout the country. Accessible guest rooms are used not only by individuals using mobility devices such as wheelchairs and scooters, but also by individuals with other mobility disabilities including persons who use walkers, crutches, or canes.

Data provided by the Disability Statistics Center at the University of California, San Francisco demonstrated that the number of adults who use wheelchairs has been increasing at the rate of six percent (6%) per year from 1969 to 1999; and by 2010, it was projected that two percent (2%) of the adult population would use wheelchairs. In addition to persons who use wheelchairs, three percent (3%) of adults used crutches, canes, walkers, and other mobility devices in 1999; and the number was projected to increase to four percent (4%) by 2010. Thus, in 2010, up to six percent (6%) of the population may need accessible guest rooms.

Dispersion. The 2010 Standards, in section 224.5, set scoping requirements for dispersion in facilities covered by the transient lodging provisions. This section covers guest rooms with mobility features and guest rooms with communication features and applies in new construction and alterations. The primary requirement is to provide choices of types of guest rooms, number of beds, and other amenities comparable to the choices provided to other guests. An advisory in section 224.5 provides guidance that "factors to be considered in providing an equivalent range of options may include, but are not limited to, room size, bed size, cost, view, bathroom fixtures such as hot tubs and spas, smoking and nonsmoking, and the number of rooms provided."

Commenters asked the Department to clarify what is meant by various terms used in section 224.5 such as "classes," "types," "options," and "amenities." Other commenters asked the Department to clarify and simplify the dispersion requirements set forth in section 224.5 of the 2010 Standards, in particular the scope of the term "amenities." One commenter expressed concern that views, if considered an amenity, would further complicate room categories and force owners and operators to make an educated guess. Other commenters stated that views should only be a dispersion criteria if view is a factor for pricing room rates.

These terms are not to be considered terms of art, but should be used as in their normal course. For example, "class" is defined by Webster's Dictionary as "a division by quality." "Type" is defined as "a group of * * * things that share common traits or characteristics distinguishing them as an identifiable group or class." Accordingly, these terms are not intended to convey different concepts, but are used as synonyms. In the 2010 Standards, section 224.5 and its advisory require dispersion in such a varied range of hotels and lodging facilities that the Department believes that the chosen terms are appropriate to convey what is intended. Dispersion required by this section is not "one size fits all" and it is imperative that each covered entity consider its individual circumstance as it applies this requirement. For example, a facility would consider view as an amenity if some rooms faced mountains, a beach, a lake, or other scenery that was considered to be a premium. A facility where view was not marketed or requested by guests would not factor the view as an amenity for purposes of meeting the dispersion requirement.

Section 224.5 of the 2010 Standards requires that guest rooms with mobility features and guest rooms with communication features "shall be dispersed among the various classes of guest rooms, and shall provide choices of types of guest rooms, number of beds, and other amenities comparable to the choices provided to other guests. When the minimum number of guest rooms required is not sufficient to allow for complete dispersion, guest rooms shall be dispersed in the following priority: guest room type, number of beds and amenities."

This general dispersion requirement is intended to effectuate Congress' directive that a percentage of each class of hotel rooms is to be fully accessible to persons with disabilities. See H.R. Rep. No. 101–485 (II) at 391. Accordingly, the promise of the ADA in this instance is that persons with disabilities will have an equal opportunity to benefit from the various options available to hotel guests without disabilities, from single occupancy guest rooms with limited features (and accompanying limited price tags) to luxury suites with lavish features and choices. The inclusion of section 224.5 of the 2010 Standards is not new. Substantially similar language is contained in section 9.1.4 of the 1991 Standards.

Commenters raised concerns that the factors included in the advisory to section 224.5 of the 2010 Standards have been expanded. The advisory provides: "[f]actors to be considered in providing an equivalent

range of options may include, but are not limited to, room size, bed size, cost, view, bathroom fixtures such as hot tubs and spas, smoking and nonsmoking, and the number of rooms provided."

As previously discussed, the advisory materials provided in the 2010 Standards are meant to be illustrative and do not set out specific requirements. In this particular instance, the advisory materials for section 224.5 set out some of the common types of amenities found at transient lodging facilities, and include common sense concepts such as view, bathroom fixtures, and smoking status. The intention of these factors is to indicate to the hospitality industry the sorts of considerations that the Department, in its enforcement efforts since the enactment of the ADA, has considered as amenities that should be made available to persons with disabilities, just as they are made available to guests without disabilities.

Commenters offered several suggestions for addressing dispersion. One option included the flexibility to use an equivalent facilitation option similar to that provided in section 9.1.4(2) of the 1991 Standards.

The 2010 Standards eliminated all specific references to equivalent facilitation. Since Congress made it clear that each class of hotel room is to be available to individuals with disabilities, the Department declines to adopt such a specific limitation in favor of the specific requirement for new construction and alterations found in section 224.5 of the 2010 Standards.

In considering the comments of the hospitality industry from the ANPRM and the Department's enforcement efforts in this area, the Department sought comment in the NPRM on whether the dispersion requirements should be applied proportionally, or whether the requirements of section 224.5 of the 2010 Standards would be complied with if access to at least one guest room of each type were to be provided.

One commenter expressed concern about requiring different guest room types to be proportionally represented in the accessible guest room pool as opposed to just having each type represented. Some commenters also expressed concern about accessible guest rooms created in pre-1993 facilities and they requested that such accessible guest rooms be safe harbored just as they are safe harbored under the 1991 Standards. In addition, one commenter requested that the proposed dispersion requirements in section 224.5 of the 2010 Standards not be applied to pre-1993 facilities even when they are altered. Some commenters also offered a suggestion for limitations to the dispersion requirements as an alternative to safe harboring pre-1993 facilities. The suggestion included: (1) Guest rooms' interior or exterior footprints may remain unchanged in order to meet the dispersion requirements; (2) Dispersion should only be required among the types of rooms affected by an alteration; and (3) Subject to (1) and (2) above and technical feasibility, a facility would need to provide only one guest room in each guest room type such as single, double and suites. One commenter requested an exception to the dispersion criteria that applies to both existing and new multi-story timeshare facilities. This requested exception waives dispersion based on views to the extent that up to eight units may be vertically stacked in a single location.

Section 224.1.1 of the 2010 Standards sets scoping requirements for alterations to transient lodging guest rooms. The advisory to section 224.1.1 further explains that compliance with 224.5 is more likely to be achieved if all of the accessible guest rooms are not provided in the same area of the facility, when accessible guest rooms are added as a result of subsequent alterations.

Some commenters requested a specific exemption for small hotels of 300 or fewer guest rooms from dispersion regarding smoking rooms. The ADA requires that individuals with disabilities be provided with the same range of options as persons without disabilities, and, therefore, the Department declines to add such an exemption. It is noted, however, that the existence of this language in the advisory does not require a place of transient lodging that does not offer smoking guest rooms at its facility to do so only for individuals with disabilities.

Guest Rooms with Mobility Features. Scoping provisions for guest rooms with mobility features are provided in section 224.2 of the 2010 Standards. Scoping requirements for alterations are included in 224.1.1. These scoping requirements in the 2010 Standards are consistent with the 1991 Standards.

One commenter expressed opposition to the new scoping provisions for altered guest rooms, which, according to the commenter, require greater numbers of accessible guest rooms with mobility features.

Section 224.1.1 of the 2010 Standards provides scoping requirements for alterations to guest rooms in existing facilities. Section 224.1.1 modifies the scoping requirements for new construction in section 224 by limiting the application of section 224 requirements only to those guest rooms being altered or added until the number of such accessible guest rooms complies with the minimum number required for new construction in section 224.2 of the 2010 Standards. The minimum required number of accessible guest rooms is based on the total number of guest rooms altered or added instead of the total number of guest rooms provided. These requirements are consistent with the requirements in the 1991 Standards. Language in the 2010 Standards clarifies the provision of section 104.2 of the 2010 Standards which requires rounding up values to the next whole number for calculations of percentages in scoping.

Guest Rooms with Communication Features. The revisions at section 224.4 of the 2010 Standards effect no substantive change from the 1991 Standards with respect to the number of guest rooms required to provide communication features. The scoping requirement is consolidated into a single table, instead of appearing in three sections as in the 1991 Standards. The revised provisions also limit the overlap between guest rooms required to provide mobility features and guest rooms required to provide communication features. Section 224.5 of the 2010 Standards requires that at least one guest room providing mobility features must also provide communications features. At least one, but not more than ten percent (10%), of the guest rooms required to provide mobility features can also satisfy the minimum number of guest rooms required to provide communication features.

Commenters suggested that the requirements for scoping and dispersion of guest rooms for persons with mobility impairments and guest rooms with communication features are too complex for the industry to effectively implement.

The Department believes the requirements for guest rooms with communications features in the 2010 Standards clarify the requirements necessary to provide equal opportunity for travelers with disabilities. Additional technical assistance will be made available to address questions before the rule goes into effect.

Visible Alarms in Guest Rooms with Communication Features. The 1991 Standards at sections 9.3.1 and 4.28.4 require transient lodging guest rooms with communication features to provide either permanently installed visible alarms that are connected to the building fire alarm system or portable visible alarms that are connected to a standard 110-volt electrical outlet and are both activated by the building fire alarm system and provide a visible alarm when the single station smoke detector is activated. Section 215.4 of the 2010 Standards no longer includes the portable visible alarm option and instead requires that transient lodging guest rooms with communication features be equipped with a fire alarm system which includes permanently installed audible and visible alarms in accordance with NFPA 72 National Fire Alarm Code (1999 or 2002 edition). Such guest rooms with communication features are also required by section 806.3.2 of the 2010 Standards to be equipped with visible notification devices that alert room occupants of incoming telephone calls and a door knock or bell.

The 2010 Standards add a new exception for alterations to existing facilities that exempts existing fire alarm systems from providing visible alarms, unless the fire alarm system itself is upgraded or replaced, or a new fire alarm system is installed. Transient lodging facilities that alter guest rooms are not required to provide permanently installed visible alarms complying with the NFPA 72 if the existing fire alarm system has not been upgraded or replaced, or a new fire alarm system has not been installed.

Commenters representing small providers of transient lodging raised concerns about the proposed changes to prohibit the use of portable visible alarms used in transient lodging guest rooms. These commenters recommended retaining requirements that allow the use of portable visible alarms.

Persons who are deaf or hard of hearing have reported that portable visible alarms used in transient lodging guest rooms are deficient because the alarms are not activated by the building fire alarm system, and the alarms do not work when the building power source goes out in emergencies. The 2010 Standards are consistent with the model

building, fire, and life safety codes as applied to newly constructed transient lodging facilities. One commenter sought confirmation of its understanding of visible alarm requirements from the Department. This commenter interpreted the exception to section 215.1 of the 2010 Standards and the Department's commentary to the NPRM to mean that if a transient lodging facility does not have permanently installed visible alarms in its communication accessible guest rooms, it will not be required to provide such alarms until such time that its fire alarm system is upgraded or replaced, or a new fire alarm system is installed. In addition, this commenter also understood that, if a hotel already has permanently installed visible alarms in all of its mobility accessible guest rooms, it would not have to relocate such visible alarms and other communication features in those rooms to other guest rooms to comply with the ten percent (10%) overlap requirement until the alarm system is upgraded or replaced.

This commenter's interpretation and understanding are consistent with the Department's position in this matter. Section 215.4 of the 2010 Standards requires that guest rooms required to have communication features be equipped with a fire alarm system complying with section 702. Communication accessible guest rooms are required to have all of the communication features described in section 806.3 of the 2010 Standards including a fire alarm system which provides both audible and visible alarms. The exception to section 215.1 of the 2010 Standards, which applies only to fire alarm requirements for guest rooms with communication features in existing facilities, exempts the visible alarm requirement until such time as the existing fire alarm system is upgraded or replaced, or a new fire alarm system is installed. If guest rooms in existing facilities are altered and they are required by section 224 of the 2010 Standards to have communication features, such guest rooms are required by section 806.3 to have all other communication features including notification devices.

Vanity Counter Space. Section 806.2.4.1 of the 2010 Standards requires that if vanity countertop space is provided in inaccessible transient lodging guest bathrooms, comparable vanity space must be provided in accessible transient lodging guest bathrooms.

A commenter questioned whether in existing facilities vanity countertop space may be provided through the addition of a shelf. Another commenter found the term "comparable" vague and expressed concern about confusion the new requirement would cause. This commenter suggested that the phrase "equal area in square inches" be used instead of comparable vanity space.

In some circumstances, the addition of a shelf in an existing facility may be a reasonable way to provide a space for travelers with disabilities to use their toiletries and other personal items. However, this is a determination that must be made on a case-by-case basis. Comparable vanity countertop space need not be one continuous surface and need not be exactly the same size as the countertops in comparable guest bathrooms. For example, accessible shelving within reach of the lavatory could be stacked to provide usable surfaces for toiletries and other personal items.

Shower and Sauna Doors in Transient Lodging Facilities. Section 9.4 of the 1991 Standards and section 206.5.3 of the 2010 Standards both require passage doors in transient lodging guest rooms that do not provide mobility features to provide at least 32 inches of clear width. Congress directed this requirement to be included so that individuals with disabilities could visit guests in other rooms. See H. Rept. 101–485, pt. 2, at 118 (1990); S. Rept. 101–116, at 70 (1989). Section 224.1.2 of the 2010 Standards adds a new exception to clarify that shower and sauna doors in such inaccessible guest rooms are exempt from the requirement for passage doors to provide at least 32 inches of clear width. Two commenters requested that saunas and steam rooms in existing facilities be exempt from the section 224.1.2 requirement and that the requirement be made applicable to new construction only.

The exemption to the section 224.1.2 requirement for a 32-inch wide clearance at doors to shower and saunas applies only to those showers and saunas in guest rooms which are not required to have mobility features. Showers and saunas in other locations, including those in common use areas and guest rooms with mobility features, are required to comply with the 32-inch clear width standard as well as other applicable accessibility standards. Saunas come in a variety of types: portable, pre-built, pre-cut, and custom-made. All saunas except for custom-made saunas are made to manufacturers' standard dimensions. The Department is aware that creating the required 32-inch clearance at existing narrower doorways may not always be technically feasible. However, the Department believes that owners and operators will have an opportunity to provide the required doorway clearance, unless doing so is technically infeasible, when an alteration to an existing sauna is undertaken. Therefore, the Department has retained these requirements.

Platform Lifts in Transient Lodging Guest Rooms and Dwelling Units. The 1991 Standards, at section 4.1.3(5), exception 4, and the 2010 Standards, at sections 206.7 and 206.7.6, both limit the locations where platform lifts are permitted to be used as part of an accessible route. The 2010 Standards add a new scoping requirement that permits platform lifts to be used to connect levels within transient lodging guest rooms and dwelling units with mobility features.

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In the NPRM, the Department included floor plans showing examples of accessible guest rooms and bathrooms designs with mobility features to illustrate how compliance with the 2010 Standards could be accomplished with little or no additional space compared to designs that comply with the 1991 Standards.

Commenters noted that the Department's plans showing accessible transient lodging guest rooms compliant with the 2010 Standards were not common in the transient lodging industry and also noted that the plans omitted doors at sleeping room closets.

The Department agrees that the configuration of the accessible bathrooms is somewhat different from past designs used by the industry, but this was done to meet the requirements of the 2010 Standards. The plans were provided to show that, with some redesign, the 2010 Standards do not normally increase the square footage of an accessible sleeping room or bathroom with mobility features in new construction. The Department has also modified several accessible guest room plans to show that doors can be installed on closets and comply with the 2010 Standards.

A commenter stated that the Department's drawings suggest that the fan coil units for heat and air conditioning are overhead, while the typical sleeping room usually has a vertical unit, or a packaged terminal air conditioning unit within the room. The Department's drawings are sample plans, showing the layout of the space, relationship of elements to each other, and required clear floor and turning spaces. It was not the intent of the Department to provide precise locations for all elements, including heating and air conditioning units.

Commenters noted that in guest rooms with two beds, each bed was positioned close to a wall, reducing access on one side. Another commenter stated that additional housekeeping time is needed to clean the room when beds are placed closer to walls. The 2010 Standards require that, when two beds are provided, there must be at least 36 inches of clear space between the beds. The plans provided in the NPRM showed two bed arrangements with adequate clear width complying with the 1991 Standards and the 2010 Standards. Additional space can be provided on the other side of the beds to facilitate housekeeping as long as the clear floor space between beds is at least 36 inches wide.

Commenters stated that chases in sleeping room bathrooms that route plumbing and other utilities can present challenges when modifying existing facilities. In multi-story facilities, relocating or re-routing these elements may not be possible, limiting options for providing access. The Department recognizes that relocating mechanical chases in multi-story facilities may be difficult or impossible to accomplish. While these issues do not exist in new facilities, altered existing facilities must comply with the 2010 Standards to the extent that it is technically feasible to do so. When an alteration cannot fully comply because it is technically infeasible to do so, the alteration must still be designed to comply to the greatest extent feasible.

Commenters noted that on some of the Department's plans where a vanity is located adjacent to a bathtub, the vanity may require more maintenance due to exposure to water. The Department agrees that it would be advisable that items placed next to a bathtub or shower be made of materials that are not susceptible to water damage.

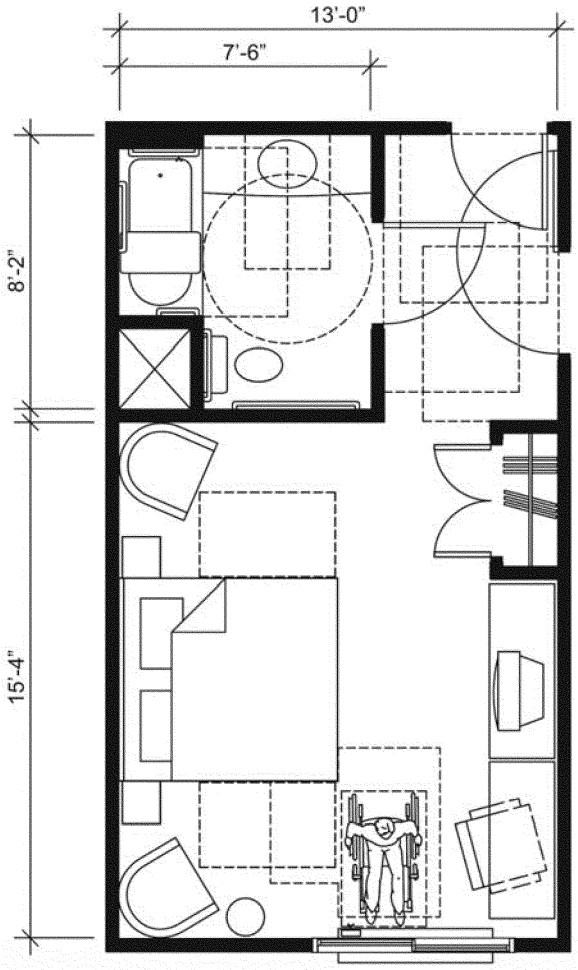
Transient Lodging Guest Room Floor Plans and Related Text. The Department has included the following floor plans showing application of the requirements of the 2010 Standards without significant loss of guest

room living space in transient lodging compared to the 1991 Standards.

BILLING CODE 4410–13–P

Plan 1A: 13-Foot Wide Accessible Guest Room

This drawing shows an accessible 13-foot wide guest room with features that comply with the 2010 Standards. Features include a standard bathtub with a seat, comparable vanity, clothes closet with swinging doors, and door connecting to adjacent guest room. Furnishings include a king bed and additional seating.



The following accessible features are provided in the bathroom:

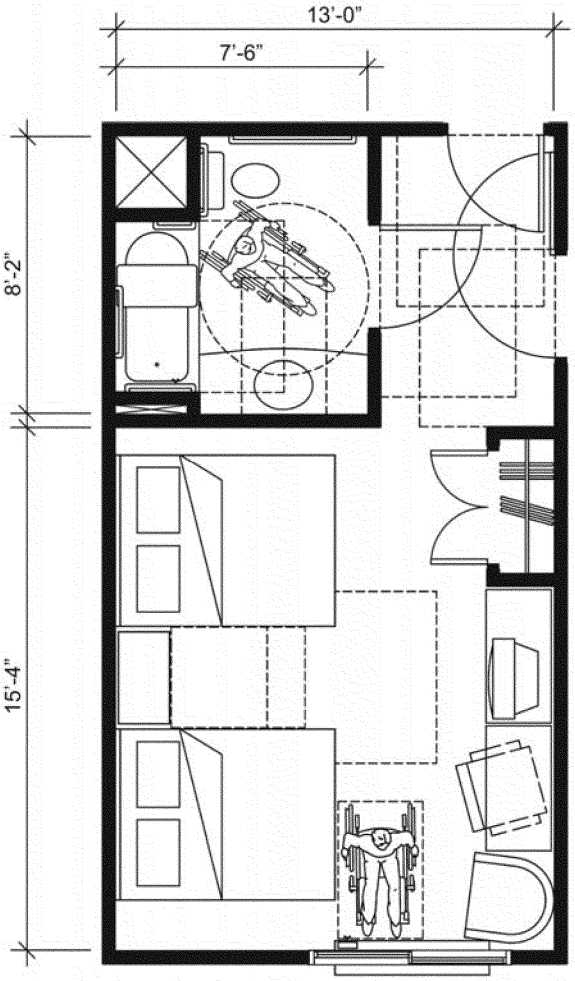
- Comparable vanity counter top space (section 806);
- Bathtub with a lavatory at the control end (section 607.2);
- Removable bathtub seat (section 607.3);
- Clearance in front of the bathtub extends its full length and is 30 inches wide min. (section 607.2);
- Recessed bathtub location permits shorter rear grab bar at water closet (section 604.5.2);
- Circular turning space in room (section 603.2.1);
- Required clear floor spaces at fixtures and turning space overlap (section 603.2.2);
- Turning space includes knee and toe clearance at lavatory (section 304.3);
- Water closet clearance is 60 inches at back wall and 56 inches deep (section 604.3);
- Centerline of the water closet at 16-18 inches from side wall (section 604.2); and
- No other fixtures or obstructions located within required water closet clearance (section 604.3).

The following accessible features are provided in the living area:

- T-shaped turning space (section 304.3.2);
- Accessible route (section 402);
- Clear floor space on both sides of the bed (section 806.2.3);
- Maneuvering clearances at all doors (section 404.2);
- Accessible operable window (section 309); and
- Accessible controls for the heat and air conditioning (section 309).

Plan 1B: 13-Foot Wide Accessible Guest Room

This drawing shows an accessible 13-foot wide guest room with features that comply with the 2010 Standards. Features include a standard bathtub with a seat, comparable vanity, clothes closet with swinging doors, and door connecting to adjacent guest room. Furnishings include two beds.



The following accessible features are provided in the bathroom:

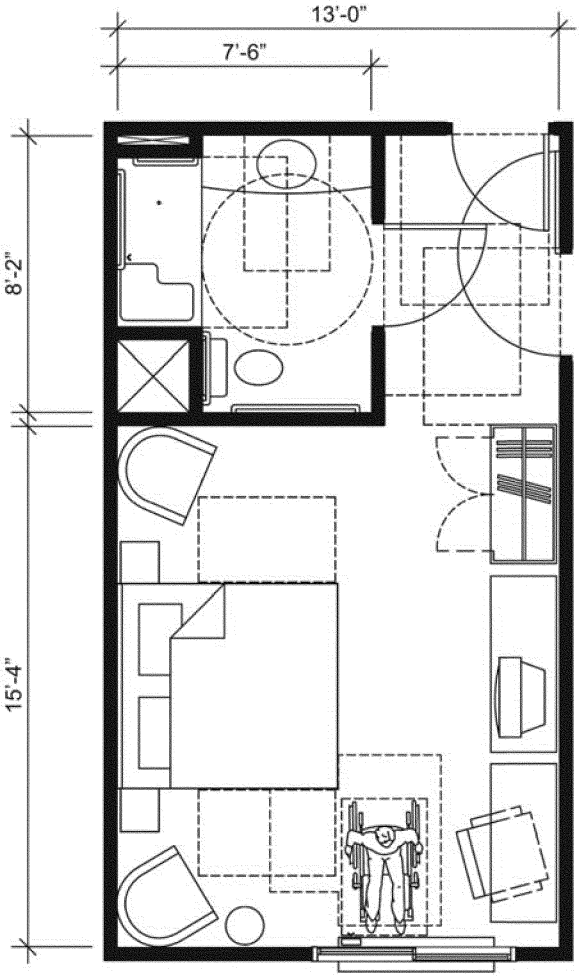
- Comparable vanity counter top space (section 806);
- Bathtub with a lavatory at the control end (section 607.2);
- Removable bathtub seat (section 607.3);
- Clearance in front of the bathtub extends its full length and is 30 inches wide min. (section 607.2);
- Recessed bathtub location permits shorter rear grab bar at water closet (section 604.5.2);
- Circular turning space in room (section 603.2.1);
- Required clear floor spaces at fixtures and turning space overlap (section 603.2.2);
- Turning space includes knee and toe clearance at lavatory (section 304.3);
- Water closet clearance is 60 inches at back wall and 56 inches deep (section 604.3);
- Centerline of the water closet at 16-18 inches from side wall (section 604.2); and
- No other fixtures or obstructions located within required water closet clearance (section 604.3);

The following accessible features are provided in the living area:

- T-shaped turning space (section 304.3.2);
- Accessible route (section 402);
- Clear floor space between beds (section 806.2.3);
- Maneuvering clearances at all doors (section 404.2);
- Accessible operable window (section 309); and
- Accessible controls for the heat and air conditioning (section 309).

Plan 2A: 13-Foot Wide Accessible Guest Room

This drawing shows an accessible 13-foot wide guest room with features that comply with the 2010 Standards. Features include a standard roll-in shower with a seat, comparable vanity, wardrobe, and door connecting to adjacent guest room. Furnishings include a king bed and additional seating.



The following accessible features are provided in the bathroom:

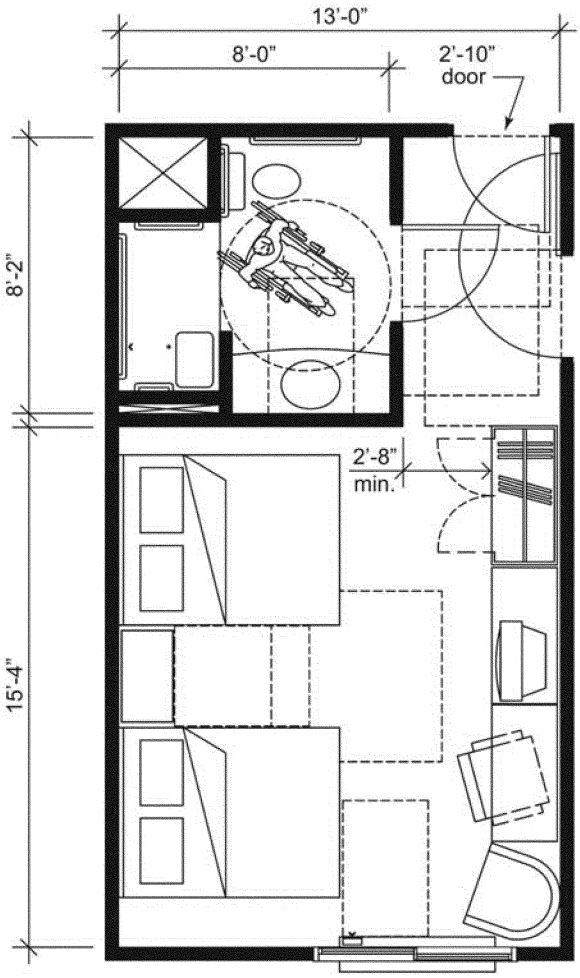
- Comparable vanity counter top space (section 806);
- Standard roll-in type shower with folding seat (section 608.2.2);
- Recessed roll-in shower location permits shorter rear grab bar at water closet (section 604.5.2);
- Clear floor space adjacent to shower min. 30 inches wide by 60 inches long (section 608.2.2);
- Circular turning space in room (section 603.2.1);
- Required clear floor spaces at fixtures and turning space overlap (section 603.2.2);
- Turning space includes knee and toe clearance at lavatory (section 304.3);
- Water closet clearance is 60 inches at back wall and 56 inches deep (section 604.3);
- Centerline of the water closet at 16-18 inches from side wall (section 604.2); and
- No other fixtures or obstructions located within required water closet clearance (section 604.3).

The following accessible features are provided in the living area:

- T-shaped turning space (section 304.3.2);
- Accessible route (section 402);
- Clear floor space on both sides of the bed (section 806.2.3);
- Maneuvering clearances at all doors (section 404.2);
- Accessible operable window (section 309); and
- Accessible controls for the heat and air conditioning (section 309).

Plan 2B: 13-Foot Wide Accessible Guest Room

This drawing shows an accessible 13-foot wide guest room with features that comply with the 2010 Standards. Features include an alternate roll-in shower with a seat, comparable vanity, wardrobe, and door connecting to adjacent guest room. Furnishings include two beds.



The following accessible features are provided in the bathroom:

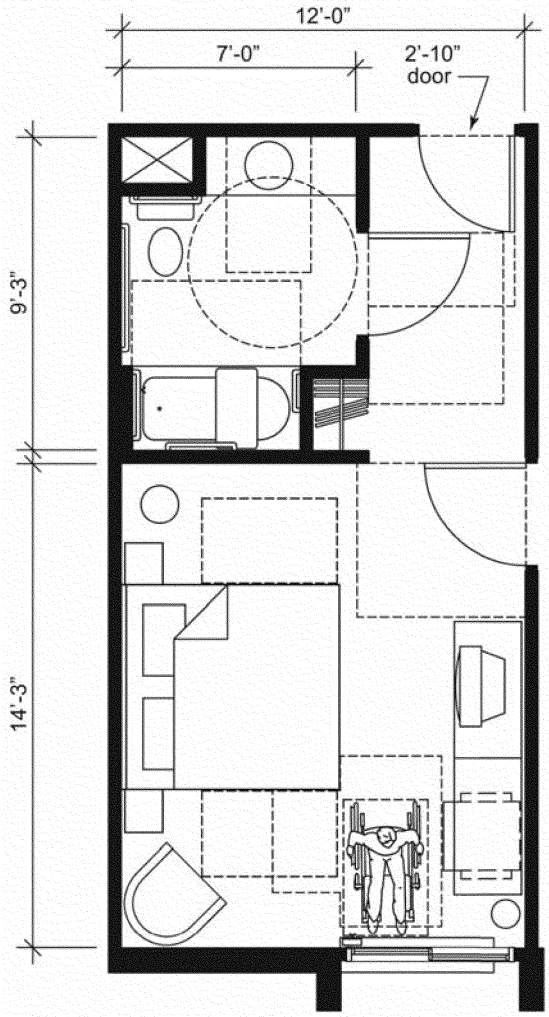
- Comparable vanity counter top space (section 806);
- Alternate roll-in type shower with folding seat is 36 inches deep and 60 inches wide (section 608.2.3);
- Alternate roll-in shower has a 36-inch wide entry at one end of the long side of the compartment (section 608.2.3);
- Recessed alternate roll-in shower location permits shorter rear grab bar at water closet (section 604.5.2);
- Circular turning space in room (section 603.2.1);
- Required clear floor spaces at fixtures and turning space overlap (section 603.2.2);
- Turning space includes knee and toe clearance at lavatory (section 304.3);
- Water closet clearance is 60 inches at back wall and 56 inches deep (section 604.3);
- Centerline of the water closet at 16-18 inches from side wall (section 604.2); and
- No other fixtures or obstructions located within required water closet clearance (section 604.3).

The following accessible features are provided in the living area:

- T-shaped turning space (section 304.3.2);
- Accessible route (section 402);
- Clear floor space between beds (section 806.2.3);
- Maneuvering clearances at all doors (section 404.2);
- Accessible operable window (section 309); and
- Accessible controls for the heat and air conditioning (section 309).

Plan 3A: 12-Foot Wide Accessible Guest Room

This drawing shows an accessible 12-foot wide guest room with features that comply with the 2010 Standards. Features include a bathtub with a seat, comparable vanity, open clothes closet, and door connecting to adjacent guest room. Furnishings include a king bed and additional seating.



The following accessible features are provided in the bathroom:

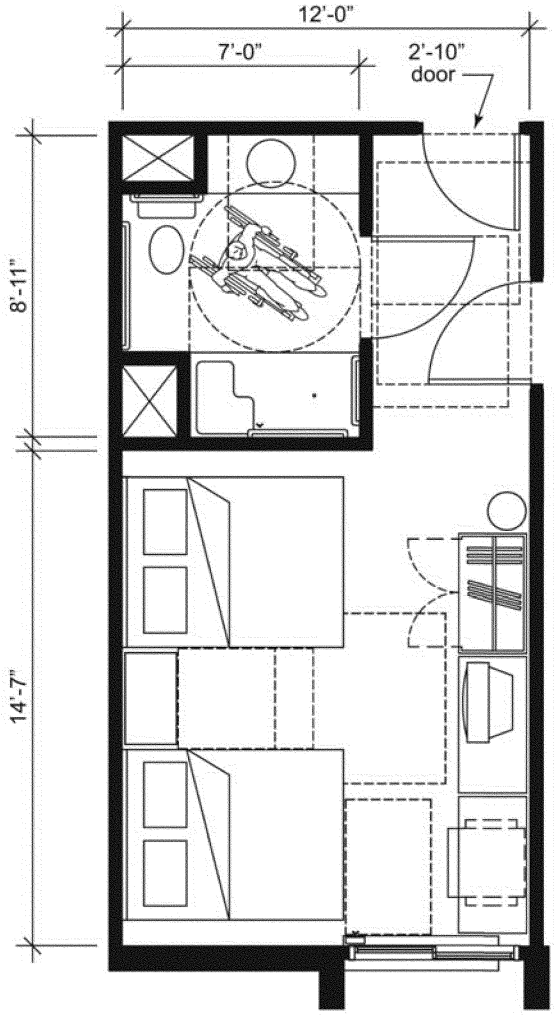
- Comparable vanity counter top space (section 806);
- Bathtub (section 607.2);
- Removable bathtub seat (section 607.3);
- Clearance in front of the bathtub extends its full length and is 30 inches wide min. (section 607.2);
- Recessed lavatory with vanity countertop permits shorter rear grab bar at water closet (section 604.5.2);
- Circular turning space in room (section 603.2.1);
- Required clear floor spaces at fixtures and turning space overlap (section 603.2.2);
- Turning space includes knee and toe clearance at lavatory (section 304.3);
- Water closet clearance is 60 inches at back wall and 56 inches deep (section 604.3);
- Centerline of the water closet at 16-18 inches from side wall (section 604.2); and
- No other fixtures or obstructions located within required water closet clearance (section 604.3).

The following accessible features are provided in the living area:

- T-shaped turning space (section 304.3.2);
- Accessible route (section 402);
- Clear floor space on both sides of the bed (section 806.2.3);
- Maneuvering clearances at all doors (section 404.2);
- Accessible operable window (section 309); and
- Accessible controls for the heat and air conditioning (section 309).

Plan 3B: 12-Foot Wide Accessible Guest Room

This drawing shows an accessible 12-foot wide guest room with features that comply with the 2010 Standards. Features include a standard roll-in shower with a seat, comparable vanity, wardrobe, and door connecting to adjacent guest room. Furnishings include two beds.



The following accessible features are provided in the bathroom:

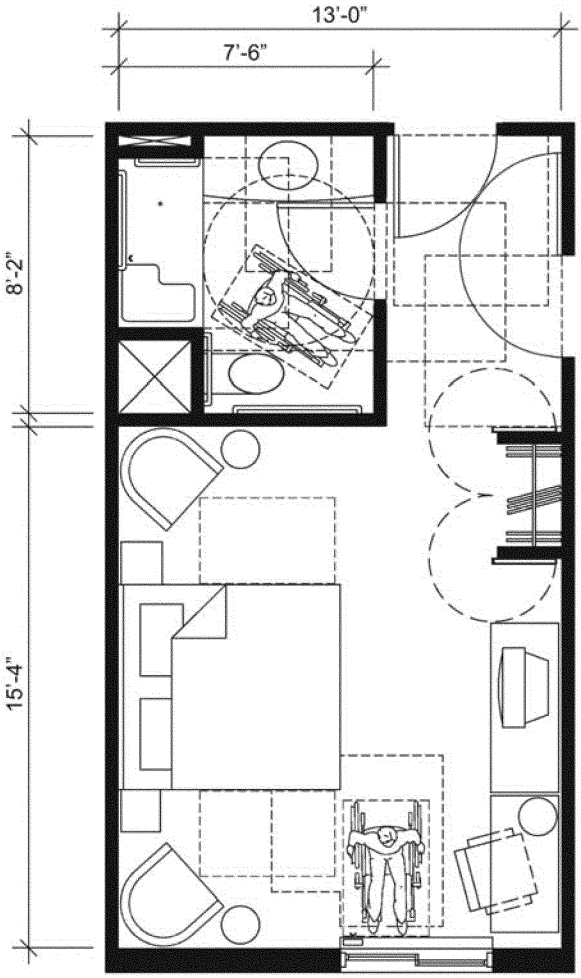
- Comparable vanity counter top space (section 806);
- Standard roll-in type shower with folding seat (section 608.2.2);
- Recessed lavatory with vanity counter top permits shorter rear grab bar at water closet (section 604.5.2);
- Clear floor space adjacent to shower min. 30 inches wide by 60 inches long (section 608.2.2);
- Circular turning space in room (section 603.2.1);
- Required clear floor spaces at fixtures and turning space overlap (section 603.2.2);
- Turning space includes knee and toe clearance at lavatory (section 304.3);
- Water closet clearance is 60 inches at back wall and 56 inches deep (section 604.3);
- Centerline of the water closet at 16-18 inches from side wall (section 604.2); and
- No other fixtures or obstructions located within required water closet clearance (section 604.3).

The following accessible features are provided in the living area:

- T-shaped turning space (section 304.3.2);
- Accessible route (section 402);
- Clear floor space between beds (section 806.2.3);
- Maneuvering clearances at all doors (section 404.2);
- Accessible operable window (section 309); and
- Accessible controls for the heat and air conditioning (section 309).

Plan 4A: 13-Foot Wide Accessible Guest Room

This drawing shows an accessible 13-foot wide guest room with features that comply with the 2010 Standards. Features include a standard roll-in shower with a seat, comparable vanity, clothes closet with swinging doors, and door connecting to adjacent guest room. Furnishings include a king bed and additional seating.



The following accessible features are provided in the bathroom:

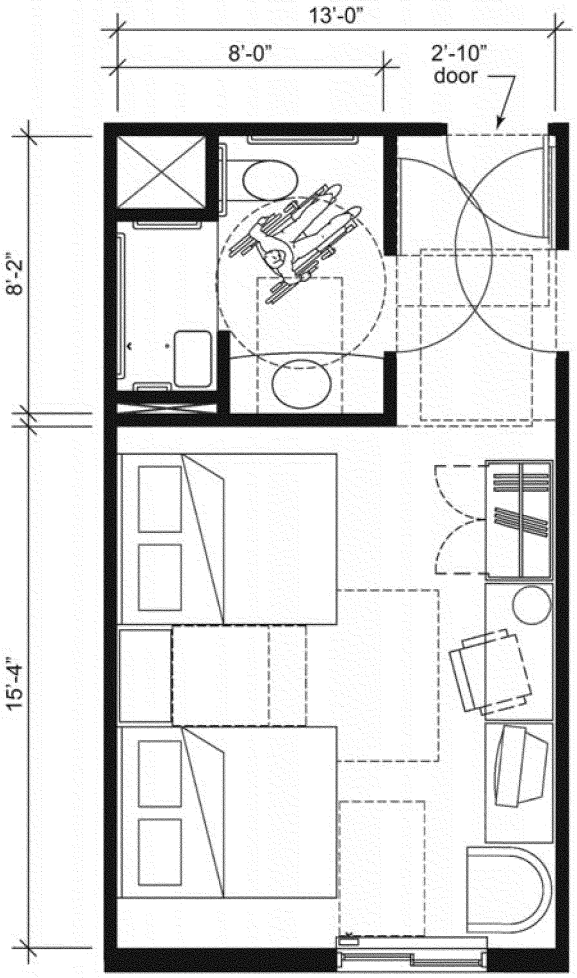
- Comparable vanity counter top space (section 806);
- Standard roll-in type shower with folding seat (section 608.2.2);
- Clear floor space adjacent to shower min. 30 inches wide by 60 inches long (section 608.2.2);
- Recessed roll-in shower location permits shorter rear grab bar at water closet (section 604.5.2);
- Circular turning space in room (section 603.2.1);
- Required clear floor spaces at fixtures and turning space overlap (section 603.2.2);
- Turning space includes knee and toe clearance at lavatory (section 304.3);
- Water closet clearance is 60 inches at back wall and 56 inches deep (section 604.3);
- Centerline of the water closet at 16-18 inches from side wall (section 604.2); and
- No other fixtures or obstructions located within required water closet clearance (section 604.3).
- 30-inch wide by 48-inch long minimum clear floor space provided beyond the arc of the swing of the entry door (section 603.2.3 exception 2).

The following accessible features are provided in the living area:

- T-shaped turning space (section 304.3.2);
- Accessible route (section 402);
- Clear floor space on both sides of the bed (section 806.2.3);
- Maneuvering clearances at all doors (section 404.2);
- Accessible operable window (section 309); and
- Accessible controls for the heat and air conditioning (section 309).

Plan 4B: 13-Foot Wide Accessible Guest Room

This drawing shows an accessible 13-foot wide guest room with features that comply with the 2010 Standards. Features include an alternate roll-in shower with a seat, comparable vanity, wardrobe, and door connecting to adjacent guest room. Furnishings include two beds.



The following accessible features are provided in the bathroom:

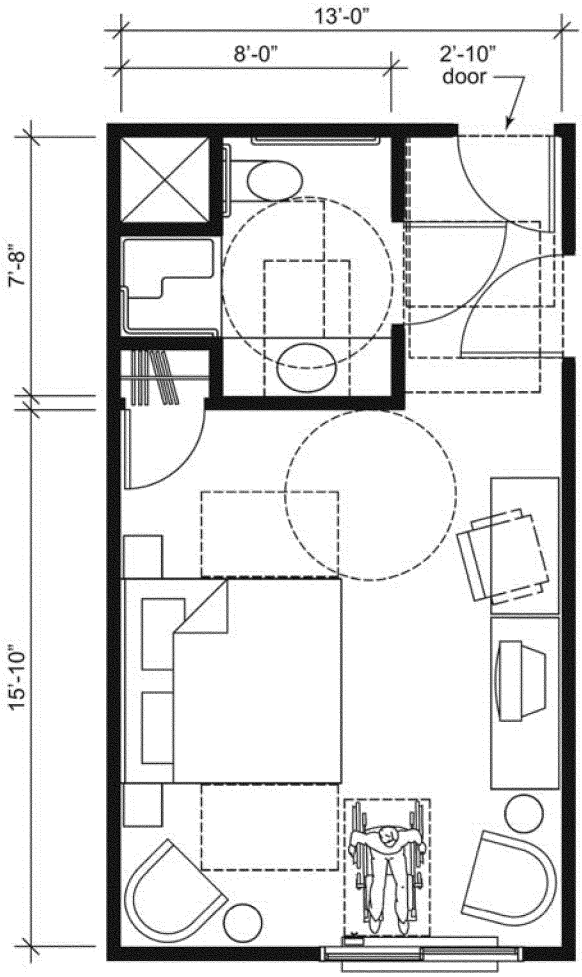
- Comparable vanity counter top space (section 806);
- Alternate roll-in type shower with folding seat is 36 inches deep and 60 inches wide (section 608.2.3);
- Alternate roll-in shower has a 36-inch wide entry at one end of the long end of the compartment (section 608.2.3);
- Recessed alternate roll-in shower location permits shorter rear grab bar at water closet (section 604.5.2);
- Circular turning space in room (section 603.2.1);
- Required clear floor spaces at fixtures and turning space overlap (section 603.2.2);
- Turning space includes knee and toe clearance at lavatory (section 304.3);
- Water closet clearance is 60 inches at back wall and 56 inches deep (section 604.3);
- Centerline of the water closet at 16-18 inches from side wall (section 604.2); and
- No other fixtures or obstructions located within required water closet clearance (section 604.3).

The following accessible features are provided in the living area:

- T-shaped turning space (section 304.3.2);
- Accessible route (section 402);
- Clear floor space between beds (section 806.2.3);
- Maneuvering clearances at all doors (section 404.2);
- Accessible operable window (section 309); and
- Accessible controls for the heat and air conditioning (section 309).

Plan 5A: 13-Foot Wide Accessible Guest Room

This drawing shows an accessible 13-foot wide guest room with features that comply with the 2010 Standards. Features include a transfer shower, comparable vanity, clothes closet with swinging door, and door connecting to adjacent guest room. Furnishings include a king bed and additional seating.



The following accessible features are provided in the bathroom:

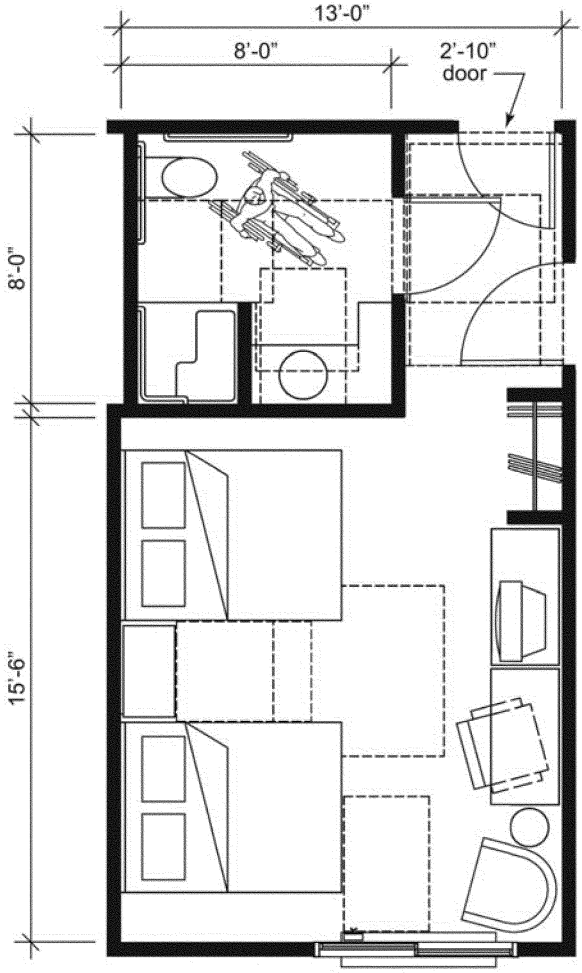
- Comparable vanity counter top space (section 806);
- Transfer shower (section 603.2);
- Shower seat (section 610.3);
- Clearance in front of the shower extends beyond the seat and is 36 inches wide min. (section 607.2);
- Recessed transfer shower location permits shorter rear grab bar at water closet (section 604.5.2);
- Circular turning space in room (section 603.2.1);
- Required clear floor spaces at fixtures and turning space overlap (section 603.2.2);
- Water closet clearance is 60 inches at back wall and 56 inches deep (section 604.3);
- Centerline of the water closet at 16 inches from side wall (section 604.2); and
- No other fixtures or obstructions located within required water closet clearance (section 604.3).

The following accessible features are provided in the living area:

- Circular turning space (section 304.3.2);
- Accessible route (section 402);
- Clear floor space on both sides of the bed (section 806.2.3);
- Maneuvering clearances at all doors (section 404.2);
- Accessible operable window (section 229); and
- Accessible controls for the heat and air conditioning (section 309).

Plan 5B: 13-Foot Wide Accessible Guest Room

This drawing shows an accessible 13-foot wide guest room with features that comply with the 2010 Standards. Features include a transfer shower, comparable vanity, open clothes closet, and door connecting to adjacent guest room. Furnishings include two beds.



The following accessible features are provided in the bathroom:

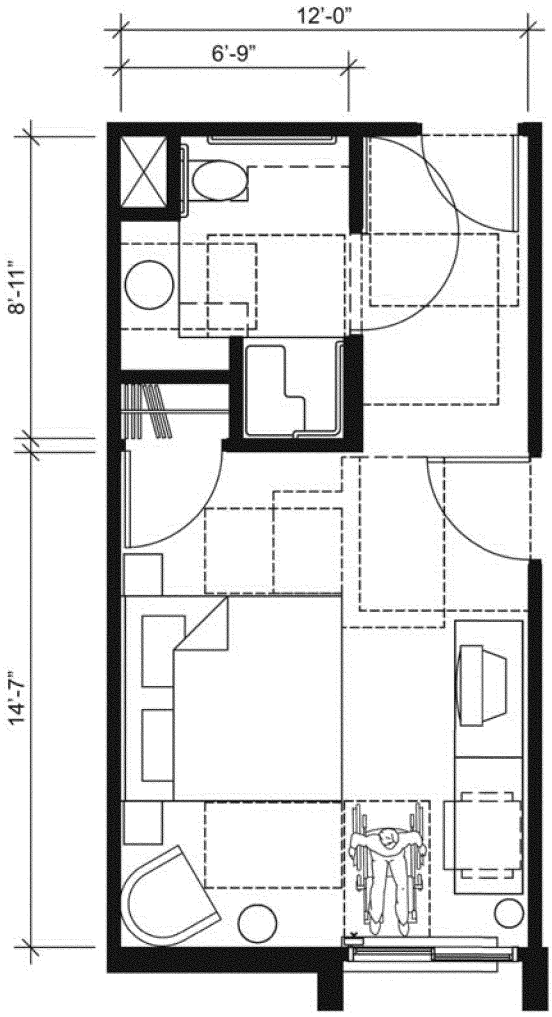
- Comparable vanity counter top space (section 806);
- Transfer shower (section 603.2);
- Shower seat (section 610.3);
- Clearance in front of the shower extends beyond the seat and is 36 inches wide min. (section 607.2);
- Lavatory with vanity counter top recessed to permit shorter rear grab bar at water closet (section 604.5.2);
- T-shaped turning space in room (section 603.2.1);
- Required clear floor spaces at fixtures and turning space overlap (section 603.2.2);
- Water closet clearance is 60 inches at back wall and 56 inches deep (section 604.3);
- Centerline of the water closet at 16-18 inches from side wall (section 604.2); and
- No other fixtures or obstructions located within required water closet clearance (section 604.3).

The following accessible features are provided in the living area:

- T-shaped turning space (section 304.3.2);
- Accessible route (section 402);
- Clear floor space between beds (section 806.2.3);
- Maneuvering clearances at all doors (section 404.2);
- Accessible operable window (section 229); and
- Accessible controls for the heat and air conditioning (section 309).

Plan 6A: 12-Foot Wide Accessible Guest Room

This drawing shows an accessible 12-foot wide guest room with features that comply with the 2010 Standards. Features include a transfer shower, water closet length (rim to rear wall) 24 inches maximum, comparable vanity, clothes closet with swinging door, and door connecting to adjacent guest room. Furnishings include a king bed and additional seating.



The following accessible features are provided in the bathroom:

- Comparable vanity counter top space (section 806);
- Transfer shower (section 603.2);
- Shower seat (section 610.3);
- Clearance in front of the shower extends beyond the seat and is 36 inches wide min. (section 607.2);
- Recessed lavatory with vanity counter top permits shorter rear grab bar at water closet (section 604.5.2);
- T-shaped turning space in room (section 603.2.1);
- Required clear floor spaces at fixtures and turning space overlap (section 603.2.2);
- Water closet clearance is 60 inches at back wall and 56 inches deep (section 604.3);
- Centerline of the water closet at 16 inches from side wall (section 604.2); and
- No other fixtures or obstructions located within required water closet clearance (section 604.3).

The following accessible features are provided in the living area:

- T-shaped turning space (section 304.3.2);
- Accessible route (section 402);
- Clear floor space on both sides of the bed (section 806.2.3);
- Maneuvering clearances at all doors (section 404.2);
- Accessible operable window (section 229); and
- Accessible controls for the heat and air conditioning (section 309).

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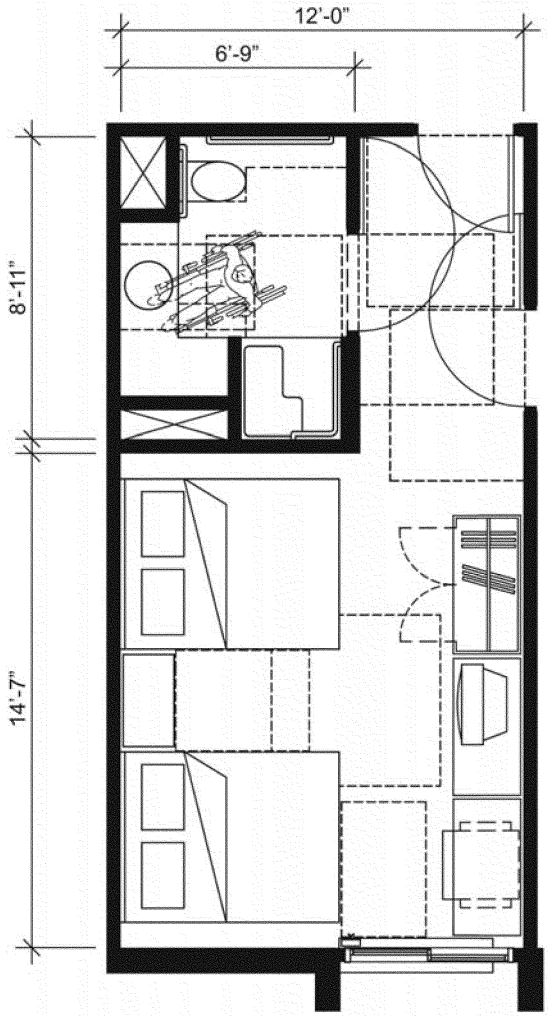
Plan 6B: 12-Foot Wide Accessible Guest Room

This drawing shows an accessible 12-foot wide guest room with features that comply with the 2010 Standards. Features include a transfer shower, water closet length (rim to rear wall) 24 inches maximum, comparable vanity, wardrobe, and door connecting to adjacent guest room. Furnishings include two beds.



The following accessible features are provided in the bathroom:

- Comparable vanity counter top space (section 806);
- Transfer shower (section 603.2);
- Shower seat (section 610.3);
- Clearance in front of the shower extends beyond the seat and is 36 inches wide min. (section 607.2);
- Recessed lavatory with vanity counter top permits shorter rear grab bar at water closet (section 604.5.2);
- Circular turning space in room (section 603.2.1);
- Required clear floor spaces at fixtures and turning space overlap (section 603.2.2);
- Water closet clearance is 60 inches at back wall and 56 inches deep (section 604.3);
- Centerline of the water closet at 16 inches from side wall (section 604.2); and
- No other fixtures or obstructions located within required water closet clearance (section 604.3).

The following accessible features are provided in the living area:

- Circular turning space (section 304.3.2);
- Accessible route (section 402);
- Clear floor space between beds (section 806.2.3);
- Maneuvering clearances at all doors (section 404.2);
- Accessible operable window (section 229); and
- Accessible controls for the heat and air conditioning (section 309).

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225 and 811 Storage

Section 225 of the 2010 Standards provides that where storage is provided in accessible spaces, at least one of each type shall comply with the 2010 Standards. Self-service shelving is required to be on an accessible route, but is not required to comply with the reach range requirements. These requirements are consistent with the 1991 Standards.

Section 225.3 adds a new scoping requirement for self-storage facilities. Facilities with 200 or fewer storage spaces will be required to make at least five percent (5%) of the storage spaces accessible. Facilities with more than 200 storage spaces will be required to provide ten accessible storage spaces, plus two percent (2%) of the total storage spaces over 200.

Sections 225.2.1 and 811 of the 2010 Standards require lockers to meet accessibility requirements. Where lockers are provided in clusters, five percent (5%) but at least one locker in each cluster will have to comply. Under the 1991 Standards, only one locker of each type provided must be accessible.

Commenters recommended that the Department adopt language requiring public accommodations to provide access to all self-service shelves and display areas available to customers. Other commenters opposed this requirement as too burdensome to retail and other entities and claimed that significant revenue would be lost if this requirement were to be implemented.

Other commenters raised concerns that section 225.2.2 of the 2010 Standards scopes only self-service shelving whereas section 4.1.3(12)(b) of the 1991 Standards applies to both “shelves or display units.”

Although “display units” were not included in the 2010 Standards under the belief that displays are not to be touched and

therefore by definition cannot be "self-service," both the 2010 Standards and the 1991 Standards should be read broadly to apply to all types of shelves, racks, hooks, and similar self-service merchandising fittings, including self-service display units. Such fixtures are permitted to be installed above or below the reach ranges possible for many persons with disabilities so that space available for merchandising is used as efficiently as possible.

226 and 902 Dining Surfaces and Work Surfaces

Section 226.1 of the 2010 Standards require that where dining surfaces are provided for the consumption of food or drink, at least five percent (5%) of the seating spaces and standing spaces at the dining surfaces comply with section 902. Section 902.2 requires the provision of accessible knee and toe clearance.

Commenters stated that basing accessible seating on seating spaces and standing spaces potentially represents a significant increase in scoping, particularly given the ambiguity in what represents a "standing space" and urged a return to the 1991 Standard of requiring accessible seating based on fixed dining tables. The scoping change merely takes into account that tables may vary in size so that basing the calculation on the number of tables rather than on the number of individuals that may be accommodated by the tables could unnecessarily restrict opportunities for persons with disabilities. The revised scoping permits greater flexibility by allowing designers to disperse accessible seating and standing spaces throughout the dining area. Human factors data, which is readily available to designers, provides information about the amount of space required for both eating and drinking while seated or standing.

227 and 904 Sales and Service

Check-Out Aisles and Sales and Service Counters. The 1991 Standards, at section 7.2, and the 2010 Standards, at section 904.4, contain technical requirements for sales and service counters. The 1991 Standards generally require sales and service counters to provide an accessible portion at least 36 inches long and no higher than 36 inches above the finish floor. The nondiscrimination requirements of the ADA regulations require the level of service provided at the accessible portion of any sales and service counter to be the same as the level of service provided at the inaccessible portions of the counter.

The 2010 Standards specify different lengths for the accessible portion of sales and service counters based on the type of approach provided. Where a forward approach is provided, the accessible portion of the counter must be at least 30 inches long and no higher than 36 inches, and knee and toe space must be provided under the counter. The requirement that knee and toe space be provided where only clear floor space for a forward approach to a sales and service counter is provided is not a new requirement. It is a clarification of the ongoing requirement that part of the sales and service counter be accessible. This requirement applies to the entire accessible part of sales and service counters and requires that the accessible clear floor or ground space adjacent to those counters be kept clear of merchandise, equipment, and other items so that the accessible part of the counter is readily accessible to and usable by individuals with disabilities. The accessible part of the counter must also be staffed and provide an equivalent level of service as that provided to all customers.

Where clear floor space for a parallel approach is provided, the accessible portion of the counter must be at least 36 inches long and no higher than 36 inches above the finish floor. A clear floor or ground space that is at least 48 inches long x 30 inches wide must be provided positioned for a parallel approach adjacent to the 36-inch minimum length of counter.

Section 904.4 of the 2010 Standards includes an exception for alterations to sales and service counters in existing facilities. It permits the accessible portion of the counter to be at least 24 inches long, where providing a longer accessible counter will result in a reduction in the number of existing counters at work stations or existing mailboxes, provided that the required clear floor or ground space is centered on the accessible length of the counter.

Section 904.4 of the 2010 Standards also clarifies that the accessible portion of the counter must extend the same depth as the sales or service counter top. Where the counter is a single-height counter, this requirement applies across the entire depth of the counter top. Where the counter is a split-height counter, this requirement applies only to the customer side of the counter top. The employee-side of the counter top may be higher or lower than the customer-side of the counter top.

Commenters recommended that the Department consider a regulatory alternative exempting small retailers from the new knee and toe clearance requirement and retaining existing wheelchair accessibility standards for sales and service counters. These commenters believed that the knee and toe clearance requirements will cause a reduction in the sales and inventory space at check-out aisles and other sales and service counters.

Both the 1991 and the 2010 Standards permit covered entities to determine whether they will provide a forward or a parallel approach to sales and service counters. So any facility that does not wish to provide the knee or toe clearance required for a front approach to such a counter may avoid that option. However, the Department believes that permitting a forward approach without requiring knee and toe clearance is not adequate to provide accessibility because the person using a wheelchair will be prevented from coming close enough to the counter to see the merchandise or to transact business with a degree of convenience that is comparable to that provided to other customers.

A parallel approach to sales and service counters also can provide the accessibility required by the 2010 Standards. Individuals using wheelchairs can approach sales and service counters from the side, and, assuming the necessary elements, features, or merchandise necessary to complete a business transaction are within the reach range requirements for a side approach, the needs of individuals with disabilities can be met effectively.

Section 227 of the 2010 Standards clarifies the requirements for food service lines. Queues and waiting lines serving counters or check-out aisles, including those for food service, must be accessible to individuals with disabilities.

229 Windows

A new requirement at section 229.1 of the 2010 Standards provides that if operable windows are provided for building users, then at least one window in an accessible space must be equipped with controls that comply with section 309.

Commenters generally supported this provision but some commenters asked whether the maximum five-pounds (5 lbs.) of force requirement of section 309 applies to the window latch itself or only to the force required to open the window. Section 309 applies to all controls and operating mechanisms, so the latch must comply with the requirement to operate with no more than five pounds of force (5 lbf).

230 and 708 Two-Way Communication Systems

New provisions of the 2010 Standards at sections 230.1 and 708 require two-way communications systems to be equipped with visible as well as audible signals.

231 and 808 Judicial Facilities and Courtrooms

Section 231 of the 2010 Standards adds requirements for accessible courtrooms, holding cells, and visiting areas.

Accessible Courtroom Stations. Sections 231.2, 808, 304, 305, and 902 of the 2010 Standards provide increased accessibility at courtroom stations. Clear floor space for a forward approach is required for all courtroom stations (judges' benches, clerks' stations, bailiffs' stations, deputy clerks' stations, court reporters' stations, and litigants' and counsel stations). Other applicable specifications include accessible work surface heights and toe and knee clearance.

Accessible Jury Boxes, Attorney Areas, and Witness Stands. Section 206.2.4 of the 2010 Standards requires, in new construction and alterations, at least one accessible route to connect accessible building or facility entrances with all accessible spaces and elements within the building or facility that are connected by a circulation path unless they are exempted by Exceptions 1–7 of section 206.2.3. Advisory 206.2.4 Spaces and Elements Exception 1 explains that the exception allowing raised courtroom stations to be used by court employees, such as judge's benches, to be adaptable does not apply to areas of the courtroom likely to be used by members of the public such as jury areas, attorney areas, or witness stands. These areas must be on an accessible route at the time of initial construction or alteration.

Raised Courtroom Stations Not for Members of the Public. Section 206.2.4, Exception 1 of the 2010 Standards provides that raised courtroom stations that are used

by judges, clerks, bailiffs, and court reporters will not have to provide full vertical access when first constructed or altered if they are constructed to be easily adaptable to provide vertical accessibility.

One commenter suggested that a sufficient number of accessible benches for judges with disabilities, in addition to requiring accessible witness stands and attorney areas, be required. The Department believes that the requirements regarding raised benches for judges are easily adaptable to provide vertical access in the event a judge requires an accessible bench. Section 206.2.4 of the 2010 Standards provides that raised courtroom stations used by judges and other judicial staff do not have to provide full vertical access when first constructed or altered as long as the required clear floor space, maneuvering space, and electrical service, where appropriate, is provided at the time of new construction or can be achieved without substantial reconstruction during alterations.

A commenter asserted that there is nothing inherent in clerks' stations, jury boxes, and witness stands that require them to be raised. While it would, of course, be easiest to provide access by eliminating height differences among courtroom elements, the Department recognizes that accessibility is only one factor that must be considered in the design process of a functioning courtroom. The need to ensure the ability of the judge to maintain order, the need to ensure sight lines among the judge, the witness, the jury, and other participants, and the need to maintain the security of the participants all affect the design of the space. The Department believes that the 2010 Standards have been drafted in a way that will achieve accessibility without unduly constraining the ability of a designer to address the other considerations that are unique to courtrooms.

Commenters argued that permitting courtroom stations to be adaptable rather than fully accessible at the time of new construction likely will lead to discrimination in hiring of clerks, court reporters, and other court staff. The Department believes that the provisions will facilitate, not hinder, the hiring of court personnel who have disabilities. All courtroom work stations will be on accessible routes and will be required to have all fixed elements designed in compliance with the 2010 Standards. Elevated work stations for court employees may be designed to add vertical access as needed. Since the original design must provide the proper space and electrical wiring to install vertical access, the change should be easily accomplished.

232 Detention Facilities and Correctional Facilities

Section 232 of the 2010 Standards establishes requirements for the design and construction of cells, medical care facilities, and visiting areas in detention facilities and in correctional facilities. Section 35.151(k) of the Department's title II rule provides scoping for newly constructed general holding cells and general housing cells requiring mobility features compliant with section 807.2 of the 2010 Standards in a minimum of three percent (3%) of cells, but no fewer than one cell. Section 232.2 of the 2010 Standards provides scoping for newly constructed cells with communications features requiring a minimum of two percent (2%) of cells, but at least one cell, to have communication features.

The Department's title II rule at § 35.151(k) also specifies scoping for alterations to detention and correctional facilities. Generally a minimum of three percent (3%), but no fewer than one, of the total number of altered cells must comply with section 807.2 of the 2010 Standards and be provided within each facility. Altered cells with mobility features must be provided in each classification level, including administrative and disciplinary segregation, each use and service area, and special program. The Department notes that the three percent (3%), but no fewer than one, requirement is a minimum. As corrections systems plan for new facilities or alterations, the Department urges planners to include in their population estimates a projection of the numbers of inmates with disabilities so as to have sufficient numbers of accessible cells to meet inmate needs.

233 Residential Facilities

Homeless Shelters, Group Homes, and Similar Social Service Establishments. Section 233 of the 2010 Standards includes specific scoping and technical provisions that apply to new construction and alteration of residential facilities. In the 1991 Standards scoping and technical requirements for homeless shelters, group homes, and similar social service establishments were included in section 9 Transient Lodging. These types of facilities will be covered by section 233 of the 2010 Standards and by 28 CFR 35.151(e) and 36.406(d) and will be subject to requirements for residential facilities rather than the requirements for transient lodging. This approach will harmonize federal accessibility obligations under both the ADA and section 504 of the Rehabilitation Act of 1973, as amended. In sleeping rooms with more than 25 beds that are covered by § 36.406(d) a minimum of five percent (5%) of the beds must have clear floor space compliant with section 806.2.3 of the 2010 Standards. In large facilities with more than 50 beds, at least one roll-in shower compliant with section 608.2.2 or section 608.2.3 of the 2010 Standards must be provided. Where separate shower facilities are provided for men and for women, at least one roll-in shower must be provided for each gender.

Housing Operated By or On Behalf of Places of Education. Housing at a place of education includes: Residence halls, dormitories, suites, apartments, or other places of residence operated by or on behalf of places of education. Residence halls or dormitories operated by or on behalf of places of education are covered by the provisions in sections 224 and 806 of the 2010 Standards. The Department has included in the title III rule at § 36.406(e) requirements that apply to housing at places of education that clarify requirements for residence halls and dormitories and other types of student housing. Requirements for housing at a place of education covered by the title II rule are included at § 35.151(f).

Kitchens and Kitchenettes. Section 4.34.2 of the UFAS requires a clear turning space at least 60 inches in diameter or an equivalent T-shaped turning space in kitchens. Section 4.34.6 requires a clearance between opposing base cabinets, counters, appliances, or walls of at least 40 inches except in a U-shaped kitchen where the minimum clearance is 60 inches.

Section 804 of the 2010 Standards provides technical requirements for kitchens and kitchenettes. Section 804.2.1 requires that pass through kitchens, which have two entries and counters, appliances, or cabinets on two opposite sides or opposite a parallel wall, provide at least 40 inches minimum clearance. Section 804.2.2 requires that U-shaped kitchens, which are enclosed on three continuous sides, provide at least 60 inches minimum clearance between all opposing base cabinets, countertops, appliances, or walls within kitchen work areas. Kitchens that do not have a cooktop or conventional range are exempt from the clearance requirements but still must provide an accessible route.

If a kitchen does not have two entries, the 2010 Standards require the kitchen to have 60 inches minimum clearance between the opposing base cabinets, counters, appliances, or walls.

One commenter supported the provisions of section 804 of the 2010 Standards but sought clarification whether this section applies to residential units only, or to lodging and office buildings as well. Section 212 makes section 804 applicable to all kitchens and kitchenettes in covered buildings.

Residential Facilities. Section 4.1.4(11) of the UFAS contains scoping requirements for the new construction of housing. Under the 1991 title II regulation, state and local governments had the option of complying with the UFAS or the 1991 Standards. After the compliance date for the 2010 Standards, state and local governments will no longer have the option of complying with the UFAS, but will have to use the 2010 Standards for new construction and alterations.

Sections 233.1, 233.2, 233.3, 233.3.1, and 233.3.2 of the 2010 Standards differentiate between entities subject to the United States Department of Housing and Urban Development (HUD) regulations implementing section 504 of the Rehabilitation Act of 1973 and entities not subject to the HUD regulations. The HUD regulations apply to recipients of federal financial assistance through HUD, and require at least five percent (5%) of dwelling units in multi-family projects of five or more dwelling units to provide mobility features and at least two percent (2%) of the dwelling units to provide communication features. The HUD regulations define a project unique to its programs as "one or more residential structures which are covered by a single contract for federal financial assistance or application for assistance, or are treated as a whole for processing purposes, whether or not located on a common site." To avoid any potential conflicts with the HUD regulations, the 2010 Standards require residential dwelling units subject to the HUD regulations to comply with the scoping requirements in the HUD regulations, instead of the scoping requirements in the 2010 Standards.

For entities not subject to the HUD regulations, the 2010 Standards require at

least five percent (5%) of the dwelling units in residential facilities to provide mobility features, and at least two percent (2%) of the dwelling units to provide communication features. The 2010 Standards define facilities in terms of buildings located on a site. The 2010 Standards permit facilities that contain 15 or fewer dwelling units to apply the scoping requirements to all the dwelling units that are constructed under a single contract, or are developed as whole, whether or not located on a common site.

Alterations to Residential Facilities. Section 4.1.6 of the UFAS requires federal, state, and local government housing to comply with the general requirements for alterations to facilities. Applying the general requirements for alterations to housing can result in partially accessible dwelling units where single elements or spaces in dwelling units are altered.

The 2010 Standards, at sections 202.3 Exception 3, 202.4, and 233.3, contain specific scoping requirements for alterations to dwelling units. Dwelling units that are not required to be accessible are exempt from the general requirements for alterations to elements and spaces and for alterations to primary function areas.

The scoping requirements for alterations to dwelling units generally are based on the requirements in the UFAS:

- Where a building is vacated for purposes of alterations and has more than 15 dwelling units, at least five percent (5%) of the altered dwelling units are required to provide mobility features and at least two percent (2%) of the dwelling units are required to provide communication features.
- Where a bathroom or a kitchen is substantially altered in an individual dwelling unit and at least one other room is also altered, the dwelling unit is required to comply with the scoping requirements for new construction until the total number of dwelling units in the facility required to provide mobility features and communication features is met.

As with new construction, the 2010 Standards permit facilities that contain 15 or fewer dwelling units to apply the scoping requirements to all the dwelling units that are altered under a single contract, or are developed as a whole, whether or not located on a common site. The 2010 Standards also permit a comparable dwelling unit to provide mobility features where it is not technically feasible for the altered dwelling unit to comply with the technical requirements.

234 and 1002 Amusement Rides

New and Altered Permanently Installed Amusement Rides. Section 234 of the 2010 Standards sets out scoping requirements and section 1002 sets out the technical requirements for the accessibility of permanently installed amusement rides. These requirements apply to newly designed and constructed amusement rides and used rides when certain alterations are made.

A commenter raised concerns that smaller amusement parks tend to purchase used rides more frequently than new rides, and that the conversion of a used ride to provide the required accessibility may be difficult to ensure because of the possible complications in modifying equipment to provide accessibility.

The Department agrees with this commenter. The Department notes, however, that the 2010 Standards will require modifications to existing amusement rides when a ride's structural and operational characteristics are altered to the extent that the ride's performance differs from that specified by the manufacturer or the original design. Such an extensive alteration to an amusement ride may well require that new load and unload areas be designed and constructed. When load and unload areas serving existing amusement rides are newly designed and constructed they must be level, provide wheelchair turning space, and be on an accessible route compliant with Chapter 4 of the 2010 Standards except as modified by section 1002.2 of the 2010 Standards.

Mobile or Portable Amusement Rides. The exception in section 234.1 of the 2010 Standards exempts mobile or portable amusement rides, such as those set up for short periods of time at carnivals, fairs or festivals, from having to comply with the 2010 Standards. However, even though the mobile/portable ride itself is not subject to the Standards, these facilities are still subject to the ADA's general requirement to ensure that individuals with disabilities have an equal opportunity to enjoy the services and amenities of these facilities.

Subject to these general requirements, mobile or portable amusement rides should be located on an accessible route and the load and unload areas serving a ride should provide a level wheelchair turning space to provide equal opportunity for individuals with disabilities to be able to participate on the amusement ride to the extent feasible.

One commenter noted that the exception in Section 234.1 of the 2010 Standards for mobile or portable amusement rides limits the opportunities of persons with disabilities to participate on amusement rides because traveling or temporary amusement rides by their nature come to their customers' town or a nearby town rather than the customer having to go to them and so are less expensive than permanent amusement parks. While the Department understands the commenter's concerns, the Department notes that most amusement rides are too complex to be reasonably modified or re-engineered to accommodate the majority of individuals with disabilities and that additional complexities and safety concerns are added when the rides are mobile or portable.

A commenter asked that section 234 of the 2010 Standards make clear that the requirements for accessible routes include the routes leading up to and including the loading and unloading areas of amusement rides. Sections 206.2.9 and 1002.2 of the 2010 Standards clarify that the requirements for accessible routes include the routes leading up to and including the loading and unloading areas of amusement rides.

A commenter requested that the final rule specifically allow for wheelchair access through the exit or other routes, or alternate means of wheelchair access routes to amusement rides. The commenter stated that the concept of wheelchair access through the exit or alternate routes was a base assumption for the 2010 Standards. The commenter noted that the concept is apparent in the signage and load/unload area provisions in Section 216.12 (" * * * where accessible unload areas also serve as accessible load areas, signs indicating the location of the accessible load and unload areas shall be provided at entries to queues and waiting lines"). The Department agrees with the commenter that accessible load and unload areas may be the same where signs that comply with section 216.12 are provided.

Wheelchair Space or Transfer Seat or Transfer Device. Sections 234.3 and 1002.4–1002.6 of the 2010 Standards provide that each new and altered amusement ride, except for mobile/portable rides and a few additional excepted rides, will be required to provide at least one type of access by means of one wheelchair space or one transfer seat or one transfer device (the design of the transfer device is not specified).

Commenters urged the Department to revise the requirements for wheelchair spaces and transfer seats and devices because most amusement rides are too complex to be reasonably modified or re-engineered to accommodate the majority of individuals with disabilities. They argued that the experience of amusement rides will be significantly reduced if the proposed requirements are implemented.

The 2004 ADAAG, which the Department adopted as part of the 2010 Standards, was developed with the assistance of an advisory committee that included representation from the design staffs of major amusement venues and from persons with disabilities. The Department believes that the resulting 2004 ADAAG reflected sensitivity to the complex problems posed in adapting existing rides by focusing on new rides that can be designed from the outset to be accessible.

To permit maximum design flexibility, the 2010 Standards permit designers to determine whether it is more appropriate to permit individuals who use wheelchairs to remain in their chairs on the ride, or to provide for transfer access.

Maneuvering Space in Load and Unload Areas. Sections 234.2 and 1002.3 of the 2010 Standards require that a level wheelchair turning space be provided at the load and unload areas of each amusement ride. The turning space must comply with sections 304.2 and 304.3.

Signs Required at Waiting Lines to Amusement Rides. Section 216.12 of the 2010 Standards requires signs at entries to queues and waiting lines identifying type and location of access for the amusement ride.

235 and 1003 Recreational Boating Facilities

These sections require that accessible boat slips and boarding piers be provided. Most commenters approved of the requirements for recreational boating facility accessibility and urged the Department to keep regulatory language consistent with those provisions. They commented that the requirements appropriately reflect industry conditions. Individual commenters and disability organizations agreed that the 2010 Standards

achieve acceptable goals for recreational boating facility access.

Accessible Route. Sections 206.2.10 and 1003.2 of the 2010 Standards require an accessible route to all accessible boating facilities, including boat slips and boarding piers at boat launch ramps. Section 1003.2.1 provides a list of exceptions applicable to structures such as gangways, transition plates, floating piers, and structures containing combinations of these elements that are affected by water level changes. The list of exceptions specifies alternate design requirements applicable to these structures which, because of water level variables, cannot comply with the slope, cross slope, and handrail requirements for fixed ramps contained in sections 403.3, 405.2, 405.3, 405.6, and 405.7 of the 2010 Standards. Exceptions 3 and 4 in Section 1003.2.1, which permit a slope greater than that specified in Section 405.2, are available for structures that meet specified length requirements. Section 206.7.10 permits the use of platform lifts as an alternative to gangways that are part of accessible routes.

Commenters raised concerns that because of water level fluctuations it may be difficult to provide accessible routes to all accessible boating facilities, including boat slips and boarding piers at boat launch ramps. One of the specific concerns expressed by several commenters relates to the limits for running slope permitted on gangways that are part of an accessible route as gangways may periodically have a steeper slope than is permitted for a fixed ramp. The exceptions contained in section 1003.2 of the 2010 Standards modify the requirements of Chapter 4. For example, where the total length of a gangway or series of gangways serving as an accessible route is 80 feet or more an exception permits the slope on gangways to exceed the maximum slope in section 405.2.

Some commenters suggested that permissible slope variations could be reduced further by introducing a formula that ties required gangway length to anticipated water level fluctuations. Such a formula would incorporate predictions of tidal level changes such as those issued by the National Oceanographic and Atmospheric Administration (NOAA) and the United States Geologic Survey (USGS). This suggested approach would be an alternative to the gangway length exceptions and limits in section 1003.2.1 of the 2010 Standards. These commenters noted that contemporary building materials and techniques make gangways of longer length and alternative configurations achievable. These commenters provided at least one example of a regional regulatory authority using this type of formula. While this approach may be successfully implemented and consistent with the goals of the ADA, the example provided was applied in a highly developed area containing larger facilities. The Department has considered that many facilities do not have sufficient resources available to take advantage of the latest construction materials and design innovations. Other commenters supported compliance exceptions for facilities that are subject to extreme tidal conditions. One commenter noted that if a facility is located in an area with limited space and extreme tidal variations, a disproportionately long gangway might intrude into water travel routes. The Department has considered a wide range of boating facility characteristics including size, water surface areas, tidal fluctuations, water conditions, variable resources, whether the facility is in a highly developed or remote location, and other factors. The Department has determined that the 2010 Standards provide sufficient flexibility for such broad application. Additionally, the length requirement for accessible routes in section 1003.2.1 provides an easily determinable compliance standard.

Accessible Boarding Piers. Where boarding piers are provided at boat launch ramps, sections 235.3 and 1003.3.2 of the 2010 Standards require that at least five percent (5%) of boarding piers, but at least one, must be accessible.

Accessible Boat Slips. Sections 235.2 and 1003.3.1 of the 2010 Standards require that a specified number of boat slips in each recreational boating facility meet specified accessibility standards. The number of accessible boat slips required by the 2010 Standards is set out in a chart in section 235.2. One accessible boat slip is required for facilities containing 25 or fewer total slips. The number of required accessible boat slips increases with the total number of slips at the facility. Facilities containing more than one thousand (1000) boat slips are required to provide twelve (12) accessible boat slips plus one for each additional one hundred slips at the facility.

One commenter asserted the need for specificity in the requirement for dispersion of accessible slips. Section 235.2.1 of the 2010 Standards addresses dispersion and requires that boat slips "shall be dispersed throughout the various types of boat slips provided." The commenter was concerned that if a marina could not put accessible slips all on one pier, it would have to reconstruct the entire facility to accommodate accessible piers, gangways, docks and walkways. The provision permits required accessible boat slips to be grouped together. The Department recognizes that economical and structural feasibility may produce this result. The 2010 Standards do not require the dispersion of the physical location of accessible boat slips. Rather, the dispersion must be among the various types of boat slips offered by the facility. Section 235.2.1 of the 2010 Standards specifies that if the required number has been met, no further dispersion is required. For example, if a facility offers five different 'types' of boat slips but is only required to provide three according to the table in Section 235.2, that facility is not required to provide more than three accessible boat slips, but the three must be varied among the five 'types' of boat slips available at the facility.

236 and 1004 Exercise Machines and Equipment

Accessible Route to Exercise Machines and Equipment. Section 206.2.13 of the 2010 Standards requires an accessible route to serve accessible exercise machines and equipment.

Commenters raised concerns that the requirement to provide accessible routes to serve accessible exercise machines and equipment will be difficult for some facilities to provide, especially some transient lodging facilities that typically locate exercise machines and equipment in a single room. The Department believes that this requirement is a reasonable one in new construction and alterations because accessible exercise machines and equipment can be located so that an accessible route can serve more than one piece of equipment.

Exercise Machines and Equipment. Section 236 of the 2010 Standards requires at least one of each type of exercise machine to meet clear floor space requirements of section 1004.1. Types of machines are generally defined according to the muscular groups exercised or the kind of cardiovascular exercise provided.

Several commenters were concerned that existing facilities would have to reduce the number of available exercise equipment and machines in order to comply with the 2010 Standards. One commenter submitted prototype drawings showing equipment and machine layouts with and without the required clearance specified in the 2010 Standards. The accessible alternatives all resulted in a loss of equipment and machines. However, because these prototype layouts included certain possibly erroneous assumptions about the 2010 Standards, the Department wishes to clarify the requirements.

Section 1004.1 of the 2010 Standards requires a clear floor space "positioned for transfer or for use by an individual seated in a wheelchair" to serve at least one of each type of exercise machine and equipment. This requirement provides the designer greater flexibility regarding the location of the clear floor space than was employed by the commenter who submitted prototype layouts. The 2010 Standards do not require changes to exercise machines or equipment in order to make them more accessible to persons with disabilities. Even where machines or equipment do not have seats and typically are used by individuals in a standing position, at least one of each type of machine or equipment must have a clear floor space. Therefore, it is reasonable to assume that persons with disabilities wishing to use this type of machine or equipment can stand or walk, even if they use wheelchairs much of the time. As indicated in Advisory 1004.1, "the position of the clear floor space may vary greatly depending on the use of the equipment or machine." Where exercise equipment or machines require users to stand on them, the clear floor space need not be located parallel to the length of the machine or equipment in order to provide a lateral seat-to-platform transfer. It is permissible to locate the clear floor space for such machines or equipment in the aisle behind the device and to overlap the clear floor space and the accessible route.

Commenters were divided in response to the requirement for accessible exercise machines and equipment. Some supported requirements for accessible machines and equipment; others urged the Department not to require accessible machines and

equipment because of the costs involved. The Department believes that the requirement strikes an appropriate balance in ensuring that persons with disabilities, particularly those who use wheelchairs, will have the opportunity to use the exercise equipment. Providing access to exercise machines and equipment recognizes the need and desires of individuals with disabilities to have the same opportunity as other patrons to enjoy the advantages of exercise and maintaining health.

237 and 1005 Fishing Piers and Platforms

Accessible Route. Sections 206.2.14 and 1005.1 of the 2010 Standards require an accessible route to each accessible fishing pier and platform. The exceptions described under Recreational Boating above also apply to gangways and floating piers. All commenters supported the requirements for accessible routes to fishing piers and platforms.

Accessible Fishing Piers and Platforms. Sections 237 and 1005 of the 2010 Standards require at least twenty-five percent (25%) of railings, guards, or handrails (if provided) to be at a 34-inch maximum height (so that a person seated in a wheelchair can cast a fishing line over the railing) and to be located in a variety of locations on the fishing pier or platform to give people a variety of locations to fish. An exception allows a guard required to comply with the IBC to have a height greater than 34 inches. If railings, guards, or handrails are provided, accessible edge protection and clear floor or ground space at accessible railings are required. Additionally, at least one turning space complying with section 304.3 of the 2010 Standards is required to be provided on fishing piers and platforms.

Commenters expressed concerns about the provision for fishing piers and platforms at the exception in section 1005.2.1 of the 2010 Standards that allows a maximum height of 42 inches for a guard when the pier or platform is covered by the IBC. Two commenters stated that allowing a 42-inch guard or railing height for facilities covered by another building code would be difficult to enforce. They also thought that this would hinder access for persons with disabilities because the railing height would be too high for a person seated in a wheelchair to reach over with their fishing pole in order to fish. The Department understands these concerns but believes that the railing height exception is necessary in order to avoid confusion resulting from conflicting accessibility requirements, and therefore has retained this exception.

238 and 1006 Golf Facilities

Accessible Route. Sections 206.2.15, 1006.2, and 1006.3 of the 2010 Standards require an accessible route to connect all accessible elements within the boundary of the golf course and, in addition, to connect golf car rental areas, bag drop areas, teeing grounds, putting greens, and weather shelters. An accessible route also is required to connect any practice putting greens, practice teeing grounds, and teeing stations at driving ranges that are required to be accessible. An exception permits the accessible route requirements to be met, within the boundaries of the golf course, by providing a "golf car passage" (the path typically used by golf cars) if specifications for width and curb cuts are met.

Most commenters expressed the general viewpoint that nearly all golf courses provide golf cars and have either well-defined paths or permit the cars to drive on the course where paths are not present, and thus meet the accessible route requirement.

The Department received many comments requesting clarification of the term "golf car passage." Some commenters recommended additional regulatory language specifying that an exception from a pedestrian route requirement should be allowed only when a golf car passage provides unobstructed access onto the teeing ground, putting green, or other accessible element of the course so that an accessible golf car can have full access to those elements. These commenters cautioned that full and equal access would not be provided if a golfer were required to navigate a steep slope up or down a hill or a flight of stairs in order to get to the teeing ground, putting green, or other accessible element of the course.

Conversely, another commenter requesting clarification of the term "golf car passage" argued that golf courses typically do not provide golf car paths or pedestrian paths up to actual tee grounds or greens, many of which are higher or lower than the car path. This commenter argued that if golf car passages were required to extend onto teeing grounds and greens in order to qualify for an exception, then some golf courses would have to substantially regrade teeing grounds and greens at a high cost.

Some commenters argued that older golf courses, small nine-hole courses, and executive courses that do not have golf car paths would be unable to comply with the accessible route requirements because of the excessive cost involved. A commenter noted that, for those older courses that have not yet created an accessible pedestrian route or golf car passage, the costs and impacts to do so should be considered.

A commenter argued that an accessible route should not be required where natural terrain makes it infeasible to create an accessible route. Some commenters cautioned that the 2010 Standards would jeopardize the integrity of golf course designs that utilize natural terrain elements and elevation changes to set up shots and create challenging golf holes.

The Department has given careful consideration to the comments and has decided to adopt the 2010 Standards requiring that at least one accessible route connect accessible elements and spaces within the boundary of the golf course including teeing grounds, putting greens, and weather shelters, with an exception provided that golf car passages shall be permitted to be used for all or part of required accessible routes. In response to requests for clarification of the term "golf car passage," the Department points out that golf car passage is merely a pathway on which a motorized golf car can operate and includes identified or paved paths, teeing grounds, fairways, putting greens, and other areas of the course. Golf cars cannot traverse steps and exceedingly steep slopes. A nine-hole golf course or an executive golf course that lacks an identified golf car path but provides golf car passage to teeing grounds, putting greens, and other elements throughout the course may utilize the exception for all or part of the accessible pedestrian route. The exception in section 206.2.15 of the 2010 Standards does not exempt golf courses from their obligation to provide access to necessary elements of the golf course; rather, the exception allows a golf course to use a golf car passage for part or all of the accessible pedestrian route to ensure that persons with mobility disabilities can fully and equally participate in the recreational activity of playing golf.

Accessible Teeing Grounds, Putting Greens, and Weather Shelters. Sections 238.2 and 1006.4 of the 2010 Standards require that golf cars be able to enter and exit each putting green and weather shelter. Where two teeing grounds are provided, the forward teeing ground is required to be accessible (golf car can enter and exit). Where three or more teeing grounds are provided, at least two, including the forward teeing ground, must be accessible.

A commenter supported requirements for teeing grounds, particularly requirements for accessible teeing grounds, noting that accessible teeing grounds are essential to the full and equal enjoyment of the golfing experience.

A commenter recommended that existing golf courses be required to provide access to only one teeing ground per hole. The majority of commenters reported that most public and private golf courses already provide golf car passage to teeing grounds and greens. The Department has decided that it is reasonable to maintain the requirement. The 2010 Standards provide an exception for existing golf courses with three or more teeing grounds not to provide golf car passage to the forward teeing ground where terrain makes such passage infeasible.

Section 1006.3.2 of the 2010 Standards requires that where curbs or other constructed barriers prevent golf cars from entering a fairway, openings 60 inches wide minimum shall be provided at intervals not to exceed 75 yards.

A commenter disagreed with the requirement that openings 60 inches wide minimum be installed at least every 75 yards, arguing that a maximum spacing of 75 yards may not allow enough flexibility for terrain and hazard placements. To resolve this problem, the commenter recommended that the standards be modified to require that each golf car passage include one 60-inch wide opening for an accessible golf car to reach the tee, and that one opening be provided where necessary for an accessible golf car to reach a green. The requirement for openings where curbs or other constructed barriers may otherwise prevent golf cars from entering a fairway allows the distance between openings to be less than every 75 yards. Therefore, the Department believes that the language in section 1006.3.2 of the 2010 Standards allows appropriate flexibility. Where a paved path with curbs or other constructed barrier exists, the Department believes that it is essential that

openings be provided to enable golf car passages to access teeing grounds, fairways and putting greens, and other required elements. Golf car passage is not restricted to a paved path with curbs. Golf car passage also includes fairways, teeing grounds, putting greens, and other areas on which golf cars operate.

Accessible Practice Putting Greens, Practice Teeing Grounds, and Teeing Stations at Driving Ranges. Section 238.3 of the 2010 Standards requires that five percent (5%) but at least one of each of practice putting greens, practice teeing grounds, and teeing stations at driving ranges must permit golf cars to enter and exit.

239 and 1007 Miniature Golf Facilities

Accessible Route to Miniature Golf Course Holes. Sections 206.2.16, 239.3, and 1007.2 of the 2010 Standards require an accessible route to connect accessible miniature golf course holes and the last accessible hole on the course directly to the course entrance or exit. Accessible holes are required to be consecutive with an exception permitting one break in the sequence of consecutive holes provided that the last hole on the miniature golf course is the last hole in the sequence.

Many commenters supported expanding the exception from one to multiple breaks in the sequence of accessible holes. One commenter noted that permitting accessible holes with breaks in sequence would enable customers with disabilities to enjoy the landscaping, water and theme elements of the miniature golf course. Another commenter wrote in favor of allowing multiple breaks in accessible holes with a connecting accessible route.

Other commenters objected to allowing multiple breaks in the sequence of miniature golf holes. Commenters opposed to this change argued that allowing any breaks in the sequence of accessible holes at a miniature golf course would disrupt the flow of play for persons with disabilities and create a less socially integrated experience. A commenter noted that multiple breaks in sequence would not necessarily guarantee the provision of access to holes that are most representative of those with landscaping, water elements, or a fantasy-like experience.

The Department has decided to retain the exception without change. Comments did not provide a sufficient basis on which to conclude that allowing multiple breaks in the sequence of accessible holes would necessarily increase integration of accessible holes with unique features of miniature golf courses. Some designs of accessible holes with multiple breaks in the sequence might provide equivalent facilitation where persons with disabilities gain access to landscaping, water or theme elements not otherwise represented in a consecutive configuration of accessible holes. A factor that might contribute to equivalent facilitation would be an accessible route designed to bring persons with disabilities to a unique feature, such as a waterfall, that would otherwise not be served by an accessible route connecting consecutive accessible holes.

Specified exceptions are permitted for accessible route requirements when located on the playing surfaces near holes.

Accessible Miniature Golf Course Holes. Sections 239.2 and 1007.3 of the 2010 Standards require at least fifty percent (50%) of golf holes on miniature golf courses to be accessible, including providing a clear floor or ground space that is 48 inches minimum by 60 inches minimum with slopes not steeper than 1:48 at the start of play.

240 and 1008 Play Areas

Section 240 of the 2010 Standards provides scoping for play areas and section 1008 provides technical requirements for play areas. Section 240.1 of the 2010 Standards sets requirements for play areas for children ages 2 and over and covers separate play areas within a site for specific age groups. Section 240.1 also provides four exceptions to the requirements that apply to family child care facilities, relocation of existing play components in existing play areas, amusement attractions, and alterations to play components where the ground surface is not altered.

Ground Surfaces. Section 1008.2.6 of the 2010 Standards provides technical requirements for accessible ground surfaces for play areas on accessible routes, clear floor or ground spaces, and turning spaces. These ground surfaces must follow special rules, incorporated by reference from nationally recognized standards for accessibility and safety in play areas, including those issued by the American Society for Testing and Materials (ASTM).

A commenter recommended that the Department closely examine the requirements for ground surfaces at play areas. The Department is aware that there is an ongoing controversy about play area ground surfaces arising from a concern that some surfaces that meet the ASTM requirements at the time of installation will become inaccessible if they do not receive constant maintenance. The Access Board is also aware of this issue and is working to develop a portable field test that will provide more relevant information on installed play surfaces. The Department would caution covered entities selecting among the ground surfacing materials that comply with the ASTM requirements that they must anticipate the maintenance costs that will be associated with some of the products. Permitting a surface to deteriorate so that it does not meet the 2010 Standards would be an independent violation of the Department's ADA regulations.

Accessible Route to Play Components. Section 206.2.17 of the 2010 Standards provides scoping requirements for accessible routes to ground level and elevated play components and to soft contained play structures. Sections 240.2 and 1008 of the 2010 Standards require that accessible routes be provided for play components. The accessible route must connect to at least one ground level play component of each different type provided (e.g., for different experiences such as rocking, swinging, climbing, spinning, and sliding). Table 240.2.1.2 sets requirements for the number and types of ground level play components required to be on accessible routes. When elevated play components are provided, an accessible route must connect at least fifty percent (50%) of the elevated play components. Section 240.2.1.2, provides an exception to the requirements for ground level play components if at least fifty percent (50%) of the elevated play components are connected by a ramp and at least three of the elevated play components connected by the ramp are different types of play components.

The technical requirements at section 1008 include provisions where if three or fewer entry points are provided to a soft contained play structure, then at least one entry point must be on an accessible route. In addition, where four or more entry points are provided to a soft contained play structure, then at least two entry points must be served by an accessible route.

If elevated play components are provided, fifty percent (50%) of the elevated components are required to be accessible. Where 20 or more elevated play components are provided, at least twenty five percent (25%) will have to be connected by a ramp. The remaining play components are permitted to be connected by a transfer system. Where less than 20 elevated play components are provided, a transfer system is permitted in lieu of a ramp.

A commenter noted that the 2010 Standards allow for the provision of transfer steps to elevated play structures based on the number of elevated play activities, but asserted that transfer steps have not been documented as an effective means of access.

The 2010 Standards recognize that play structures are designed to provide unique experiences and opportunities for children. The 2010 Standards provide for play components that are accessible to children who cannot transfer from their wheelchair, but they also provide opportunities for children who are able to transfer. Children often interact with their environment in ways that would be considered inappropriate for adults. Crawling and climbing, for example, are integral parts of the play experience for young children. Permitting the use of transfer platforms in play structures provides some flexibility for creative playground design.

Accessible Play Components. Accessible play components are required to be on accessible routes, including elevated play components that are required to be connected by ramps. These play components must also comply with other accessibility requirements, including specifications for clear floor space and seat heights (where provided).

A commenter expressed concerns that the general requirements of section 240.2.1 of the 2010 Standards and the advisory accompanying section 240.2.1 conflict. The comment asserts that section 240.2.1 of the 2010 Standards provides that the only requirement for integration of equipment is where there are two or more required ground level play components, while the advisory appears to suggest that all accessible components must be integrated.

The commenter misinterprets the requirement. The ADA mandates that persons with disabilities be able to participate in programs or activities in the most integrated setting appropriate to their needs. Therefore, all accessible play components must be integrated into the general playground setting. Section 240.2.1 of

the 2010 Standards specifies that where there is more than one accessible ground level play component, the components must be both dispersed and integrated.

241 and 612 Saunas and Steam Rooms

Section 241 of the 2010 Standards sets scoping for saunas and steam rooms and section 612 sets technical requirements including providing accessible turning space and an accessible bench. Doors are not permitted to swing into the clear floor or ground space for the accessible bench. The exception in section 612.2 of the 2010 Standards permits a readily removable bench to obstruct the required wheelchair turning space and the required clear floor or ground space. Where they are provided in clusters, five percent (5%) but at least one sauna or steam room in each cluster must be accessible.

Commenters raised concerns that the safety of individuals with disabilities outweighs the usefulness in providing accessible saunas and steam rooms. The Department believes that there is an element of risk in many activities available to the general public. One of the major tenets of the ADA is that individuals with disabilities should have the same opportunities as other persons to decide what risks to take. It is not appropriate for covered entities to prejudge the abilities of persons with disabilities.

242 and 1009 Swimming Pools, Wading Pools, and Spas

Accessible Means of Entry to Pools. Section 242 of the 2010 Standards requires at least two accessible means of entry for larger pools (300 or more linear feet) and at least one accessible entry for smaller pools. This section requires that at least one entry will have to be a sloped entry or a pool lift; the other could be a sloped entry, pool lift, a transfer wall, or a transfer system (technical specifications for each entry type are included at section 1009).

Many commenters supported the scoping and technical requirements for swimming pools. Other commenters stated that the cost of requiring facilities to immediately purchase a pool lift for each indoor and outdoor swimming pool would be very significant especially considering the large number of swimming pools at lodging facilities. One commenter requested that the Department clarify what would be an "alteration" to a swimming pool that would trigger the obligation to comply with the accessible means of entry in the 2010 Standards.

Alterations are covered by section 202.3 of the 2010 Standards and the definition of "alteration" is provided at section 106.5. A physical change to a swimming pool which affects or could affect the usability of the pool is considered to be an alteration. Changes to the mechanical and electrical systems, such as filtration and chlorination systems, are not alterations. Exception 2 to section 202.3 permits an altered swimming pool to comply with applicable requirements to the maximum extent feasible if full compliance is technically infeasible. "Technically infeasible" is also defined in section 106.5 of the 2010 Standards.

The Department also received comments suggesting that it is not appropriate to require two accessible means of entry to wave pools, lazy rivers, sand bottom pools, and other water amusements where there is only one point of entry. Exception 2 of Section 242.2 of the 2010 Standards exempts pools of this type from having to provide more than one accessible means of entry provided that the one accessible means of entry is a swimming pool lift compliant with section 1009.2, a sloped entry compliant with section 1009.3, or a transfer system compliant with section 1009.5 of the 2010 Standards.

Accessible Means of Entry to Wading Pools. Sections 242.3 and 1009.3 of the 2010 Standards require that at least one sloped means of entry is required into the deepest part of each wading pool.

Accessible Means of Entry to Spas. Sections 242.4 and 1009.2, 1009.4, and 1009.5 of the 2010 Standards require spas to meet accessibility requirements, including an accessible means of entry. Where spas are provided in clusters, five percent (5%) but at least one spa in each cluster must be accessible. A pool lift, a transfer wall, or a transfer system will be permitted to provide the required accessible means of entry.

243 Shooting Facilities with Firing Positions

Sections 243 and 1010 of the 2010 Standards require an accessible turning space for each different type of firing position at a shooting facility if designed and constructed on a site. Where firing positions are provided in clusters, five percent (5%), but at least one position of each type in each cluster must be accessible.

Additional Technical Requirements

302.1 Floor or Ground Surfaces

Both section 4.5.1 of the 1991 Standards and section 302.2 of the 2010 Standards require that floor or ground surfaces along accessible routes and in accessible rooms and spaces be stable, firm, slip-resistant, and comply with either section 4.5 in the case of the 1991 Standards or section 302 in the case of the 2010 Standards.

Commenters recommended that the Department apply an ASTM Standard (with modifications) to assess whether a floor surface is "slip resistant" as required by section 302.1 of the 2010 Standards. The Department declines to accept this recommendation since, currently, there is no generally accepted test method for the slip-resistance of all walking surfaces under all conditions.

304 Turning Space

Section 4.2.3 of the 1991 Standards and Section 304.3 of the 2010 Standards allow turning space to be either a circular space or a T-shaped space. Section 304.3 permits turning space to include knee and toe clearance complying with section 306. Section 4.2.3 of the 1991 Standards did not specifically permit turning space to include knee and toe clearance. Commenters urged the Department to retain the turning space requirement, but exclude knee and toe clearance from being permitted as part of this space. They argued that wheelchairs and other mobility devices are becoming larger and that more individuals with disabilities are using electric three and four-wheeled scooters which cannot utilize knee clearance.

The Department recognizes that the technical specifications for T-shaped and circular turning spaces in the 1991 and 2010 Standards, which are based on manual wheelchair dimensions, may not adequately meet the needs of individuals using larger electric scooters. However, there is no consensus about the appropriate dimension on which to base revised requirements. The Access Board is conducting research to study this issue in order to determine if new requirements are warranted. For more information, see the Access Board's Web site at *http://www.access-board.gov/research/current-projects.htm#suny.* The Department plans to wait for the results of this study and action by the Access Board before considering any changes to the Department's rules. Covered entities may wish to consider providing more than the minimum amount of turning space in confined spaces where a turn will be required. Appendix section A4.2.3 and Fig. A2 of the 1991 Standards provide guidance on additional space for making a smooth turn without bumping into surrounding objects.

404 Doors, Doorways, and Gates

Automatic Door Break Out Openings. The 1991 Standards do not contain any technical requirement for automatic door break out openings. The 2010 Standards at sections 404.1, 404.3, 404.3.1, and 404.3.6 require automatic doors that are part of a means of egress and that do not have standby power to have a 32-inch minimum clear break out opening when operated in emergency mode. The minimum clear opening width for automatic doors is measured with all leaves in the open position. Automatic bi-parting doors or pairs of swinging doors that provide a 32-inch minimum clear break out opening in emergency mode when both leaves are opened manually meet the technical requirement. Section 404.3.6 of the 2010 Standards includes an exception that exempts automatic doors from the technical requirement for break out openings when accessible manual swinging doors serve the same means of egress.

Maneuvering Clearance or Standby Power for Automatic Doors. Section 4.13.6 of the 1991 Standards does not require maneuvering clearance at automatic doors. Section 404.3.2 of the 2010 Standards requires automatic doors that serve as an accessible means of egress to either provide maneuvering clearance or to have standby power to operate the door in emergencies. This provision has limited application and will affect, among others, in-swinging automatic doors that serve small spaces.

Commenters urged the Department to reconsider provisions that would require maneuvering clearance or standby power for automatic doors. They assert that these requirements would impose unreasonable financial and administrative burdens on all covered entities, particularly smaller entities. The Department declines to change these provisions because they are fundamental life-safety issues. The requirement applies only to doors that are part of a means of egress that must be accessible in an emergency. If an emergency-related power failure prevents the

operation of the automatic door, a person with a disability could be trapped unless there is either adequate maneuvering room to open the door manually or a back-up power source.

Thresholds at Doorways. The 1991 Standards, at section 4.13.8, require the height of thresholds at doorways not to exceed ½ inch and thresholds at exterior sliding doors not to exceed ¾ inch. Sections 404.1 and 404.2.5 of the 2010 Standards require the height of thresholds at all doorways that are part of an accessible route not to exceed ½ inch. The 1991 Standards and the 2010 Standards require raised thresholds that exceed ¼ inch in height to be beveled on each side with a slope not steeper than 1:2. The 2010 Standards include an exception that exempts existing and altered thresholds that do not exceed ¾ inch in height and are beveled on each side from the requirement.

505 Handrails

The 2010 Standards add a new technical requirement at section 406.3 for handrails along walking surfaces.

The 1991 Standards, at sections 4.8.5, 4.9.4, and 4.26, and the 2010 Standards, at section 505, contain technical requirements for handrails. The 2010 Standards provide more flexibility than the 1991 Standards as follows:

- Section 4.26.4 of the 1991 Standards requires handrail gripping surfaces to have edges with a minimum radius of ⅛ inch. Section 505.8 of the 2010 Standards requires handrail gripping surfaces to have rounded edges.
- Section 4.26.2 of the 1991 Standards requires handrail gripping surfaces to have a diameter of 1¼ inches to 1½ inches, or to provide an equivalent gripping surface. Section 505.7 of the 2010 Standards requires handrail gripping surfaces with a circular cross section to have an outside diameter of 1¼ inches to 2 inches. Handrail gripping surfaces with a non-circular cross section must have a perimeter dimension of 4 inches to 6¼ inches, and a cross section dimension of 2¼ inches maximum.
- Sections 4.8.5 and 4.9.4 of the 1991 Standards require handrail gripping surfaces to be continuous, and to be uninterrupted by newel posts, other construction elements, or obstructions. Section 505.3 of the 2010 Standards sets technical requirements for continuity of gripping surfaces. Section 505.6 requires handrail gripping surfaces to be continuous along their length and not to be obstructed along their tops or sides. The bottoms of handrail gripping surfaces must not be obstructed for more than twenty percent (20%) of their length. Where provided, horizontal projections must occur at least 1½ inches below the bottom of the handrail gripping surface. An exception permits the distance between the horizontal projections and the bottom of the gripping surface to be reduced by ⅛ inch for each ½ inch of additional handrail perimeter dimension that exceeds 4 inches.
- Section 4.9.4 of the 1991 Standards requires handrails at the bottom of stairs to continue to slope for a distance of the width of one tread beyond the bottom riser nosing and to further extend horizontally at least 12 inches. Section 505.10 of the 2010 Standards requires handrails at the bottom of stairs to extend at the slope of the stair flight for a horizontal distance at least equal to one tread depth beyond the last riser nosing. Section 4.1.6(3) of the 1991 Standards has a special technical provision for alterations to existing facilities that exempts handrails at the top and bottom of ramps and stairs from providing full extensions where it will be hazardous due to plan configuration. Section 505.10 of the 2010 Standards has a similar exception that applies in alterations.

A commenter noted that handrail extensions are currently required at the top and bottom of stairs, but the proposed regulations do not include this requirement, and urged the Department to retain the current requirement. Other commenters questioned the need for the extension at the bottom of stairs.

Sections 505.10.2 and 505.10.3 of the 2010 Standards require handrail extensions at both the top and bottom of a flight of stairs. The requirement in the 1991 Standards that handrails extend horizontally at least 12 inches beyond the width of one tread at the bottom of a stair was changed in the 2004 ADAAG by the Access Board in response to public comments. Existing horizontal handrail extensions that comply with 4.9.4(2) of the 1991 Standards should meet or exceed the requirements of the 2010 Standards.

Commenters noted that the 2010 Standards will require handrail gripping surfaces with a circular cross section to have an outside diameter of 2 inches, and that this requirement would impose a physical barrier to individuals with disabilities who need the handrail for stability and support while accessing stairs.

The requirement permits an outside diameter of 1¼ inches to 2 inches. This range allows flexibility in meeting the needs of individuals with disabilities and designers and architects. The Department is not aware of any data indicating that an outside diameter of 2 inches would pose any adverse impairment to use by individuals with disabilities.

Handrails Along Walkways. The 1991 Standards do not contain any technical requirement for handrails provided along walkways that are not ramps. Section 403.6 of the 2010 Standards specifies that where handrails are provided along walkways that are not ramps, they shall comply with certain technical requirements. The change is expected to have minimal impact.

■ 23. Revise the heading to Appendix C to read as follows:

Appendix C to Part 36—Guidance on ADA Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities originally published on July 26, 1991.

■ 24. Revise the heading to Appendix D to read as follows:

Appendix D to Part 36—1991 Standards for Accessible Design as Originally Published on July 26, 1991.

Dated: July 23, 2010.

Eric H. Holder, Jr.,

Attorney General.

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Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 32

2010–2011 Refuge-Specific Hunting and Sport Fishing Regulations; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 32

[Docket No. FWS-R9-NSR-2010-0036]
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2010–2011 Refuge-Specific Hunting and Sport Fishing Regulations

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The Fish and Wildlife Service proposes to add one refuge to the list of areas open for hunting and/or sport fishing and increase the activities available at seven other refuges, along with pertinent refuge-specific regulations on other refuges that pertain to migratory game bird hunting, upland game hunting, big game hunting, and sport fishing for the 2010–2011 season.

DATES: We will accept comments received or postmarked on or before by October 15, 2010.

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

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments to Docket No FWS-R9-NSR-2010-0036.
- U.S. mail or hand-delivery: Public Comments Processing, Attn: RIN 1018-AX20; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the **Request for Comments** section below for more information). For information on specific refuges' public use programs and the conditions that apply to them or for copies of compatibility determinations for any refuge(s), contact individual programs at the addresses/phone numbers given in "Available Information for Specific Refuges" under **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Leslie A. Marler, (703) 358-2397.

SUPPLEMENTARY INFORMATION: The National Wildlife Refuge System Administration Act of 1966 closes national wildlife refuges in all States except Alaska to all uses until opened. The Secretary of the Interior (Secretary) may open refuge areas to any use, including hunting and/or sport fishing, upon a determination that such uses are compatible with the purposes of the refuge and National Wildlife Refuge System (Refuge System or our/we) mission. The action also must be in accordance with provisions of all laws applicable to the areas, developed in coordination with the appropriate State fish and wildlife agency(ies), consistent with the principles of sound fish and wildlife management and administration, and otherwise in the public interest. These requirements ensure that we maintain the biological integrity, diversity, and environmental health of the Refuge System for the benefit of present and future generations of Americans.

We annually review refuge hunting and sport fishing programs to determine whether to include additional refuges or whether individual refuge regulations governing existing programs need modifications. Changing environmental conditions, State and Federal regulations, and other factors affecting fish and wildlife populations and habitat may warrant modifications to refuge-specific regulations to ensure the continued compatibility of hunting and sport fishing programs and to ensure that these programs will not materially interfere with or detract from the fulfillment of refuge purposes or the Refuge System's mission.

Provisions governing hunting and sport fishing on refuges are in title 50 of the Code of Federal Regulations in part 32 (50 CFR part 32). We regulate hunting and sport fishing on refuges to:

- Ensure compatibility with refuge purpose(s);
- Properly manage the fish and wildlife resource(s);
- Protect other refuge values;
- Ensure refuge visitor safety; and
- Provide opportunities for quality fish- and wildlife-dependent recreation.

On many refuges where we decide to allow hunting and sport fishing, our general policy of adopting regulations identical to State hunting and sport fishing regulations is adequate in meeting these objectives. On other refuges, we must supplement State regulations with more-restrictive Federal regulations to ensure that we meet our management responsibilities, as outlined in the "Statutory Authority" section. We issue refuge-specific hunting and sport fishing regulations when we open wildlife refuges to migratory game bird hunting, upland game hunting, big game hunting, or sport fishing. These regulations list the wildlife species that you may hunt or fish, seasons, bag or creel (container for carrying fish) limits, methods of hunting or sport fishing, descriptions of areas open to hunting or sport fishing, and other provisions as appropriate. You may find previously issued refuge-specific regulations for hunting and sport fishing in 50 CFR part 32. In this rulemaking, we are also proposing to standardize and clarify the language of existing regulations.

Statutory Authority

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee, as amended by the National Wildlife Refuge System Improvement Act of 1997 [Improvement Act]) (Administration Act), and the Refuge Recreation Act of 1962 (16 U.S.C. 460k–460k-4) (Recreation Act) govern the administration and public use of refuges.

Amendments enacted by the Improvement Act, built upon the Administration Act in a manner that provides an "organic act" for the Refuge System, are similar to those that exist for other public Federal lands. The Improvement Act serves to ensure that we effectively manage the Refuge System as a national network of lands, waters, and interests for the protection and conservation of our Nation's wildlife resources. The Administration Act states first and foremost that we focus our Refuge System mission on conservation of fish, wildlife, and plant resources and their habitats. The Improvement Act requires the Secretary, before allowing a new use of a refuge, or before expanding, renewing, or extending an existing use of a refuge, to determine that the use is compatible with the purpose for which the refuge was established and the mission of the Refuge System. The Improvement Act established as the policy of the United States that wildlife-dependent recreation, when compatible, is a legitimate and appropriate public use of the Refuge System, through which the American public can develop an appreciation for fish and wildlife. The Improvement Act established six wildlife-dependent recreational uses as the priority general public uses of the Refuge System. These uses are: hunting, fishing, wildlife observation and photography, and environmental education and interpretation.

The Recreation Act authorizes the Secretary to administer areas within the Refuge System for public recreation as an appropriate incidental or secondary use only to the extent that doing so is practicable and not inconsistent with the primary purpose(s) for which Congress and the Service established the areas. The Recreation Act requires that any recreational use of refuge lands be compatible with the primary purpose(s) for which we established the refuge and

not inconsistent with other previously authorized operations.

The Administration Act and Recreation Act also authorize the Secretary to issue regulations to carry out the purposes of the Acts and regulate uses.

We develop specific management plans for each refuge prior to opening it to hunting or sport fishing. In many cases, we develop refuge-specific regulations to ensure the compatibility of the programs with the purpose(s) for which we established the refuge and the Refuge System mission. We ensure initial compliance with the Administration Act and the Recreation Act for hunting and sport fishing on newly acquired refuges through an interim determination of compatibility made at or near the time of acquisition. These regulations ensure that we make the determinations required by these acts prior to adding refuges to the lists of areas open to hunting and sport fishing in 50 CFR part 32. We ensure continued compliance by the development of comprehensive conservation plans, specific plans, and by annual review of hunting and sport fishing programs and regulations.

Amendments to Existing Regulations

This document proposes to codify in the Code of Federal Regulations all of the Service's hunting and/or sport fishing regulations that are applicable at Refuge System units previously opened to hunting and/or sport fishing. We are doing this to better inform the general public of the regulations at each refuge, to increase understanding and compliance with these regulations, and to make enforcement of these regulations more efficient. In addition to now finding these regulations in 50 CFR part 32, visitors to our refuges will usually find them reiterated in literature distributed by each refuge or posted on signs.

We have cross-referenced a number of existing regulations in 50 CFR parts 26, 27, and 32 to assist hunting and sport fishing visitors with understanding safety and other legal requirements on refuges. This redundancy is deliberate, with the intention of improving safety and compliance in our hunting and sport fishing programs.

TABLE 1. CHANGES FOR 2010-2011 HUNTING/FISHING SEASON

National Wildlife Refuge	State	Migratory Bird Hunting	Upland Game Hunting	Big Game Hunting	Fishing
Modoc	CA	C	Already open	Closed	Already open
Cape May	NJ	Already open	B	D (turkey)	Already open
Fort Niobrara	NE	Closed	Closed	B	Already open
Caddo Lake	TX	Closed	Closed	A	Closed
Deep Fork	OK	Already open	Already open	C	Already open
Bosque del Apache	NM	Already open	Already open	D (turkey)	Already open
Rappahannock River Valley	VA	Closed	Closed	Already open	C
Minnesota Valley	MN	C/D	C/D	C	Already open

A = New refuge opened
B = New activity on a refuge previously opened to other activities
C = Refuge already open to activity but added new land/waters which increased activity
D = Refuge already open to activity but added new species to hunt

The changes for the 2010-11 hunting/fishing season noted in the chart above are each based on a complete administrative record which, among other detailed documentation, also includes a hunt plan, a compatibility determination, and the appropriate NEPA analysis, all of which were the subject of a public review and comment process. These documents are available upon request.

Fish Advisory

For health reasons, anglers should review and follow State-issued consumption advisories before enjoying recreational sport fishing opportunities on Service-managed waters. You can find information about current fish consumption advisories on the internet at: *http://www.epa.gov/waterscience/fish/*.

Plain Language Mandate

In this proposed rule we made some of the revisions to the individual refuge units to comply with a Presidential mandate to use plain language in regulations; as such, these particular revisions do not modify the substance of the previous regulations. These types of changes include using "you" to refer to the reader and "we" to refer to the Refuge System, using the word "allow" instead of "permit" when we do not require the use of a permit for an activity, and using active voice (i.e., "We restrict entry into the refuge" vs. "Entry into the refuge is restricted").

Request for Comments

You may submit comment and materials on this proposed rule by any one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section. We will not consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked, by the date specified in the **DATES** section.

We will post your entire comment on *http://www.regulations.gov*. Before including 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. We will post all hardcopy comments on *http://www.regulations.gov*.

Public Comment

Department of the Interior policy is, whenever practicable, to afford the public a meaningful opportunity to participate in the rulemaking process.

The process of opening refuges is done in stages, with the fundamental work being performed on the ground at the refuge and in the community where the program is administered. In these stages, the public is given other opportunities to comment, for example, on the comprehensive conservation plans and the compatibility determinations. The second stage is this document, when we publish the proposed rule in the **Federal Register** for additional comment, commonly for a 30–day comment period.

There is nothing contained in this annual regulation outside the scope of the annual review process where we determine whether individual refuges need modifications, deletions, or additions made to them. We make every attempt to collect all of the proposals from the refuges nationwide and process them expeditiously to maximize the time available for public review. We believe that a 30–day comment period, through the broader publication following the earlier public involvement, gives the public sufficient time to comment and allows us to establish hunting and fishing programs in time for the upcoming seasons. Many of these rules also relieve restrictions and allow the public to participate in recreational activities on a number of refuges. In addition, in order to continue to provide for previously authorized hunting opportunities while at the same time providing for adequate resource protection, we must be timely in providing modifications to certain hunting programs on some refuges.

We considered providing a 60–day, rather than a 30–day, comment period. However, we determined that an additional 30–day delay in processing these refuge-specific hunting and sport fishing regulations would hinder the effective planning and administration of our hunting and sport fishing programs. Such a delay would jeopardize enacting amendments to hunting and sport fishing programs in time for implementation this year and/or early next year, or shorten the duration of these programs.

Even after issuance of a final rule, we accept comments, suggestions, and concerns for consideration for any appropriate subsequent rulemaking.

When finalized, we will incorporate these regulations into 50 CFR part 32. Part 32 contains general provisions and refuge-specific regulations for hunting and sport fishing on refuges.

Clarity of This Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be a specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Regulatory Planning and Review

The Office of Management and Budget (OMB) has determined that this rule is not significant under Executive Order 12866 (E.O. 12866). OMB bases its determination on 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, use fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act [SBREFA] of 1996) (5 U.S.C. 601, *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule would not have a significant economic impact on a substantial number of small entities. Thus, for a regulatory flexibility analysis to be required, impacts must exceed a threshold for "significant impact" and a threshold for a "substantial number of small entities." See 5 U.S.C. 605(b). SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities.

This proposed rule adds one national wildlife refuge to the list of refuges open to hunting, increases hunting activities on six national wildlife refuges, and increases fishing activities at one national wildlife refuge. As a result, visitor use for wildlife-dependent recreation on these national wildlife refuges will change. If the refuges establishing new programs were a pure addition to the current supply of such activities, it would mean an estimated increase of 12,330 user days (one person per day participating in a recreational opportunity) (Table 2). Because the participation trend is flat in these activities since 1991, this increase in supply will most likely be offset by other sites losing participants. Therefore, this is likely to be a substitute site for the activity and not necessarily an increase in participation rates for the activity.

TABLE 2. ESTIMATED CHANGE IN RECREATION OPPORTUNITIES IN 2010/2011

Refuge	Additional Days	Additional Expenditures
Modoc	130	$13,868
Cape May	1,700	$181,356
Fort Niobrara	250	$26,670
Caddo Lake	225	$24,003

TABLE 2. ESTIMATED CHANGE IN RECREATION OPPORTUNITIES IN 2010/2011—Continued

Refuge	Additional Days	Additional Expenditures
Deep Fork	177	$18,882
Bosque del Apache	8	$853
Rappahannock River Valley	640	$51,510
Minnesota Valley	9,200	$981,454
Total	*12,330*	*$1,298,596*

To the extent visitors spend time and money in the area of the refuge that they would not have spent there anyway, they contribute new income to the regional economy and benefit local businesses. Due to the unavailability of site-specific expenditure data, we use the national estimates from the 2006 National Survey of Fishing, Hunting, and Wildlife Associated Recreation to identify expenditures for food and lodging, transportation, and other incidental expenses. Using the average expenditures for these categories with the maximum expected additional participation of the Refuge System yields approximately $1.3 million in recreation-related expenditures (Table 2). By having ripple effects throughout the economy, these direct expenditures are only part of the economic impact of these recreational activities. Using a national impact multiplier for hunting activities (2.67) derived from the report "Economic Importance of Hunting in America" and a national impact multiplier for fishing activities (2.79) derived from the report "Economic Importance of Fishing in America" yields a total economic impact of approximately $3.5 million (2009 dollars) (Southwick Associates, Inc., 2007). Using a local impact multiplier would yield more accurate and smaller results. However, we employed the national impact multiplier due to the difficulty in developing local multipliers for each specific region.

Since we know that most of the fishing and hunting occurs within 100 miles of a participant's residence, then it is unlikely that most of this spending would be "new" money coming into a local economy; therefore, this spending would be offset with a decrease in some other sector of the local economy. The net gain to the local economies would be no more than $3.5 million, and most likely considerably less. Since 80 percent of the participants travel less than 100 miles to engage in hunting and fishing activities, their spending patterns would not add new money into the local economy and, therefore, the real impact would be on the order of about $695,000 annually.

Small businesses within the retail trade industry (such as hotels, gas stations, taxidermy shops, bait and tackle shops, etc.) may be impacted from some increased or decreased refuge visitation. A large percentage of these retail trade establishments in the local communities around national wildlife refuges qualify as small businesses (Table 3). We expect that the incremental recreational changes will be scattered, and so we do not expect that the rule will have a significant economic effect on a substantial number of small entities in any region or nationally. As noted previously, we expect approximately $695,000 to be spent in total in the refuges' local economies. The maximum increase ($3.5 million if all spending were new money) at most would be less than 1 percent for local retail trade spending.

TABLE 3. COMPARATIVE EXPENDITURES FOR RETAIL TRADE ASSOCIATED WITH ADDITIONAL REFUGE VISITATION FOR 2010/2011 (THOUSANDS, 2009 DOLLARS)

Refuge/County(ies)	Retail Trade in 2002 (2009 $)	Estimated Maximum Addition from New Activities	Addition as % of Total	Establishments in 2007	Establ. With < 10 emp in 2007
Modoc					
Modoc, CA	$51,719	$13.9	0.027%	33	22
Cape May					
Cape May, NJ	$1,649,345	$181.4	0.011%	746	597
Fort Niobrara					
Cherry, NE	$80,374	$26.7	0.033%	44	28
Caddo Lake					
Caddo, LA	$3,329,277	$6.0	0.000%	999	685
Bossier, LA	$1,369,032	$6.0	0.000%	469	201
Harrison, TX	$505,210	$6.0	0.001%	209	160
Marion, TX	$63,964	$6.0	0.009%	38	30
Deep Fork					

TABLE 3. COMPARATIVE EXPENDITURES FOR RETAIL TRADE ASSOCIATED WITH ADDITIONAL REFUGE VISITATION FOR 2010/2011 (THOUSANDS, 2009 DOLLARS)—Continued

Refuge/County(ies)	Retail Trade in 2002 (2009 $)	Estimated Maximum Addition from New Activities	Addition as % of Total	Establishments in 2007	Establ. With < 10 emp in 2007
Okmulgee, OK	$302,176	$18.9	0.006%	128	98
Bosque del Apache					
Bernalillo, NM	$9,354,821	$0.3	0%	2,272	1,512
Socorro, NM	$91,494	$0.3	0%	47	35
Sierra, NM	$85,374	$0.3	0%	563	40
Rappahannock River Valley					
Northumberland, VA	$72,965	$51.5	0.071%	50	39
Minnesota Valley					
Hennepin MN	$20,238,488	$245.4	0.001%	4,399	2,742
Carver MN	$703,601	$245.4	0.035%	232	142
Scott MN	$878,227	$245.4	0.028%	358	240
Dakota MN	$5,787,006	$245.4	0.004%	1,181	722

With the small change in overall spending anticipated from this proposed rule, it is unlikely that a substantial number of small entities will have more than a small impact from the spending change near the affected refuges. Therefore, we certify that this proposed rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). An initial/final Regulatory Flexibility Analysis is not required. Accordingly, a Small Entity Compliance Guide is not required.

Small Business Regulatory Enforcement Fairness Act

The proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. We anticipate no significant employment or small business effects. This rule:

a. Would not have an annual effect on the economy of $100 million or more. The minimal impact would be scattered across the country and would most likely not be significant in any local area.

b. Would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. This proposed rule would have only a slight effect on the costs of hunting opportunities for Americans. If the substitute sites are farther from the participants' residences, then an increase in travel costs would occur. The Service does not have information to quantify this change in travel cost but assumes that, since most people travel less than 100 miles to hunt, the increased travel cost would be small. We do not expect this proposed rule to affect the supply or demand for hunting opportunities in the United States and, therefore, it should not affect prices for hunting equipment and supplies, or the retailers that sell equipment.

c. Would not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States–based enterprises to compete with foreign–based enterprises. This proposed rule represents only a small proportion of recreational spending at national wildlife refuges. Therefore, this rule would have no measurable economic effect on the wildlife-dependent industry, which has annual sales of equipment and travel expenditures of $72 billion nationwide.

Unfunded Mandates Reform Act

Since this proposed rule would apply to public use of federally owned and managed refuges, it would not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. The rule would not have a significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

Takings (E.O. 12630)

In accordance with E.O. 12630, this proposed rule would not have significant takings implications. This regulation would affect only visitors at national wildlife refuges and describe what they can do while they are on a refuge.

Federalism (E.O. 13132)

As discussed in the Regulatory Planning and Review and Unfunded Mandates Reform Act sections above, this proposed rule would not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment under E.O. 13132. In preparing this proposed rule, we worked with State governments.

Civil Justice Reform (E.O. 12988)

In accordance with E.O. 12988, the Office of the Solicitor has determined that the proposed rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. The regulation would clarify established regulations and result in better understanding of the regulations by refuge visitors.

Energy Supply, Distribution or Use (E.O. 13211)

On May 18, 2001, the President issued E.O. 13211 on regulations that significantly affect energy supply,

distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Because this proposed rule would increase activities at seven refuges and open one new refuge, it is not a significant regulatory action under E.O. 12866 and is not expected to significantly affect energy supplies, distribution, and use. Therefore, this action is a not a significant energy action and no Statement of Energy Effects is required.

Consultation and Coordination with Indian Tribal Governments (E.O. 13175)

In accordance with E.O. 13175, we have evaluated possible effects on federally recognized Indian tribes and have determined that there are no effects. We coordinate recreational use on national wildlife refuges with Tribal governments having adjoining or overlapping jurisdiction before we propose the regulations.

Paperwork Reduction Act

This regulation does not contain any information collection requirements other than those already approved by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) (OMB Control Numbers are 1018-0102 and 1018-0140). See 50 CFR 25.23 for information concerning that approval. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Endangered Species Act Section 7 Consultation

We comply with section 7 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), when developing Comprehensive Conservation Plans (CCPs) and step-down management plans (which would include hunting and/or fishing plans) for public use of refuges, and prior to implementing any new or revised public recreation program on a refuge as identified in 50 CFR 26.32. We have completed section 7 consultation on each of the affected refuges.

National Environmental Policy Act

We analyzed this proposed rule in accordance with the criteria of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4332(C)), 43 CFR part 46, and 516 Departmental Manual (DM) 8.

A categorical exclusion from NEPA documentation applies to publication of proposed amendments to refuge-specific hunting and fishing regulations since they are technical and procedural in nature, and the environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis (43 CFR 46.210 and 516 DM 8). Concerning the actions that are the subject of this proposed rulemaking, we have complied with NEPA at the project level when developing each proposal. This is consistent with the Department of the Interior instructions for compliance with NEPA where actions are covered sufficiently by an earlier environmental document (516 DM 3.2A).

Prior to the addition of a refuge to the list of areas open to hunting and fishing in 50 CFR part 32, we develop hunting and fishing plans for the affected refuges. We incorporate these proposed refuge hunting and fishing activities in the refuge CCPs and/or other step-down management plans, pursuant to our refuge planning guidance in 602 Fish and Wildlife Service Manual (FW) 1, 3, and 4. We prepare these CCPs and step-down plans in compliance with section 102(2)(C) of NEPA, and the Council on Environmental Quality's regulations for implementing NEPA in 40 CFR parts 1500–1508. We invite the affected public to participate in the review, development, and implementation of these plans. Copies of all plans and NEPA compliance are available from the refuges at the addresses provided below.

Available Information for Specific Refuges

Individual refuge headquarters have information about public use programs and conditions that apply to their specific programs and maps of their respective areas. To find out how to contact a specific refuge, contact the appropriate Regional offices listed below:

Region 1 – Hawaii, Idaho, Oregon, and Washington. Regional Chief, National Wildlife Refuge System, U.S. Fish and Wildlife Service, Eastside Federal Complex, Suite 1692, 911 N.E. 11th Avenue, Portland, OR 97232-4181; Telephone (503) 231-6214.

Region 2 – Arizona, New Mexico, Oklahoma, and Texas. Regional Chief, National Wildlife Refuge System, U.S. Fish and Wildlife Service, Box 1306, 500 Gold Avenue, Albuquerque, NM 87103; Telephone (505) 248-7419.

Caddo Lake National Wildlife Refuge, P.O. Box 230, Karnack, TX 75661; Telephone (903) 679-9144.

Region 3 – Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin. Regional Chief, National Wildlife Refuge System, U.S. Fish and Wildlife Service, 1 Federal Drive, Federal Building, Fort Snelling, Twin Cities, MN 55111; Telephone (612) 713-5401.

Region 4 – Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Puerto Rico, and the Virgin Islands. Regional Chief, National Wildlife Refuge System, U.S. Fish and Wildlife Service, 1875 Century Boulevard, Atlanta, GA 30345; Telephone (404) 679-7166.

Region 5 – Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, and West Virginia. Regional Chief, National Wildlife Refuge System, U.S. Fish and Wildlife Service, 300 Westgate Center Drive, Hadley, MA 01035-9589; Telephone (413) 253-8306.

Region 6 – Colorado, Kansas, Montana, Nebraska, North Dakota, South Dakota, Utah, and Wyoming. Regional Chief, National Wildlife Refuge System, U.S. Fish and Wildlife Service, 134 Union Blvd., Lakewood, CO 80228; Telephone (303) 236-8145.

Region 7 – Alaska. Regional Chief, National Wildlife Refuge System, U.S. Fish and Wildlife Service, 1011 E. Tudor Rd., Anchorage, AK 99503; Telephone (907) 786-3545.

Region 8 – California and Nevada. Regional Chief, National Wildlife Refuge System, U.S. Fish and Wildlife Service, 2800 Cottage Way, Room W-2606, Sacramento, CA 95825; Telephone (916) 414-6464.

Primary Author

Leslie A. Marler, Management Analyst, Division of Conservation Planning and Policy, National Wildlife Refuge System is the primary author of this rulemaking document.

List of Subjects in 50 CFR Part 32

Fishing, Hunting, Reporting and recordkeeping requirements, Wildlife, Wildlife refuges.

For the reasons set forth in the preamble, we propose to amend title 50, chapter I, subchapter C of the Code of Federal Regulations as follows:

PART 32–[AMENDED]

1. The authority citation for part 32 continues to read as follows:

Authority: 5 U.S.C. 301; 16 U.S.C. 460k, 664, 668dd-668ee, and 715i.

2. Amend §32.7 "What refuge units are open to hunting and/or sport fishing?" by:

a. Adding Michigan Wetland Management District, in alphabetical order, in the State of Michigan; and

b. Adding Caddo Lake National Wildlife Refuge, in alphabetical order, in the State of Texas.

3. Amend §32.20 Alabama by:

a. Revising paragraphs B., C., and D. of Choctaw National Wildlife Refuge; and

b. Revising paragraph A.1., adding paragraph A.6., and revising paragraph C.3., of Eufaula National Wildlife Refuge to read as follows:

§32.20 Alabama.

* * * * *

Choctaw National Wildlife Refuge

* * * * *

B. Upland Game Hunting. We allow hunting of squirrel, rabbit, raccoon, and opossum on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We prohibit hunting within 100 yards (90 m) of the fenced-in refuge work center area, hiking trail, and refuge boat ramp.

2. We prohibit marking trees and using flagging tape, reflective tacks, and other similar marking devices.

3. We allow take of incidental species as listed in the refuge hunt permit (signed brochure) during any hunt with those weapons legal during those hunts.

4. Hunters must possess and carry a signed refuge hunt permit (signed brochure) when hunting.

5. All youth hunters age 15 and younger must remain within sight and normal voice contact of an adult age 21 or older, possessing a license and permit. One adult may supervise no more than two youth hunters.

6. We prohibit overnight mooring or storage of boats.

7. We require hunters to check all harvested game at the conclusion of each day at one of the refuge check out stations.

8. A hunter may only use approved nontoxic shot (see §32.2(k)). We restrict hunting weapons to shotguns with shot size no larger than No. 6 or rifles no larger than .22 standard rimfire or legal archery equipment.

9. We prohibit the use of mules, horses, and ATVs.

10. We allow dogs for upland game hunting except in Middle Swamp. We allow dogs only in Middle Swamp the last 2 weeks of upland game season.

C. Big Game Hunting. We allow hunting of white-tailed deer and feral hog in accordance with State regulations subject to the following conditions:

1. Conditions B1 through B9 apply.

2. We require tree stand users to use a safety belt or harness.

3. We prohibit damaging trees or hunting from a tree that contains an inserted metal object (see §32.2(i)). We require hunters to remove all tree stands and blinds daily (see §27.93 of this chapter).

4. We prohibit participation in organized drives.

5. We prohibit hunting by aid or distribution of any feed, salt, or other mineral at any time (see §32.2(h)).

D. Sport Fishing. We allow fishing in designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We allow fishing year-round, except in the waterfowl sanctuary, which we close from December 1 through March 1.

2. With the exception of the refuge boat ramp, we limit access from ½ hour before legal sunrise to ½ hour after legal sunset.

3. We allow a rod and reel and pole and line. We prohibit all other methods of fishing.

4. We prohibit the taking of frogs and turtles (see §27.21 of this chapter).

5. We prohibit bow fishing.

6. We prohibit the use of airboats, hovercrafts, and inboard-water-thrust boats such as, but not limited to, personal watercraft, watercycles, and waterbikes.

7. We require a refuge Special Use Permit (FWS Form 3-1383) for commercial fishing. Commercial anglers may use nets, seines, baskets, and boxes legal for use within the State of Alabama.

8. We prohibit mooring or storing of boats from ½ hour after legal sunset to ½ hour before legal sunrise.

Eufaula National Wildlife Refuge

A. Migratory Bird Hunting. * * *

1. You must possess and carry a signed refuge hunt brochure (permit) when hunting.

* * * * *

6. All waterfowl hunting opportunities are spaced-blind and assigned by lottery. Hunters wishing to participate in our waterfowl hunt must submit a Waterfowl Lottery Application (FWS Form 3-2355). Consult the refuge brochure for details.

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C. Big Game Hunting. * * *

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3. All youth gun hunting opportunities are spaced-blind and assigned by lottery. Hunters wishing to participate in our youth gun hunt must submit a Big/Upland Game Hunt Application (FWS Form 3-2356). Consult the refuge brochure for details.

* * * * *

4. Amend §32.22 Arizona by:

a. Revising paragraphs A.2. through A.6., A.10., C.1., and C.2., adding paragraph C.3., and revising paragraphs D.1. and D.3. of Bill Williams River National Wildlife Refuge;

b. Revising the introductory text of paragraph A., and revising paragraphs B. and C.2. of Buenos Aires National Wildlife Refuge; and

c. Removing paragraph B.4. and redesignating paragraph B.5. as B.4. of Imperial National Wildlife Refuge.

The revisions and additions read as follows:

§32.22 Arizona.

* * *

Bill Williams River National Wildlife Refuge

A. Migratory Game Bird Hunting. * * *

* * * * *

2. You may possess only nontoxic shot while hunting in the field (see §32.2(k)).

3. We prohibit hunting within 50 yards (45 m) of any building, road, or levee open to public use.

4. We allow hunting/angling on the refuge only in those areas posted or designated as open. The public hunting area is generally described as south of the Bill Williams Road and east of Arizona State Rt. 95 plus the south half of Section 35, T 11N-R 17W as posted. We close the isolated grow-out cove near the visitor center to fishing as posted.

5. We allow hunting/angling in accordance with State regulations only for the listed species.

6. You may retrieve fish or game from an area closed to hunting or entry only upon specific consent from an authorized refuge employee.

* * * * *

10. All refuge visitors must remove all personal items from the refuge at the end of each day's activity, i.e., boats, equipment, cameras, temporary blinds, stands, etc. (see §27.93 of this chapter).

* * * * *

C. Big Game Hunting * * *

1. Conditions A4 through A11 apply.

2. In Arizona Wildlife Management Unit 44A, we allow hunting on the refuge only in those areas south of the Bill Williams River Road and east of Arizona State Rt. 95 plus the south half of Section 35, T 11N-R 17W as posted.

3. In Arizona Wildlife Management Unit 16A, we allow hunting for desert bighorn sheep only in those areas north of the Bill Williams River.

*D. Sport Fishing.** * *

1. Conditions A4 through A11 apply.

* * * * *

3. We designate all refuge waters as wakeless speed zones (as defined by State law).

* * * * *

Buenos Aires National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of goose, duck, coot, and dove on designated areas of the refuge in accordance with State regulations subject to the following conditions:

* * * * *

B. Upland Game Hunting. We allow hunting of rabbit, coyote, and skunk on designated areas of the refuge in accordance with State regulations subject to the following condition: Conditions A1 through A3 apply.

C. Big Game Hunting. * * *

* * * * *

2. Conditions A1 through A3 apply.

* * * * *

5. Amend §32.23 Arkansas by:

a. Revising Bald Knob National Wildlife Refuge;

b. Revising paragraph B., C.1., C.3., C.5., C.8., C.12., removing paragraph C.13., and revising paragraph D. of Big Lake National Wildlife Refuge;

c. Revising Cache River National Wildlife Refuge;

d. Revising paragraphs A., B., C.1., C.3. through C.9., C.13. through C.15., and D. of Felsenthal National Wildlife Refuge;

e. Removing paragraph B.4., redesignating paragraphs B.5. through B.14. as paragraphs B.4. through B.13., revising newly redesignated paragraphs B.6., B.11., and B.13., and revising paragraphs C.1., C.2., and D.1. of Holla Bend National Wildlife Refuge;

f. Revising the introductory text of paragraph A., revising paragraphs A.1., A.3., A.5., A.7., A.9., A.10., and A.12. through A.17., removing paragraph A.20. and redesignating paragraphs A.21. through A.24. as paragraphs A.20. through A.23., revising the introductory text of paragraph B., revising paragraphs B.1., B.3. through B.5., C.1. through C.5., and C.8. through C.11. of Overflow National Wildlife Refuge;

g. Revising paragraphs A.1., A.3., A.5., A.7., and A.11. through A.18., removing paragraph A.19., redesignating paragraphs A.20. through A.24. as paragraphs A.19. through A.23., and revising paragraphs B., C.2., C.4. through C.8., and C.12. through C.16. of Pond Creek National Wildlife Refuge;

h. Revising paragraph A.1., adding paragraphs A.5. through A.11., revising paragraphs B., C.1., C.2., C.7. through C.9., D.1., and D.5. through D.8., and removing paragraph D.9. of Wapanocca National Wildlife Refuge; and

i. Revising paragraphs A., B.1. through B.3., and B.7., adding paragraphs B.9. through B.11. and revising paragraphs C. and D. of White River National Wildlife Refuge.

The revisions and additions read as follows:

§32.23 Arkansas.

* * * * *

Bald Knob National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of duck, goose, coot, snipe, woodcock, and dove on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We require refuge hunting permits. The permits (found on the front cover of the annual hunt brochure/permit – signature required) are nontransferable, and anyone on refuge land in possession of hunting equipment must sign, possess, and carry the permits at all times.

2. We allow hunting of duck, goose, coot, dove, and snipe daily until 12 p.m. (noon) throughout the State seasons, except for season closures on the Farm Unit during the Quota Gun Deer Hunt and for the exception provided in A3.

3. We allow hunting for goose from ½ hour before legal sunrise until ½ hour past legal sunset after the closing of the duck season in January for the remainder of the State goose season(s) and Snow, Blue, and Ross' Goose Conservation Orders.

4. We allow hunting for woodcock daily throughout the State seasons, except for season closures during the Quota Gun Deer Hunt.

5. We prohibit commercial hunting/guiding.

6. You may possess only approved nontoxic shot shells for hunting while in the field (see §32.2(k)) in quantities of 25 or less. The possession limit includes shells located in/on vehicles and other personal equipment. The field possession limit for shells does not apply to goose hunting after the closing of the duck season in January.

7. We prohibit hunting closer than 100 yards (90 m) to another hunter or hunting party.

8. You must remove decoys, blinds, boats, and all other equipment (see §27.93 of this chapter) daily by 1 p.m.

9. Waterfowl hunters may enter the refuge at 4 a.m.

10. Boats with the owner's name and address permanently displayed or valid registration may be left on the refuge from March 1 through October 31. We prohibit the use of boats from 12 p.m. (midnight) to 4 a.m. during duck season.

11. Hunters may use and possess only biodegradable materials to mark trails.

12. We prohibit building or hunting from permanent blinds. We prohibit driving or screwing any metal object into a tree or hunting from a tree in which a metal object has been driven or screwed to support a hunter (see §32.2(i)).

13. We prohibit cutting of holes or manipulation of vegetation (i.e., cutting bushes, mowing, weed-eating, herbicide use, etc.) and hunting from manipulated areas (see §27.51 of this chapter).

14. We allow use of dogs for migratory game bird hunting.

15. We allow waterfowl hunting from refuge roads and levees.

16. Any hunter born after 1968 must carry a valid hunter education card. An adult at least age 21 must supervise hunters under age 16 who have a valid hunter education card and remain within sight and normal voice contact with the youth. Hunters under age 16 do not need to have a card if they are under the direct supervision (within arm's reach) of an adult (at least age 21) holder of a valid hunting license. An adult may supervise up to two youths for migratory bird and upland game hunting but may supervise only one youth for big game hunting. We will honor home State hunter education cards.

17. We prohibit target practice or nonhunting discharge of firearms (see §27.42 of this chapter).

18. We allow vehicle use only on established roads and trails (see §27.31 of this chapter). We limit vehicle access on the Mingo Creek unit to ATV use only, only on marked ATV trails, September 1 through February 28, and only to provide access for hunting beyond Parking Areas. Hunters may use conventional vehicles on the Farm Unit from March 1 through November 14 only. Hunters may only use ATVs from September 1 through February 28 and only to provide access for hunting beyond Parking Areas. We prohibit driving around a locked gate, barrier, or beyond a sign closing a road to vehicular traffic (see §27.31 of this chapter).

19. We prohibit entry into or hunting in waterfowl sanctuaries from November 15 through February 28.

20. Hunters must adhere to all public use special conditions and regulations on the annual hunt brochure (permit).

21. We prohibit airboats, hovercraft, and personal watercraft (Jet Ski, etc.).

22. We prohibit the possession or use of alcoholic beverages while hunting (see §32.2(j)).

B. Upland Game Hunting. We allow hunting of squirrel, rabbit, quail, raccoon, opossum, beaver, muskrat, nutria, armadillo, coyote, and feral hog

on designated areas of the refuge in accordance with State regulations subject to the following special conditions:

1. Conditions A1, A5, A10 through A12, and A16 through A22 apply.

2. Hunters may use shotguns only with approved nontoxic shot (see §32.2(k)) and rifles chambered for rimfire cartridges.

3. We allow squirrel hunting September 1 through February 28 on the Mingo Creek Unit and on the Farm Unit, except for season closure on the Farm Unit during the Quota Gun Deer Hunt. We prohibit dogs, except for the period of December 1 through February 28.

4. We allow rabbit hunting in accordance with the State season on the Mingo Creek Unit and on the Farm Unit, except for season closure on the Farm Unit during the Quota Gun Deer Hunt. We prohibit dogs, except for the period of December 1 through February 28.

5. We allow quail hunting in accordance with the State season except for season closure on the Farm Unit during the Quota Gun Deer Hunt. We allow dogs.

6. We allow hunting of raccoon and opossum with dogs on all refuge hunt units. We require dogs for hunting of raccoon/opossum at night. We list annual season dates in the refuge hunting brochure/permit. We prohibit field trials and organized training events.

7. We prohibit the use of horses and mules.

8. Hunters may take beaver, muskrat, nutria, armadillo, feral hog, and coyote during any refuge hunt with the device allowed for that hunt subject to State seasons.

9. We prohibit hunting from refuge roads except by waterfowl hunters.

10. We prohibit hunting from a vehicle.

11. We limit nighttime use to fishing, frogging, and/or raccoon/opossum hunting, and the hunter must possess the appropriate tackle or gear.

C. Big Game Hunting. We allow hunting of deer and turkey on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A1, A5, A10 through A12, A16 through A22, and B8 through B11 apply.

2. We divide the refuge into two hunting units: Farm Unit and Mingo Creek Unit.

3. The archery/crossbow hunting season for deer begins on the opening day of the State season and continues throughout the State season in the Mingo Creek Unit and Farm Unit except for the season closure on the Farm Unit during the Quota Gun Deer Hunt. We provide annual season dates and bag limits on the hunt brochure/permit (signature required).

4. Muzzleloader hunting season for deer will begin in October and continue for a period of up to 9 days in all hunting units with annual season dates and bag limits provided on the hunt brochure/permit.

5. The modern gun hunting season for deer will begin in November and continue for a period of up to 9 days on the Farm Unit with annual season dates and bag limits provided on the hunt brochure/permit. We close the Mingo Creek Unit.

6. The fall archery/crossbow hunting season for turkey will begin on the opening day of the State season and continue throughout the State season on the Mingo Creek Unit only.

7. We prohibit spring and fall gun hunting for turkey.

8. Immediately record the zone 002 on your hunting license and later at an official check station for all deer and turkey harvested on the refuge.

9. You may use only shotguns with rifled slugs, muzzleloaders, and legal pistols for modern gun deer hunting.

10. We allow only portable deer stands capable of being carried by a single individual. Hunters may erect stands 7 days prior to the refuge deer season and must remove them from the waterfowl sanctuaries prior to November 15, except for stands used by Quota Gun Deer Hunt permit holders (signature required), which must be removed by the last day of the Quota Gun Deer Hunt. Hunters must remove all stands on the remainder of the refuge within 7 days of the closure of archery season (see §27.93 of this chapter). Hunters must permanently affix their name and address to their deer stands on the refuge.

11. We prohibit hunting from a vehicle or use of a vehicle as a deer stand.

12. We prohibit the use of dogs.

13. We prohibit the possession or use of buckshot for hunting on all refuge lands.

14. We prohibit hunting from mowed and/or graveled road right-of-ways.

15. Refuge lands are located in State-designated Flood Prone Region B, and we will close them to all deer hunting when the White River gauge at Augusta reaches 31 feet (9.3 m), as reported by the National Weather Service at *http://www.srh.noaa.gov/data/LZK/RVSLZK*and reopen them when the same gauge reading falls below 30 feet (9.1 m) and the White River Gauge at Georgetown falls to or below 19 feet (5.7 m).

16. We allow only Quota Gun Deer Hunt permit holders on the Farm Unit during the Quota Gun Deer Hunt and only for the purposes of deer hunting. We close the refuge to all other entry and public use during the Quota Gun Deer Hunt.

17. We close waterfowl sanctuaries to all entry and hunting from November 15 to February 28 except for Quota Gun Deer Hunt permit holders who may hunt the sanctuary when the season overlaps with these dates.

D. Sport Fishing. We allow fishing and frogging in accordance with State regulations subject to the following conditions:

1. Conditions A10, A18 through A21, B11, and C16 apply.

2. We close waterfowl sanctuaries to all entry and fishing/frogging from November 15 to February 28. We also close the Farm Unit to all entry and fishing during the Quota Gun Deer Hunt.

3. We prohibit commercial fishing.

4. We prohibit the take or possession of turtles and/or mollusks (see §27.21 of this chapter).

5. We prohibit mooring houseboats to the refuge bank on the Little Red River.

Big Lake National Wildlife Refuge

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B. Upland Game Hunting. We allow hunting of squirrel, rabbit, raccoon, nutria, coyote, beaver, and opossum on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We require refuge hunt permits. The permits (found on the front cover of the annual hunt brochure/permit – signature required) are nontransferable and anyone on refuge land in possession of hunting equipment must sign and carry the permit at all times.

2. We provide annual season dates for squirrel, rabbit, raccoon, and opossum hunting in the refuge hunting brochure/permit.

3. We allow take of nutria, beaver, and coyote during any refuge hunt with the device allowed for that hunt subject to State seasons.

4. Any hunter born after 1968 must carry a valid hunter education card. An adult age 21 or older must supervise and remain within sight and normal voice contact with hunters under age 16 who have a valid hunter education card. Hunters under age 16 do not need to have a card if they are under the direct supervision (within arm's reach) of an adult (age 21 or older) holder of a valid hunting license. An adult may supervise up to two youths for upland game hunting but may supervise only one youth for big game hunting. We will

honor home State hunter education cards.

5. We prohibit target practice or any nonhunting discharge of firearms (see §27.42 of this chapter).

6. You may take opossum when hunting raccoon.

7. We require dogs for night hunting of raccoon and opossum. We prohibit field trials and organized training events.

8. When hunting, you may only use shotguns with approved nontoxic shot (see §32.2(k)) and rifles chambered for rimfire cartridges.

9. We prohibit boats from November 1 through February 28, except on that portion of the refuge open for public fishing with electric motors and Ditch 28.

10. We prohibit hunting from mowed and/or gravel road right-of-ways.

11. We prohibit ATVs (see §27.31(f) of this chapter).

12. We prohibit horses and mules.

13. We limit nighttime use to fishing, frogging, and/or raccoon/opossum hunting, and the angler must possess the appropriate tackle or gear.

14. We prohibit driving around a locked gate, barrier, or beyond a sign closing a road to vehicular traffic (see §27.31 of this chapter).

15. We prohibit the possession or use of alcoholic beverages while hunting (see §32.2(j)).

16. You must adhere to all public use special conditions and regulations on the annual hunt brochure/permit.

C. Big Game Hunting. We allow hunting of white-tailed deer on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions B1, B3 through B5, and B9 through B16 apply.

* * * * *

3. Hunters may use only bows or crossbows.

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5. Hunters may possess or use only biodegradable materials to mark trails.

* * * * *

8. We allow only portable deer stands capable of being carried by a single individual. Hunters may erect stands 7 days prior to the refuge deer season and must remove them within 7 days of the closure of archery season (see §27.93 of this chapter). Hunters must permanently affix their name and address to their deer stands on the refuge.

* * * * *

12. Hunters may enter the refuge no earlier than 4 a.m.

D. Sport Fishing. We allow fishing and frogging on designated areas of the refuge subject to the following conditions:

1. Conditions B9, B11 through B14, and B16 apply.

2. Anglers may launch boats only in designated areas.

3. We prohibit ATVs, airboats, personal watercraft, Jet Skis, and hovercraft (see §27.31 of this chapter).

4. We allow frogging from the beginning of the State frogging season through October 31.

5. We allow the take of largemouth bass in accordance with State regulations.

6. We prohibit the take or possession of turtle and/or mollusks (see §27.21 of this chapter).

7. We require a Special Use Permit (FWS Form 3-1383) for all commercial fishing activities on the refuge.

Cache River National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of duck, goose, coot, snipe, woodcock, and dove on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We require refuge hunting permits. These permits (found on the front cover of the annual hunt brochure/permit – signature required) are nontransferable, and anyone on the refuge in possession of hunting equipment must sign and carry the permit at all times.

2. We allow hunting of duck, goose, coot, dove, and snipe daily until 12 p.m. (noon) throughout the State seasons, except for refuge-wide season closures during Quota Gun Deer Hunt and the exception provided in A3.

3. We allow hunting for goose from ½ hour before legal sunrise until ½ hour after legal sunset after the close of duck season in January for the remainder of the State goose season(s) and Snow, Blue, and Ross' Goose Conservation Order.

4. We allow hunting for woodcock daily throughout the State seasons except for season closures during the Quota Gun Deer Hunt.

5. We prohibit commercial hunting and/or guiding.

6. You may possess only approved nontoxic shot while hunting in the field (see §32.2(k)).

7. You must remove decoys, blinds, boats, and all other equipment (see §27.93 of this chapter) daily by 1 p.m.

8. Waterfowl hunters may enter the refuge at 4 a.m.

9. Boats with the owner's name and address permanently displayed or valid registration may be left on the refuge from March 1 through October 31. We prohibit boats on the refuge from 12 p.m. (midnight) to 4 a.m. during duck season.

10. Hunters may possess or use only biodegradable materials to mark trails.

11. We prohibit building or hunting from permanent blinds. We prohibit driving or screwing any metal object into a tree or hunting from a tree in which a metal object has been driven or screwed to support a hunter (see §32.2(i)).

12. We prohibit cutting of holes or other manipulation of vegetation (e.g., cutting bushes, mowing, weed-eating, herbicide use, and other actions) or hunting from manipulated areas (see §27.51 of this chapter).

13. We allow use of dogs for migratory game bird hunting.

14. We allow waterfowl hunting on flooded refuge roads.

15. Any hunter born after 1968 must carry a valid hunter education card. An adult at least age 21 must supervise and remain within sight and normal voice contact with hunters younger than age 16 who have a valid hunter education card. Hunters younger than age 16 do not need to have a card if they are under the direct supervision (within arm's reach) of a holder of a valid hunting license of at least age 21. An adult may supervise up to two youths for migratory bird and upland game hunting but may supervise only one youth for big game hunting. We will honor home State hunter education cards.

16. We prohibit target practice or any nonhunting discharge of firearms (see §27.42 of this chapter).

17. We prohibit ATVs except from September 1 through February 28, on designated roads, trails, or established parking areas, and only to provide access for hunting. We prohibit driving around a locked gate, barrier, or beyond a sign closing a road to vehicular traffic (see §27.31 of this chapter).

18. We prohibit entry into or hunting in waterfowl sanctuaries from November 15 through February 28.

19. You must adhere to all public use special conditions and regulations on the annual hunt brochure/permit.

20. We close all other hunts during the Quota Gun Deer Hunt. We allow only Quota Gun Deer Hunt permit (signature only required) holders to enter the refuge during this hunt and only for the purpose of deer hunting.

21. We prohibit airboats, hovercraft, and personal watercraft (Jet Ski, etc.) (see §27.31 of this chapter).

B. Upland Game Hunting. We allow hunting of squirrel, rabbit, quail, raccoon, opossum, beaver, muskrat, nutria, armadillo, coyote, and feral hog on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A1, A5, A9 through A11, and A15 through A21 apply.

2. We allow squirrel hunting September 1 through February 28 on all refuge hunt units except for refuge-wide season closure during the Quota Gun Deer Hunt. We prohibit dogs, except during the period December 1 through February 28.

3. Rabbit season corresponds with the State season on all refuge hunt units except for refuge-wide season closure during the Quota Gun Deer Hunt. We prohibit dogs except during the period December 1 through February 28.

4. Quail season corresponds with the State season on all refuge hunt units except for refuge-wide season closure during the Quota Gun Deer Hunt. We allow dogs.

5. We allow hunting of raccoon and opossum with dogs on all refuge hunt units. We require dogs for hunting of raccoon/opossum at night. We provide annual season dates in the refuge hunting brochure/permit. We prohibit field trials and organized training events.

6. We prohibit horses and mules.

7. You may take beaver, muskrat, nutria, armadillo, feral hog, and coyote during any refuge hunt with the device allowed for that hunt.

8. We prohibit hunting from mowed and/or graveled refuge roads except by waterfowl hunters during flooded conditions.

9. We prohibit hunting from a vehicle.

10. You may use only shotguns with approved nontoxic shot (see §32.2(k)) and rifles chambered for rimfire cartridges when hunting.

11. We limit nighttime use to fishing, frogging, and/or raccoon/opossum hunting; and the hunter must possess appropriate tackle or gear.

C. Big Game Hunting. We allow hunting of deer and turkey on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A1, A5, A9 through A11, A15 through A21, B6 through B9, and B11 apply.

2. We divide the refuge into the following three hunting units: Unit I – refuge lands between Highway 79 and Interstate 40; Unit II – all refuge lands east of Highway 33 between Interstate 40 and Highway 18 at Grubbs, Arkansas; and Unit III – all refuge lands west of Highway 33, from Interstate 40 to Highway 64.

3. Archery/crossbow hunting season for deer begins on the opening day of the State season and continues throughout the State season in all refuge hunting units except for refuge-wide season closure during the Quota Gun Deer Hunt. We provide annual season dates and bag limits on the hunt brochure/permit.

4. Muzzleloader hunting season for deer will begin in October and will continue for a period of up to 9 days in all hunting units with annual season dates and bag limits provided on the hunt brochure/permit.

5. Modern gun deer hunting will begin in November and continue for a period of up to 11 days in all hunting units with annual season dates and bag limits provided on the hunt brochure/permit.

6. The fall archery/crossbow hunting season for turkey will begin on the opening day of the State season and continue throughout the State season in Hunt Units I, III, and those Unit II lands that are located within the State fall archery/crossbow turkey zone. We close Unit II lands outside the fall archery/crossbow turkey zone. We prohibit turkey hunting during the refuge-wide season closure during the Quota Gun Deer Hunt. We do not open for fall gun hunting for turkeys.

7. The spring gun hunt for turkey will begin on the opening day of the State season and continue throughout the State season in Hunt Units I and III. We close Unit II lands with the exception of those refuge lands included in the combined Black Swamp Wildlife Management Area/ Cache River National Wildlife Refuge quota permit hunts administered by the State.

8. Immediately record the zone 095 on your hunting license and later at an official check station for all deer and turkey harvested on the refuge.

9. Hunters may only use shotguns with rifled slugs, muzzleloaders, or legal pistols for modern gun deer hunting on the Dixie Farm Unit Waterfowl Sanctuary, adjacent waterfowl hunt area, and the Plunkett Farm Unit Waterfowl Sanctuary.

10. We allow only portable deer stands capable of being carried by a single individual.

11. We prohibit hunting from a vehicle or use of a vehicle as a deer stand.

12. You must permanently affix the owner's name and address to all deer stands on the refuge.

13. Hunters may erect stands 7 days prior to the refuge deer season and must remove them from the waterfowl sanctuaries prior to November 15, and from the rest of the refuge within 7 days of the closure of archery season (see §27.93 of this chapter).

14. We prohibit the use of dogs.

15. We prohibit the possession or use of buckshot for hunting on all refuge lands.

16. We prohibit hunting from mowed and/or graveled road right-of-ways.

17. We will close refuge lands located in State-designated Flood Prone Region B to all deer hunting when the White River gauge at Augusta reaches 31 feet (9.3 m), as reported by the National Weather Service at *http://www.srh.noaa.gov/data/LZK/RVSLZK*and reopen them when the same gauge reading falls below 30 feet (9.1 m) and the White River gauge at Georgetown falls to, or below, 19 feet (5.7 m).

18. We will close refuge lands located in State-designated Flood Prone Region C to all deer hunting when the Cache River gauge at Patterson exceeds 10 feet (3 m), as reported by the National Weather Service at *http://www.srh.noaa.gov/data/LZK/RVSLZK*and reopen them when the same gauge reading falls below 8.5 feet (2.6 m).

19. We will close refuge lands located in Flood Prone Region D to all deer and turkey hunting when the White River gauge at Clarendon reaches 28 feet (8.4 m), as reported by the National Weather Service at *http://www.srh.noaa.gov/data/LZK/RVSLZK*and reopen them when the same gauge reading falls to or below 27 feet (8.1 m).

D. Sport Fishing. We allow fishing and frogging on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A9, A17, A19, A21, and B11 apply.

2. We close waterfowl sanctuaries to all entrance and fishing/frogging from November 15 to February 28. We prohibit refuge-wide entry and fishing during the Quota Gun Deer Hunt.

3. We require a Special Use Permit (FWS Form 3-1383) for all commercial fishing activities on the refuge.

4. We prohibit the take or possession of turtles and/or mollusks (see §27.21 of this chapter).

5. We prohibit the mooring of houseboats to refuge property.

Felsenthal National Wildlife Refuge

A. Hunting of Migratory Game Birds. We allow hunting of duck, goose, and coot on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We allow hunting of duck, goose, and coot during the State waterfowl season except during scheduled quota refuge Gun Deer Hunts.

2. Hunting of duck, goose, and coot ends at 12 p.m. (noon) each day.

3. We allow only portable blinds. You must remove all duck hunting equipment (portable blinds, boats, guns,

and decoys) (see §27.93 of this chapter) from the hunt area by 1:30 p.m. each day.

4. You may possess only approved nontoxic shells when hunting (see §32.2(k)) in quantities of 25 or less each day during waterfowl season; hunters may not discharge more than 25 shells per day.

5. We close areas of the refuge posted with "Area Closed" signs and identify them on the refuge hunt brochure map as a waterfowl sanctuary. Waterfowl sanctuaries are closed to all public entry and public use during waterfowl hunting season.

6. No person will utilize the services of a guide, guide service, outfitter, club, organization, or other person who provides equipment, services, or assistance on Refuge System lands for compensation. Failure to comply with this provision subjects each hunter in the party to a fine if convicted of this violation.

7. Hunters must possess and carry a signed refuge hunt brochure permit while hunting. These hunt brochure permits are available at the refuge office, brochure dispensers at multiple locations throughout the refuge, and area businesses.

8. We prohibit possession and/or use of herbicides.

9. We prohibit marking trails with tape, ribbon, paint, or any other substance other than biodegradable paper flagging, reflective twist ties, or reflective tacks (see §27.93 of this chapter).

10. We prohibit possession or use of alcoholic beverage(s) while hunting (see §32.2(j)). We prohibit consumption or possession of opened container(s) of alcoholic beverage(s) in parking lots, on roadways, and in plain view in campgrounds.

11. All persons born after 1968 must possess a valid hunter education card in order to hunt.

12. All youth hunters age 15 and younger must remain within sight and normal voice contact of an adult age 21 or older, possessing a valid hunting license. One adult may supervise no more than two youth hunters.

13. We allow only all-terrain vehicles/utility-type vehicles (ATVs/UTVs) for hunting and fishing activities. We restrict ATVs/UTVs to designated times and designated trails (see §27.31 of this chapter) marked with signs and paint. We identify these trails and the dates they are open for use in the refuge hunt brochure. We limit ATVs/UTVs to those having an engine displacement size not exceeding 700cc. We limit ATV/UTV tires to those having a centerline lug depth not exceeding 1 inch (2.5 cm). You may use horses on roads and ATV/UTV trails (when open to motor vehicle and ATV/UTV traffic respectively) as a mode of transportation for on-refuge, hunting and fishing activities.

14. We prohibit hunting within 150 feet (45 m) of roads and trails open to motor vehicle use (including ATV/UTV trails).

15. We prohibit target practice with any firearm, archery tackle, or crossbow or any nonhunting discharge of firearms (see §27.42 of this chapter).

16. We allow camping only at designated primitive campground sites identified in the refuge hunt brochure, and we restrict camping to individuals involved in wildlife-dependent refuge activities. Campers may stay no more than 14 days during any 30 consecutive-day period in any campground and must occupy camps daily. We prohibit all disturbances, including use of generators, after 10 p.m. You must unload all hunting weapons (see §27.42(b) of this chapter) within 100 yards (90 m) of a campground.

17. You may take beaver, nutria, feral hog, and coyote during any daytime refuge hunt with weapons and ammunition allowed for that hunt. There is no bag limit. You may not transport or possess live hog.

18. We prohibit blocking of gates, roadways, and boat ramps (see §27.31(h) of this chapter).

19. We allow the use of retriever dogs.

20. We prohibit the use or possession of any electronic call or other electronic device used for producing or projecting vocal sounds of any wildlife species.

B. Upland Game Hunting. We allow hunting of quail, squirrel, rabbit, and furbearers (as defined by State law) on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A4 through A18 and A20 apply.

2. We allow hunting for the species listed above on the refuge during State seasons for this zone through January 31. We list specific hunting season dates annually in the refuge hunt brochure. We close upland game hunting during refuge quota deer hunts. We annually publish dates for these quota deer hunts in the refuge hunt brochure.

3. We do not open for spring squirrel hunting season, summer/early fall raccoon hunting season, or spring bobcat hunting season.

4. We prohibit possession of lead ammunition except that you may use rimfire rifle lead ammunition no larger than .22 caliber for upland game hunting. We prohibit possession of shot larger than that legal for waterfowl hunting. During the deer and turkey hunts, hunters may use lead ammunition legal for taking deer and turkey. We prohibit buckshot for gun deer hunting.

5. You may use dogs for squirrel and rabbit hunting from the opening of furbearer (as defined by State law) hunting season through January 31. You may also use dogs for quail hunting and for raccoon/opossum hunting during open season on the refuge for these species. At other times, you must keep dogs and other pets on a leash or confined (see §26.21(b) of this chapter).

C. Big Game Hunting. * * *

1. Conditions A6 through A11, A13 through A18, and A20 apply.

* * * * *

3. We close archery deer hunting during the quota gun deer hunts.

4. The refuge will conduct no more than two muzzleloader deer hunts and no more than four quota modern gun deer hunts.

5. We restrict hunt participants for quota hunts to those drawn for a quota permit (Big/Upland Game Hunt Application; FWS Form 3-2356). The permits are nontransferable and permit fees are nonrefundable. If conditions prevent the hunts from occurring, there will not be any refunds or permits carried over from year to year. Hunt dates and application procedures will be available at the refuge office in July.

6. The muzzleloader and modern gun deer hunt bag limit is two deer with no more than one buck on each hunt.

7. Hunters must check all harvested deer during quota hunts at refuge deer check stations on the same day of the kill. We identify the check station locations in the refuge hunt brochure. Carcasses of deer taken must remain intact (except you may field dress) until checked.

8. You may only use portable deer stands erected no earlier than 2 days before the opening of the State deer season and you must remove them no later than February 2 each year (see §27.93 of this chapter).

9. We prohibit the use of deer decoy(s).

* * * * *

13. The refuge will conduct no more than three quota permit spring turkey gun hunts. Specific hunt dates and application procedures will be available at the refuge office in January. We restrict hunt participants to those selected for a quota permit, except that one nonhunting adult age 21 or older possessing a valid hunting license must accompany the youth hunter age 15 and younger.

14. An adult age 21 or older possessing a valid hunting license must

accompany and be within sight and normal voice contact of hunters age 15 and younger. One adult may supervise no more than one youth hunter.

15. We prohibit leaving any tree stand, ground blind, boat, or game camera on the refuge without the owner's name and address clearly written in a conspicuous location.

D. Sport Fishing. We allow fishing, frogging, and crawfishing for personal use on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A6, A8, A9, A13, A16, and A18 apply.

2. We prohibit fishing in the waterfowl sanctuary area during the waterfowl hunting season, with the exception of the main channel of the Ouachita and Saline Rivers and the borrow pits along Highway 82. We post the waterfowl sanctuary area with "Area Closed" signs and identify those areas in refuge hunt brochures.

3. We allow fishing only in areas accessible from the Oauchita and Saline Rivers and Eagle, Jones, and Pereogeethe Lakes during the refuge quota gun hunts.

4. You must reset trotlines when receding water levels expose them.

5. We prohibit consumption or possession of opened container(s) of alcoholic beverage(s) in parking lots, on roadways, and in plain view in campgrounds (see §32.5(c)).

Holla Bend National Wildlife Refuge

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B. Upland Game Hunting. * * *

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6. We allow ATVs only for hunters with disabilities. We require a refuge ATV permit (Special Use Permit; FWS Form 3-1383) issued by the refuge manager.

* * * * *

11. We prohibit hunting within 150 feet (45 m) of roads open to motor vehicle use and nature trails.

* * * * *

13. We allow the use of nonmotorized boats during the refuge fishing/boating season (March 1 to October 31), but we prohibit hunters leaving boats on the refuge overnight (see §27.93 of this chapter).

C. Big Game Hunting. * * *

1. Conditions B1 and B4 through B13 apply.

2. We allow archery/crossbow hunting for white-tailed deer. We provide annual season dates in the hunt brochure/permit (name, address, signature required).

* * * * *

D. Sport Fishing. * * *

1. Conditions B6, B7, and B9 apply.

* * * * *

Overflow National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of duck, goose, and coot on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We allow hunting of duck, goose, and coot during the State waterfowl season. We do not open during the September teal season.

* * * * *

3. We allow only portable blinds. Hunters must remove portable blinds, boats, and decoys from the hunt area by 1:30 p.m. each day (see §27.93 of this chapter). Exception: Hunters may store boats in designated areas identified on refuge brochure.

* * * * *

5. We close areas of the refuge by posting "Area Closed" signs and identifying them on the refuge hunt brochure map as Sanctuary and closed to all public entry and public use. Exception: We open the area identified as North Sanctuary on refuge hunt brochure map to all authorized public use activities from 2 days prior to opening of deer archery season through October 31. We close the South Waterfowl Sanctuary from December 1 until the end of waterfowl season.

* * * * *

7. You must possess and carry a signed refuge hunt brochure permit while hunting. These hunt brochure permits are available at the refuge office, brochure dispensers at multiple locations throughout the refuge, and area businesses.

* * * * *

9. We prohibit marking trails with tape, ribbon, paint, or any other substance other than biodegradable paper flagging, reflective twist ties, or reflective tacks (see §27.93 of this chapter).

10. We prohibit possession or use of alcoholic beverage(s) while hunting (see §32.2(j)). We prohibit consumption or possession of opened container(s) of alcoholic beverage(s) in parking lots and roadways.

* * * * *

12. All youth hunters age 15 and younger must remain within sight and normal voice contact of an adult age 21 or older, possessing a valid hunting license. One adult may supervise no more than two youth hunters.

13. We allow only all-terrain vehicles/utility-type vehicles (ATVs/UTVs) for hunting activities. We restrict ATVs/UTVs to designated times and designated trails (see §27.31 of this chapter) marked with signs and paint. We identify those trails and the dates they are open for use in the refuge hunt brochure. We limit ATVs/UTVs to those having an engine displacement size not exceeding 700cc. We limit ATV/UTV tires to those having a centerline lug depth not exceeding 1 inch (2.5 cm). You may use horses on roads and ATV/UTV trails (when open to motor vehicle and ATV/UTV traffic respectively) as a mode of transportation for on-refuge, hunting activities. You may use ATVs/UTVs on unmarked roads and levees in the North Sanctuary beginning 2 days prior to the opening of deer archery season through October 31.

14. We prohibit hunting within 150 feet (45 m) of roads and trails open to motor vehicle use (including ATV/UTV trails).

15. We prohibit target practice with any firearm, archery tackle, or crossbow or any nonhunting discharge of firearms (see §27.42 of this chapter).

16. We prohibit blocking of gates, roadways, and boat ramps (see §27.31(h) of this chapter).

17. You may take beaver, nutria, feral hog, and coyote during any daytime refuge hunt with weapons and ammunition legal for that hunt. There is no bag limit. We prohibit transportation or possession of live hog.

* * * * *

B. Upland Game Hunting. We allow hunting of quail, squirrel, rabbit, and furbearers (as defined by State law) on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A4 through A17, and A19 apply.

* * * * *

3. We do not open for the spring squirrel hunting season, summer/fall raccoon hunting season, or the spring bobcat hunting season.

4. When upland game hunting, we prohibit possession of lead ammunition except that you may use rimfire rifle lead ammunition no larger than .22 caliber. We prohibit possession of shot larger than that legal for waterfowl hunting. During the deer and turkey hunts, we allow use of lead ammunition legal for taking deer and turkey. We prohibit buckshot for gun deer hunting.

5. You may use dogs for squirrel and rabbit hunting from December 1 through January 31. You may also use dogs for quail hunting and for raccoon/opossum hunting during open season on the refuge for these species. At other times, you must keep dogs and other pets on a leash or confined (see §26.21(b) of this chapter).

*C. Big Game Hunting. * * **

1. Conditions A5 through A11, A13 through A17, and A19 apply.

2. We allow muzzleloader deer hunting during the first State muzzleloader season for this zone (see State regulations for appropriate zone).

3. Bag limit for the muzzleloader deer hunt is two deer, with no more than one buck.

4. You may use only portable deer stands erected no earlier than 2 days before the opening of the State deer season, and you must remove them no later than February 2 each year (see §27.93 of this chapter).

5. We prohibit the use of deer decoy(s).

* * * * *

8. We do not open for the fall turkey archery season or spring turkey gun season.

9. We do not open for the gun deer season or the second (and December) muzzleloader deer season.

10. An adult age 21 or older possessing a valid hunting license must accompany and be within sight or normal voice contact of hunters age 15 and younger. One adult may supervise no more than one youth hunter.

11. We prohibit leaving any tree stand, ground blind, boat, or game camera on the refuge without the owner's name and address clearly written in a conspicuous location.

* * * * *

Pond Creek National Wildlife Refuge

A. Migratory Game Bird Hunting. * **

1. We allow hunting of migratory game birds during the State waterfowl seasons, except we close during scheduled quota refuge gun deer hunts.

* * * * *

3. We allow only portable blinds. You must remove portable blinds, boats, and decoys from the hunt area by 1:30 p.m. each day (see §27.93 of this chapter).

* * * * *

5. You must possess and carry a signed refuge hunt brochure permit while hunting. These hunt brochure permits are available at the refuge office, brochure dispensers at multiple locations throughout the refuge, and area businesses.

* * * * *

7. We prohibit marking trails with tape, ribbon, paint, or any other substance other than biodegradable paper flagging, reflective twist ties, or reflective tacks (see §27.93 of this chapter).

* * * * *

11. We allow only all-terrain vehicles/utility-type vehicles (ATVs/UTVs) for hunting and fishing activities. We restrict ATVs/UTVs to designated times and designated trails (see §27.31 of this chapter) marked with signs and paint. We identify those trails and the dates they are open for use in the refuge hunt brochure. We limit ATVs/UTVs to those having an engine displacement size not exceeding 700cc and a total width not to exceed 63 inches (160.02 cm). We limit ATV/UTV tires to those having a centerline lug depth not exceeding 1 inch (2.5 cm). You may use horses on roads and ATV/UTV trails (when open to motor vehicle and ATV/UTV traffic respectively) as a mode of transportation for on-refuge, hunting and fishing activities.

12. We prohibit hunting within 150 feet (45 m) of roads and trails open to motor vehicle use (including ATV/UTV trails).

13. We prohibit target practice with any firearm, archery tackle, or crossbow or any nonhunting discharge of firearms (see §27.42 of this chapter).

14. We allow camping only at designated primitive campground sites identified in the refuge hunt brochure. We restrict camping to the individuals involved in refuge wildlife-dependent activities. Campers may stay no more than 14 days during any consecutive 30–day period in a campground and must occupy the camps daily. We prohibit all disturbances, including use of generators, after 10 p.m. You must unload all hunting firearms and crossbows (see §27.42(b) of this chapter) within 100 yards (90 m) of a campground.

15. You may take beaver, nutria, feral hog, and coyote during any daytime refuge hunt with weapons and ammunition allowed for that hunt. We prohibit the use of dogs to take these species. There is no bag limit. You may not transport or possess live hog.

16. We prohibit blocking of gates, roadways, and boat ramps (see §27.31(h) of this chapter).

17. We allow the use of retriever dogs.

18. We prohibit the use or possession of any electronic call or other electronic device used for producing or projecting vocal sounds of any wildlife species.

* * * * *

B. Upland Game Hunting. We allow hunting of squirrel, rabbit, and furbearers (as defined by State law) on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We allow hunting on the refuge during State seasons for this zone for the species listed above through January 31. We list specific hunting season dates annually in the refuge hunt brochure. We close upland game hunting during refuge quota deer hunts. We annually publish dates for these quota deer hunts in the refuge hunt brochure.

2. We do not open to spring squirrel hunting season, summer/early fall raccoon hunting season, or the spring bobcat hunting season.

3. Conditions A4 through A16, and A18 apply.

4. We prohibit possession of lead ammunition when hunting, except that you may use rimfire rifle lead ammunition no larger than .22 caliber for upland game hunting. We prohibit possession of shot larger than that legal for waterfowl hunting. During the deer and turkey hunts, we allow use of lead ammunition legal for taking deer and turkey. We prohibit buckshot for gun deer hunting.

5. You may use dogs for squirrel, rabbit, raccoon, and opossum hunting from the opening of furbearer (as defined by State law) hunting season through January 31. At other times you must keep dogs and other pets on a leash or confined (see §26.21(b) of this chapter).

C. Big Game Hunting. * **

* * * * *

2. Conditions A4 through A9, A11 through A16, and A18 apply.

* * * * *

4. We allow muzzleloader deer hunting during the early State muzzleloader season for this deer management zone. The bag limit for the refuge muzzleloader hunt is two deer, with no more than one buck.

5. The refuge will conduct no more than three quota gun deer hunts.

6. We restrict hunt participants for quota hunts to those drawn for a quota permit. These permits are nontransferable and permit fees are nonrefundable. If conditions prevent the hunts from taking place, there will be no refunds or permits carried over from year to year. Hunt dates and application procedures will be available at the refuge office in July.

7. The quota Gun Deer Hunt bag limit is two deer, with no more than one buck (one buck and one doe).

8. You must check all deer at the refuge deer check station on the same day of kill. You must keep carcasses of deer taken intact (you may field dress) until checked.

* * * * *

12. You may use only portable deer stands erected no sooner than 2 days before the opening of the State deer season, and you must remove them no later than February 2 each year (see §27.93 of this chapter).

13. We prohibit the use of deer decoy(s).

14. The refuge will conduct no more than two quota permit spring turkey gun hunts. Specific hunt dates and application procedures will be available at the refuge office in January. We restrict hunt participants on these hunts to those selected for a quota permit, except that one nonhunting adult age 21 or older and possessing a valid hunting license must accompany a youth hunter.

15. An adult age 21 or older possessing a valid hunting license must accompany and be within sight and normal voice contact of hunters age 15 and younger. One adult may supervise no more than one youth hunter during big game hunts.

16. We prohibit leaving any tree stand, ground blind, boat, or game camera on the refuge without the owner's name and address clearly written in a conspicuous location.

* * * * *

Wapanocca National Wildlife Refuge

A. Migratory Game Bird Hunting. * * *

1. We require refuge hunting permits. The permits (found on the front cover of the annual hunt brochure/permit – signature required) are nontransferable and anyone on refuge land in possession of hunting equipment must sign and carry them at all times.

* * * * *

5. Hunters may enter the refuge at 4 a.m.

6. We prohibit ATVs.

7. Any hunter born after 1968 must carry a valid hunter education card. An adult age 21 or older must supervise hunters younger than age 16 who have a valid hunter education card and remain within sight and normal voice contact with the adult. Hunters younger than age 16 do not need to have a card if they are under the direct supervision (within arm's reach) of a holder of a valid hunting license of at least age 21. An adult may supervise up to two youths for migratory bird and upland game hunting but may supervise only one youth for big game hunting. We honor home State hunter education cards.

8. Hunters may possess or use only biodegradable materials to mark trails (see §27.93 of this chapter).

9. We prohibit target practice or any nonhunting discharge of firearms (see §27.42 of this chapter).

10. We prohibit driving around a locked gate, barrier, or beyond a sign closing a road to vehicular traffic (see §27.31 of this chapter).

11. We prohibit the possession or use of alcoholic beverages while hunting (see §32.2(j)).

*B. Upland Game Hunting.*We allow hunting of squirrel, rabbit, raccoon, nutria, beaver, coyote, feral hog, and opossum in accordance with State regulations subject to the following conditions:

1. Conditions A1 and A3 through A11 apply.

2. You may use only shotguns with approved nontoxic shot (see §32.2(k)) and rifles chambered for rimfire cartridges when hunting.

3. We provide annual season dates for squirrel, rabbit, raccoon, and opossum hunting on the hunt brochure/permit. We allow dogs.

4. You may take nutria, beaver, feral hog, and coyote during any refuge hunt with the device allowed for that hunt, subject to State seasons, on these species.

5. We require dogs for night hunting of raccoon/opossum. We prohibit field trials and organized training events.

6. We prohibit horses and mules.

7. We limit nighttime use to raccoon/opossum hunting and the hunters must possess appropriate gear.

8. We close all other hunts during the Quota Gun Deer Hunt. We allow only Quota Gun Deer Hunt permit (signature only required) holders to enter the refuge during this hunt and only for the purpose of deer hunting.

C. Big Game Hunting. * * *

1. Conditions A1, A3 through A11, and B4 through B8 apply.

2. We prohibit hunting from mowed and/or graveled road right-of-ways.

* * * * *

7. We only allow portable deer stands capable of being carried by a single individual. Hunters may erect stands 7 days prior to the refuge deer season and must remove them from the waterfowl sanctuaries by December 1. Hunters must remove all stands on the remainder of the refuge within 7 days of the closure of archery season (see §27.93 of this chapter). You must permanently affix the owner's name and address on stands left on the refuge.

8. We prohibit hunting from a vehicle or use of a vehicle as a deer stand.

9. We prohibit the possession or use of buckshot for hunting on all refuge lands.

D. Sport Fishing. * * *

1. Conditions A4, A6, A10, B6, and B7 apply. We allow fishing from March 15 through October 31 from ½ hour before legal sunrise to ½ hour after legal sunset.

* * * * *

5. We allow bank fishing, but you must park vehicles in designated parking areas.

6. We prohibit the take or possession of frog, mollusk, and/or turtle (see §27.21 of this chapter).

7. Anglers may launch boats only in designated areas.

8. Anglers must remove all boats daily from the refuge (see §27.93 of this chapter). We prohibit airboats, personal watercraft, and hovercraft.

White River National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of duck, goose, woodcock, and coot on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We require all refuge users to sign and possess a refuge user brochure/permit (signature required).

2. We allow duck hunting from legal shooting hours until 12 p.m. (noon).

3. We allow retriever dogs for migratory game bird hunting.

4. You must remove blinds, blind material, and decoys (see §27.93 of this chapter) from the refuge by 1 p.m. each day.

5. You may take duck, goose, coot, and woodcock during the State season in designated areas.

6. North Unit waterfowl season and youth waterfowl hunts are concurrent with State season dates.

7. We restrict the South Unit waterfowl season to the Jack's Bay hunt area as indicated in the refuge user brochure/permit. We open to hunting every Tuesday, Thursday, Saturday, and Sunday of the concurrent State season dates, including State youth waterfowl hunt dates.

8. Waterfowl hunters may enter and access the refuge no earlier than 4 a.m.

9. We prohibit boating December 1 through January 31 in the South Unit Waterfowl Hunt Area, except from 4 am to 1 pm on designated waterfowl hunt days.

10. We prohibit marking trails with materials other than biodegradable paper flagging or reflective tape/tacks (see §27.93 of this chapter).

11. We prohibit use and/or possession of alcoholic beverages while hunting (see §32.2(j)) or open alcohol containers on refuge roads, ATV trails, and parking areas.

12. We prohibit cutting of holes in or other manipulation of vegetation or hunting in such areas (see §27.51 of this chapter).

13. We prohibit waterfowl hunting on Kansas Lake Area (indicated in refuge user brochure/permit).

14. We prohibit loaded hunting weapons in or on a vehicle, ATV, or

boat while under power (see §27.42(b) of this chapter). We define "loaded" as shells in the gun or ignition device on a muzzleloader.

15. We allow duck hunting on specific scattered tracts of land, in accordance with the North Unit regulations. Consult the refuge office for further information.

16. We only allow ATVs for wildlife-dependent hunting and fishing activities. We restrict ATVs to designated yellow-marked trails throughout the refuge, unless marked otherwise. We prohibit the use of ATVs after December 15 each year in designated South Unit areas as shown in refuge user brochure/permit. We define ATV as an off-road vehicle with factory specifications not to exceed the following: A maximum dry weight of 1,550 lbs (697.5 kg), tires having a centerline lug depth of one inch (2.5 cm) or less and a maximum tire pressure of 15 psi as indicated on the tire the manufacturer. We allow only those vehicles originally designed by their manufacturer to be ATVs; we prohibit mini trucks or other modified off-road vehicles.

17. We require hunters born after 1968 to carry a valid hunter education card. We do not require hunters under age 16 to have a hunter education card while under direct supervision (within arms reach) of a holder of a valid hunting license and at least age 21. Youth hunters under age 16 must remain within sight and normal voice contact of an adult age 21 or older, possessing a valid hunting license. An adult may supervise only one youth for big game hunting but may supervise up to two youths for waterfowl and small game hunting.

18. We allow take of beaver, nutria, coyote, and feral hog incidental to any daytime refuge hunt with weapons authorized for that hunt. We prohibit take of beaver, nutria, and feral hog with the aid of dogs or after the hunter has taken the daily bag limit for that hunt.

19. No person, including but not limited to, a guide, guide service, outfitter, club, or other organization, will provide assistance, services, or equipment on the refuge to any other person for compensation unless such guide, guide service, outfitter, club, or organization has obtained a Special Use Permit (FWS Form 3-1383) from the refuge. For purposes of this regulation, we will consider any fees or services rendered to a person for lodging, meals, club membership, or similar services as compensation.

20. We prohibit hunting, taking, possessing, or attempting to take wildlife with a guide, guide service, outfitter, club, or organization providing assistance, service, or equipment that does not possess and carry the required refuge Special Use Permit (FWS Form 3-1383).

21. We allow camping only in designated sites and areas identified in the refuge user brochure/permit, and we restrict camping to individuals involved in wildlife-dependent activities. Campers may stay no more than 14 days during any 30 consecutive-day period in any campground site or area and must occupy camps daily. We prohibit all disturbances, including use of generators, after 10 p.m. You must unload all hunting weapons (see §27.42(b) of this chapter) within 100 yards (90 m) of a campground.

22. We allow refuge users to leave ATVs and boats 16 feet (4.8 m) or less in length unattended overnight as long as the owner clearly displays their complete name and physical address.

23. We prohibit all access in the Demonstration and Dry Lake Waterfowl Rest Areas as indicated in the refuge brochure/permit.

24. We require a refuge Special Use Permit (FWS Form 3-1383) for all commercial use activities including, but not limited to, fishing, trapping, timber management, or collecting acorns.

25. We prohibit hovercraft, personal watercraft (e.g., jet skis, wetbike, etc.) and airboats.

26. You must adhere to all public use special conditions and regulations on the annual refuge user brochure/permit.

B. Upland Game Hunting. * * *

1. Conditions A1, A9, A10, A11, A12, A14, A16, A17, A18, and A19 through A26 apply.

2. You may hunt rabbit and squirrel on the North Unit from opening day of the State squirrel season until February 28.

3. We allow dogs for hunting of rabbit and squirrel December 1 through February 28 on the North Unit.

* * * * *

7. We close all upland game hunts during quota Gun Deer Hunt and quota Muzzleloader Deer Hunt.

* * * * *

9. We allow furbearer (as defined by State law) hunting in accordance with season dates posted in the refuge user brochure/permit. We only allow furbearer hunting with rimfire weapons and shotguns.

10. We allow the use of dogs and horses for hunting furbearers from legal sunset to legal sunrise. All dogs and horses used for furbearer hunting must be tethered or penned from legal sunrise to legal sunset and any time not involved in actual hunting.

11. We allow upland game hunting on specific scattered tracts of land, in accordance with State-wide regulations.

C. Big Game Hunting. We allow the hunting of white-tailed deer and turkey on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A1, A9, A10, A11, A12, A14, A16, A17, and A18 through 26 apply.

2. Archery deer and turkey seasons on the North Unit are from the beginning of the State archery season until the end of January except for refuge-wide season closure during quota muzzleloader and quota gun deer hunts. We provide annual season dates and bag limits in the refuge user brochure/permit.

3. Archery deer and turkey seasons on the South Unit are from the beginning of the State archery season until the end of December except for refuge-wide season closure during quota muzzleloader and quota gun deer hunts. We provide annual season dates and bag limits in the refuge user brochure/permit.

4. Muzzleloader season for deer will begin in October and will continue for a period of up to 3 days of quota hunting and 4 days of nonquota hunting in the North and/or South Units with annual season dates and bag limits provided in the annual refuge user brochure/permit.

5. Gun deer hunt will begin in November and will continue for a period of up to 8 days of quota hunting and 4 days of nonquota hunting in the North and/or South Units with annual season dates, bag limits, and areas provided in the annual refuge user brochure/permit.

6. We restrict hunt participants for quota hunts to those drawn for a quota permit. The permits are nontransferable and nonrefundable. Hunt dates and application procedures will be available at the refuge office in April.

7. We do not open for the bear season on all refuge-owned lands, including out-tracts and refuge lands in the Trusten Holder Wildlife Management Area.

8. If you harvest deer or turkey on the refuge, you must immediately record the zone number (Zone 660 South Unit and Zone 661 North Unit) on your hunting license and later check deer and/or turkey through State phone or on-line checking system.

9. We close the refuge to all nonquota hunting during refuge-wide quota muzzleloader and quota gun deer hunts.

10. We close refuge lands on the North Unit to all deer and turkey hunting when the White River gauge at St. Charles (station no. 53) reaches 23

feet (7 m) as reported by the following website: *http://www.srh.noaa.gov/lzk/html/whitervr.htm*. The season will reopen when the gauge reading reaches 21 feet (6 m) as reported by the same website.

11. We close refuge lands on the South Unit to all deer hunting and fall turkey hunting when the White River gauge reading at St. Charles (station no. 53) reaches 23 feet (7 m) and the gauge at Lock and Dam # 1 (station no. 55) reaches 145 feet (msl) (43.5 m) simultaneously as reported by the following website: *http://www.srh.noaa.gov/lzk/html/whitervr.htm*. The season will reopen when the same gauge readings reach 21 feet (6 m) and 143 feet msl (mean sea level) (43 m), respectively.

12. We prohibit hunting with the aid of bait, salt, or ingestible attractant (see §32.2(h)).

13. We prohibit the use of dogs and/or horses other than specified in the refuge user permit.

14. We prohibit all forms of organized deer drives.

15. We prohibit firearm hunting from or across roads, ATV trails, levees, and maintained utility rights-of-way for deer only.

16. We prohibit hunting from a tree into which a metal object has been driven (see §32.2(i)).

17. You may only use portable deer stands (see §27.93 of this chapter). You may erect stands up to 7 days before each hunt, but you must remove them within 7 days after each hunt. All unattended deer stands on the refuge must have the owner's complete name and physical address clearly displayed.

18. We prohibit target practice or any nonhunting discharge of firearms (see §27.42 of this chapter).

19. We prohibit gun deer hunting on Kansas Lake Area and all other types of hunting after November 30.

20. We prohibit the possession and use of buckshot on the refuge.

D. Sport Fishing. We allow fishing, frogging, and crawfishing for personal use on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A1, A9, A10, A11, A16, and A21 through A26 apply.

2. We allow fishing year-round in LaGrue, Essex, Prairie, Scrubgrass and Brooks Bayous, Big Island Chute, Moon and Belknap Lakes next to Arkansas Highway 1, Indian Bay, the Arkansas Post Canal and adjacent drainage ditches; those borrow ditches located adjacent to the west bank of that portion of the White River Levee north of the Graham Burke pumping station; and all refuge-owned North Unit and scattered tract waters. We open all other South Unit refuge waters to sport fishing from March 1 through November 30 unless posted otherwise.

3. We allow frogging on all refuge-owned waters open for sport fishing as follows: We allow frogging on the South Unit from the beginning of the State season through November 30; we allow frogging on the North Unit for the entire State season.

4. We require a Special Use Permit (FWS Form 3-1383) for all commercial fishing on the refuge in addition to compliance with State regulations governing commercial fishing.

5. We prohibit all commercial and recreational harvest of turtle on all property administered by White River National Wildlife Refuge.

6. We allow commercial fishing on all refuge waters from 12 p.m. (noon) September 30 through 12 p.m. (noon) November 30. However, when the White River exceeds 23.5 feet (7 m) at the St. Charles, Arkansas gauge or 146 feet msl (mean sea level) (43.8 m) at the tailwater gauge at Lock and Dam #1 on the Arkansas Post Canal, we allow commercial fishing on all refuge waters from 12 p.m. (noon) March 1 through 12:00 p.m. (noon) September 30.

7. We prohibit take or possession of any freshwater mussel, and we do not open to mussel shelling.

8. Amend §32.24 California by revising paragraphs A.1., A.2., A.3., A.5. and the introductory text of paragraph D. of Modoc National Wildlife Refuge to read as follows:

§32.24 California.

* * * * *

Modoc National Wildlife Refuge

A. Migratory Game Bird Hunting. * **

1. On the opening weekend of the hunting season, hunters must possess and carry a Waterfowl Lottery Application (FWS Form 3-2355) as their refuge permit. We will issue this permit through a random drawing to hunters with advanced reservations only. The Waterfowl Lottery Applications are available on the refuge website.

2. After the opening weekend of the hunting season, we allow hunting only on Tuesdays, Thursdays, and Saturdays. Hunters must check-in and out of the refuge by filling out the Migratory Bird Hunt Report (FWS Form 3-2361) and must possess and carry this report while on the refuge. Hunters must fill out the harvest information and turn in the form prior to exiting the hunting area.

3. In the designated spaced blind and assigned pond areas, you must remain within your assigned blind or pond.

* * * * *

5. While in the field, to take wildlife on the refuge, you may possess only nontoxic ammunition and shotshells in quantities of 25 or less.

* * * * *

D. Sport Fishing. We allow fishing (fish and crayfish) only on Dorris Reservoir in accordance with State regulations subject to the following conditions:

* * * * *

7. Amend §32.28 Florida by:

a. Revising paragraph D.20. and adding paragraph D.21. of J. N. "Ding" Darling National Wildlife Refuge;

b. Revising paragraphs A.1., A.2., A.6., and A.7., adding paragraphs A.17. and A.18., revising paragraph B., C.1., C.3., C.5., C.6., C.8., C.11. through C.14., C.19., and C.21. through C.25., and revising paragraph D.4. of Lower Suwannee National Wildlife Refuge;

c. Adding paragraphs A.15. through A.16., revising paragraphs D.7. and D.12., and adding paragraphs D.13. through D.16. of Merritt Island National Wildlife Refuge;

d. Revising paragraph A., the introductory text of paragraph B., paragraphs B.2. and B.3., removing paragraph B.4., redesignating paragraphs B.5. through B.10. as paragraphs B.4. through B.9., adding new paragraph B.10., and revising paragraphs C., D.1., D.2., D.4., D.5., D.7., and D.12. of St. Marks National Wildlife Refuge; and

e. Revising paragraphs C.1., C.2., and C.8., removing paragraph C.9., redesignating paragraphs C.10. through C.22. as paragraphs C.9. through C.21., and revising paragraph D. of St. Vincent National Wildlife Refuge.

The revisions and additions read as follows:

§32.28 Florida.

* * * * *

J. N. "Ding" Darling National Wildlife Refuge

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*D. Sport Fishing. * * **

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20. We close to public entry all refuge islands (including rookery islands) except for designated trails.

21. We prohibit the use of internal combustion engines within the Wulfert Flats Pole/Troll Zone. Combustion engines must be in a nonuse position (out of the water) while the vessel is within the Pole/Troll Zone.

* * * * *

Lower Suwannee National Wildlife Refuge

A. Migratory Game Bird Hunting. * * *

1. We require hunters to possess and carry a signed copy of the refuge annual hunt brochure for all hunts. The signed brochure is a permit to hunt on the refuge.

2. We designate open and closed refuge hunting areas on the map in the refuge hunt brochure which the hunter must possess and carry.

* * * * *

6. Persons possessing, transporting, or carrying firearms on national wildlife refuges must comply with all provisions of State and local law. Persons may only use (discharge) firearms in accordance with refuge regulations (see §27.42 of this chapter and specific refuge regulations in §32).

7. We prohibit hunting from or within 150 feet (45 m) of all refuge roads open to public vehicle travel.

* * * * *

17. We prohibit the dumping of game carcasses on the refuge.

18. We prohibit consumption of alcohol or possession of open alcohol containers while hunting (see §32.2(j)).

B. Upland Game Hunting. We allow hunting of feral hog, gray squirrel, armadillo, opossum, rabbit, raccoon, coyote, and beaver on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A1 through A18 apply.

2. We will print dates for the refuge upland game (small game) hunting season in the annual refuge hunt brochure. Contact the refuge office for specific dates.

3. You may use only .17, .22, and .22 magnum caliber rimfire rifle firearms (see §27.42 of this chapter), bows, or shotguns with shot no larger than #4 birdshot when hunting.

4. We allow night hunting in accordance with State regulations for raccoon and opossum on Wednesday through Saturday nights from legal sunset until legal sunrise during the month of February.

C. Big Game Hunting. * * *

1. Conditions A1 through A18 apply.

* * * * *

3. We require quota hunt permits (issued through a random draw – name, address, phone number requested) for the limited deer gun hunt, limited hog hunt, and limited youth gun deer hunt. They cost $12.50 for the limited deer gun hunt and limited hog hunt. Instructions on how to apply are printed in the annual refuge hunt brochure.

* * * * *

5. During the refuge archery season, hunters may only use archery equipment in accordance with State archery regulations.

6. During the refuge muzzleloader season, hunters may only use muzzleloading firearms (see §27.42 of this chapter) in accordance with State muzzleloader regulations.

* * * * *

8. You may leave temporary tree stands on the refuge starting on the last weekend of August, but you must remove them by the last day of the general gun hunting season (see §27.93 of this chapter). You may also leave temporary tree stands on the refuge beginning the Saturday prior to the limited hog hunt, but you must remove them by the last day of the upland game season.

* * * * *

11. The refuge general gun season lasts 14 days during the Florida State Zone C General Gun Season. We will print dates in the annual refuge hunt brochure. Contact the refuge office for specific dates.

12. The refuge limited either-sex deer hunt coincides with the State's either-sex deer hunting season. We will print dates in the annual refuge hunt brochure. Contact the refuge office for specific dates.

13. The youth limited Gun Deer Hunt follows the refuge general gun season. We will print dates in the annual refuge hunt brochure. Contact the refuge office for specific dates.

14. The refuge limited hog hunt lasts 7 days. We will print dates in the annual refuge hunt brochure. Contact the refuge office for specific dates.

* * * * *

19. Hunters may take hog (no size or bag limit), and a maximum of two deer per day, during the limited deer gun hunt and limited youth gun deer hunt, except only one deer may be antlerless for each of the 2–day limited hunts.

* * * * *

21. Hunters must check all game harvested during all deer and hog hunts.

22. Hunters may take only bearded turkeys and only during the State Zone C youth turkey hunt and spring turkey season.

23. Shooting hours for spring turkey begin ½ hour before legal sunrise and end at 1 p.m.

24. We only allow shotguns with shot no larger than size 2 common shot or bows and arrows for spring turkey hunting.

25. We prohibit the use of crossbows during all refuge hunts except with a State-issued disabled persons crossbow permit.

D. Sport Fishing. * * *

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4. We prohibit consumption of alcohol or possession of open alcohol containers.

Merritt Island National Wildlife Refuge

A. Migratory Game Bird Hunting. * * *

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15. We prohibit boats in impoundments from November 1 through February 28 except in impoundments open to waterfowl hunting on days the refuge is open to hunting. We allow pre-hunt scouting in the impoundments open to waterfowl hunting after 1 p.m. on hunt days. We allow nonmotorized vessels access to the posted canoe trails in M Pond, Peacocks Pocket, and West Bio Lab on days not open to waterfowl hunting.

16. We require all guides to purchase, possess, and carry a Commercial Harvesting Permit (NPS Form 10-930).

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D. Sport Fishing. * * *

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7. We prohibit harvesting and possession of horseshoe crab, frog, turtle, snake, and/or other wildlife (see §27.21 of this chapter).

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12. We allow vessels drafting 12" (30 cm) or less (measured while vessel is fully stopped) to be propelled only by poling, paddling, drifting, or electric trolling motors in the established Pole & Troll Zone(s), except in the posted running channels.

13. We prohibit kite surfing, kite boarding, wind surfing, sail boarding, and other similar nonwildlife oriented recreational activities.

14. We require all guides to purchase, possess, and carry a Commercial Harvesting Permit (NPS Form 10-930).

15. We will remove abandoned or unchecked crab pots after 72 hours (see §27.93 of this chapter).

16. We prohibit glass beverage containers.

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St. Marks National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of duck and coot on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. You must remove blinds daily (see §27.93 of this chapter).

2. We allow retriever dogs to recover game.

3. We prohibit migratory game bird hunting in the Executive Closure Area on the refuge.

B. Upland Game Hunting. We allow hunting of grey squirrel, rabbit, raccoon, and feral hog on designated areas of the refuge in accordance with State regulations subject to the following conditions:

* * * * *

2. All visitors must wear 500 square inches (3,250 cm^2) of fluorescent orange above the waistline while in a designated hunting unit during a refuge hunt.

3. You may use .22 caliber or smaller rim-fire rifles, shotguns, with nontoxic shot (#4 bird shot or smaller) (see §32.2(k)), or muzzleloaders to harvest squirrel, rabbit, and raccoon. In addition, you may use shotgun slugs, buckshot, or archery equipment to take feral hog. We prohibit the use of other weapons.

* * * * *

10. We prohibit the use of flagging, paint, blazes, or reflective trail markers (see §27.93 of this chapter).

C. Big Game Hunting. We allow hunting of white-tailed deer, feral hog, and turkey in accordance with State regulations subject to the following conditions:

1. We require refuge permits (hunters apply through State for license – fee charged). Permits are nontransferrable. There is an additional fee for duplicate permits. Each hunter must possess and carry a signed permit when participating in a hunt. Prior to hunting each day, you must check-in at a hunt check station as specified in the refuge hunt brochure. You must check out upon completion if hunting each day.

2. Conditions B2 and B4 through B10 apply.

3. You may access the refuge hunt areas by vehicle for pre-hunt scouting 2 days prior to the hunt for which you are drawn (lottery administered by the State).

4. There is a two-deer limit per hunt as specified in condition C8 below, except in the youth hunt, where the limit is one deer per hunt as specified in condition C9 below. The limit for turkey is one per hunt. There is no limit on feral hog.

5. We prohibit the use of deer decoys.

6. There are two fall archery hunts: Hunters may harvest either-sex deer, feral hog, and either- sex turkey during the fall archery hunts. There will be a fall archery hunt on the Panacea and Wakulla Units.

7. There are two modern gun hunts. Hunters may harvest deer, feral hog, and bearded turkey. Modern guns must meet State requirements. We will hold one hunt on the Panacea Unit and one hunt on the Wakulla Unit. See condition C8 for game limits. Contact the refuge office for specific dates.

8. The bag limit for white-tailed deer is two deer per scheduled hunt period. We allow hunters to harvest two antlerless deer per scheduled hunt period. We define antlerless deer per State regulations, i.e., antlers less than 5 inches (12.5 cm), or hunters may harvest one antlerless deer and one antlered deer per hunt. Hunters must ensure that antlered deer have at least three points, 1 inch (2.5 cm) or greater in length on one antler before harvesting them. There is no limit on feral hogs.

9. There is one youth hunt for youth ages 10 to 15 on the St. Marks Unit in an area we will specify in the refuge hunt brochure. Hunters may harvest one deer of either sex or feral hog (no limit). An adult age 21 or older possessing a refuge permit must accompany each youth hunter, and each adult may accompany only one youth. Only the youth hunter may handle or discharge firearms. Contact the refuge office for specific dates.

10. There is one mobility-impaired hunt. Hunters may have an assistant accompany them. You may transfer permits issued to assistants. We limit those hunt teams to harvesting white-tailed deer and feral hog within the limits described in condition C8. Contact the refuge office for specific dates.

11. There is one spring gobbler turkey hunt. You may harvest one bearded turkey per hunt. You may only use shotguns or archery equipment to harvest turkey. Contact the refuge office for specific dates. We prohibit hunting after 1 p.m.

*D. Sport Fishing. * * **

1. We prohibit taking blue crabs from impounded water on the St. Marks Unit.

2. We only allow fishing in refuge lakes, ponds, and impoundments from ½ hour before legal sunrise to ½ hour after legal sunset.

* * * * *

4. We prohibit use of boats with motors over 10 hp on any refuge lake or pond.

5. We allow use of hand-launched boats on impoundments on the St. Marks Unit from March 15 through October 15 each year. We prohibit launching of boats from trailers in the impoundments in the St. Marks Unit. We prohibit all gasoline-powered motors in the impoundments in the St. Marks Unit.

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7. We prohibit use of cast nets or traps to take fish from any lake, pond, or impoundment on the refuge.

* * * * *

12. We prohibit air-thrust boats, personal watercraft, and commercial guides to launch from Wakulla Beach.

* * * * *

St. Vincent National Wildlife Refuge

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*C. Big Game Hunting. * * **

1. We require refuge permits (State license – fee charged). The permits are nontransferable, and the hunter must possess and carry them while hunting. Only signed permits are valid. We only allow people with a signed refuge hunt permit on the island during the hunt periods. Contact the refuge office for details on receiving a permit. We will charge fees for duplicate permits.

2. We restrict hunting to three periods: Sambar deer, raccoon, and feral hog (primitive weapons); white-tailed deer, raccoon, feral hog (archery); and white-tailed deer, raccoon, and feral hog (primitive weapons). Contact the refuge office for specific dates. Hunters may check-in and set up camp sites and stands on the day prior to the scheduled hunt. Hunters must leave the island and remove all equipment by the date and time specified in the brochure.

* * * * *

8. You may retrieve game from the closed areas only if accompanied by a refuge staff member.

* * * * *

D. Sport Fishing. We allow fishing on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. You may fish from ½ hour before legal sunrise to ½ hour after legal sunset year-round.

2. We allow boats with electric motors. You must remove all other motors from the boats and secure them to a designated motor rack with a lock and chain.

3. We prohibit the use of live minnows as bait.

4. We allow boats in refuge lakes from May 15 through September 30.

5. We allow the use of only rods and reels or poles and lines in the refuge lakes. Anglers must attend their fishing equipment at all times.

6. You may take only fish species and fish limits authorized by State regulations. We prohibit taking of frog and/or turtle.

* * * * *

8. Amend §32.29 Georgia by:

a. Revising paragraphs C.1. and C.9., adding paragraph C.19., and revising paragraphs D.1. and D.5. of Blackbeard Island National Wildlife Refuge;

b. Revising paragraphs C.1., C.2., C.8., C.12., C.13., D.1., and D.2., and adding

paragraph D.4. of Harris Neck National Wildlife Refuge;

c. Revising the introductory text of paragraph A., revising paragraphs A.1., A.3., B.1., and B.3., removing paragraph B.6., redesignating paragraphs B.7. and B.8. as paragraphs B.6. and B.7., and revising paragraphs C.1., C.5., C.6., C.9., C.10., C.11., and D.4. of Savannah National Wildlife Refuge; and

d. Revising paragraphs C.1., C.7., C.9., C.15., C.16., D.1., and D.2. of Wassaw National Wildlife Refuge.

The revisions and additions read as follows:

§32.29 Georgia.

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Blackbeard Island National Wildlife Refuge

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C. Big Game Hunting. * * *

1. Hunters must possess and carry a signed refuge hunting regulations brochure on their persons at all times. You may obtain information about the quota hunt drawings at the Savannah Coastal Refuges Complex headquarters.

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9. We only allow bows. We prohibit crossbows (see §27.43 of this chapter).

* * * * *

19. We prohibit mooring boats to the government dock except for loading and unloading purposes.

D. Sport Fishing. * * *

1. We allow freshwater fishing year-round from legal sunrise to legal sunset except during managed deer hunts.

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5. We allow bank/beach saltwater fishing into estuarine waters only from legal sunrise to legal sunset except during managed hunts.

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Harris Neck National Wildlife Refuge

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C. Big Game Hunting. * * *

1. To participate in the refuge bow hunt, hunters must possess and carry a signed refuge hunting regulations brochure on their person at all times. To participate in the refuge gun hunt, hunters must submit the Quota Deer Hunt Application Form (FWS Form 3-2354). If drawn, hunters must submit a permit fee in order to receive the hunt permit. You may obtain information on hunt regulations brochures, quota hunt applications, and quota hunt drawings at the refuge office.

2. Each hunter may place one stand on the refuge during the week preceding each hunt, but you must remove stands by the end of each hunt (see §27.93 of this chapter).

* * * * *

8. During the hunts we will restrict vehicles to the auto tour route (see §27.31 of this chapter) and allow two-way traffic.

* * * * *

12. During the gun hunt, we allow only shotguns (20 gauge or larger; slugs only) and bows. We prohibit crossbows (see §27.43 of this chapter) for hunting.

13. We prohibit target practice (see §27.42 of this chapter).

* * * * *

D. Sport Fishing. * * *

1. We allow saltwater fishing year-round in the estuarine waters adjacent to the refuge.

2. We allow bank fishing into estuarine waters only from legal sunrise to legal sunset except during managed hunts.

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4. We prohibit freshwater fishing.

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Savannah National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of duck and coot on designated areas of the refuge north of Georgia Highway 25/South Carolina Highway 170 in accordance with State regulations subject to the following conditions:

1. You must possess and carry a signed refuge hunt regulations brochure at all times while hunting on the refuge. To participate in the youth waterfowl hunt, hunters must submit the Waterfowl Lottery Application (FWS Form 3-2355). If drawn, youth hunters must submit a permit fee in order to receive the hunt permit. You may obtain information on regulations brochures, quota hunt applications, and quota hunt drawings at the refuge headquarters.

* * * * *

3. We prohibit hunting within 100 yards (90 m) of GA Highway 25/SC Highway 170, and in or on Middle and Steamboat Rivers and Houstown Cut, and closer than 50 yards (45 m) from the shoreline of these waterways.

* * * * *

B. Upland Game Hunting. * * *

1. You must possess and carry a signed refuge hunt regulations brochure at all times while hunting on the refuge. Refuge hunt regulations brochures and other information are available at the refuge headquarters.

* * * * *

3. We prohibit hunting within 100 yards (90 m) of U.S. Highway 17, GA Highway 25/SC Highway 170, refuge facilities, railroad rights of way, and within areas marked as closed.

* * * * *

C. Big Game Hunting. * * *

1. You must possess and carry a signed refuge hunt regulations brochure at all times while hunting on the refuge. To participate in the gun hunt for wheelchair-dependent hunters, hunters must submit the Quota Deer Hunt Application (FWS Form 3-2354). If drawn, hunters must submit a permit fee in order to receive the hunt permit. You may obtain information on hunt regulations brochures, quota hunt applications, and quota hunt drawings at the refuge headquarters.

* * * * *

5. We only allow shotguns (20 gauge or larger; slugs only), muzzleleaders, and bows for deer and hog hunting throughout the designated hunt area during the November gun hunt and the March hog hunt.

6. You must remove hunt stands daily (see §27.93 of this chapter).

* * * * *

9. Conditions B3, B7, A4, and A5 apply.

10. We allow turkey hunting during a special 16–day turkey hunt in April. Turkey hunters may only harvest three gobblers.

11. We allow shotguns with only #2 shot or smaller and bows for turkey hunting in accordance with State regulations. We prohibit crossbows (see §27.43 of this chapter) and the use of slugs or buckshot during turkey hunts.

D. Sport Fishing. * * *

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4. Anglers may bank fish year-round in the canals adjacent to the Laurel Hill Wildlife Drive.

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Wassaw National Wildlife Refuge

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C. Big Game Hunting. * * *

1. Hunters must carry a signed refuge hunting regulations brochure on their persons at all times. You may obtain hunt information and permits at the Savannah Coastal Refuges Complex headquarters.

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7. We prohibit target practice (see §27.42 of this chapter).

* * * * *

9. For hunting, we only allow shotguns (20 gauge or larger; slugs only), centerfire rifles of .22 caliber or larger, bows, and primitive weapons during the

gun hunt. We prohibit crossbows (see §27.43 of this chapter).

* * * * *

15. Hunters may check-in at the refuge dock no more than 1 day in advance of the opening day of the hunt.

16. Hunters must be off the island by 12 p.m. (noon) the day following the last day of the hunt.

* * * * *

D. Sport Fishing. * * *

1. We allow saltwater fishing year-round in the estuarine waters adjacent to the refuge.

2. We allow bank/beach fishing into estuarine waters only from legal sunrise to legal sunset except during managed hunts.

* * * * *

9. Amend §32.32 Illinois by removing paragraph A.6., redesignating paragraphs A.7. and A.8. as paragraphs A.6. and A.7., revising newly redesignated paragraphs A.7.iv. and A.7.v., removing newly redesignated paragraph 7.xi., and by redesignating newly designated paragraph A.7.xii. as A.7.xi. of Cypress Creek National Wildlife Refuge to read as follows:

§32.32 Illinois.

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Cypress Creek National Wildlife Refuge

A. Migratory Game Bird Hunting. * * *

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7. * * *

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iv. We allow hunting from ½ hour before legal sunrise until 3 p.m.

v. Hunters must exit the reserve by 4 p.m.

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10. Amend §32.33 Indiana by revising paragraphs B.1. and B.3., adding paragraph B.5., revising paragraphs C.2., C.3., C.4., and C.7., adding paragraph C.8., and revising paragraph D.1. of Muscatatuck National Wildlife Refuge. The revisions and additions read as follows:

§32.33 Indiana.

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Muscatatuck National Wildlife Refuge

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B. Upland Game Hunting. * * *

1. We prohibit hunting and the discharge of a weapon within 100 yards (90 m) of any dwelling, private property line, or any other building that may be occupied by people, pets, or livestock.

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3. We allow only shotguns for upland game hunting.

* * * * *

5. We require hunters to read the current refuge hunting brochure, sign it, and then carry it while hunting.

C. Big Game Hunting. * * *

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2. You must possess and carry a State-issued refuge hunting permit to hunt deer during the State early archery and muzzleloader deer seasons.

3. We prohibit deer hunting during the State firearms season except in compliance with condition C2.

4. Our late archery season deer hunt is open from the end of the State muzzleloader season to the conclusion of the State late archery season.

* * * * *

7. We require successful deer and turkey hunters to report their harvest on the Big Game Harvest Report (FWS Form 3-2359) at a box at the entrance gate before leaving the refuge.

8. We allow only spring turkey hunting on the refuge, and hunters must possess a State-issued refuge hunting permit.

D. Sport Fishing. * * *

1. We allow the use of boats (hand- or foot-propelled only) on Stanfield Lake. We prohibit the use of electric or gasoline motors.

* * * * *

11. Amend §32.35 Kansas by:

a. Removing paragraph C.2. and redesignating paragraphs C.3. through C.6. as paragraphs C.2. through C.5. of Flint Hills National Wildlife Refuge.

b. Revising paragraph A.8., removing paragraph C.3., redesignating paragraphs C.4. through C.10. as C.3. through C.9., and revising paragraph D.2. of Kirwin National Wildlife Refuge; and

c. Revising the introductory text of paragraph A. and removing paragraphs C.4. and C.5. of Marais des Cygnes National Wildlife Refuge.

The revisions read as follows:

§32.35 Kansas.

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Kirwin National Wildlife Refuge

A. Migratory Game Bird Hunting. * * *

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8. We allow motorized vehicles only on designated roads, parking lots, and boat ramps (see §27.31 of this chapter).

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D. Sport Fishing. * * *

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2. We allow motorized vehicles only on designated roads, parking lots, and boat ramps (see §27.31 of this chapter). We prohibit motorized vehicles on the ice.

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Marais des Cygnes National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of goose, duck, coot, rail, snipe, woodcock, and mourning dove on designated areas of the refuge in accordance with State regulations subject to the following conditions:

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12. Amend §32.36 Kentucky by revising the introductory text of paragraph A., revising paragraphs A.1., and A.9. through A.17., adding paragraphs A.18. through A.20., revising the introductory text of paragraph B., revising paragraphs B.1., B.2., and C.1., adding paragraph C.5., revising the introductory text of paragraph D., and adding paragraph D.2.viii. of Clarks River National Wildlife Refuge. The revisions and additions read as follows:

§32.36 Kentucky.

* * * * *

Clarks River National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of mourning dove, woodcock, common snipe, Canada and snow goose, coot, crow, and waterfowl listed in 50 CFR 10.13 under DUCKS on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Except for raccoon, opossum, and bullfrog hunting, access to the refuge is from 2 hours before legal sunrise to 2 hours after legal sunset.

* * * * *

9. We prohibit discharge of firearms or carrying loaded firearms used for hunting on or within 200 feet (90 m) of any home, the abandoned railroad tracks, graveled roads, and hiking trails.

10. We prohibit possession or use of alcoholic beverages.

11. We prohibit the use of any electronic call or other electronic device used for producing or projecting vocal sounds of any wildlife species.

12. We allow use of trail cameras. Cameras may be used year-round. Cameras must have owner's name, address, and phone number clearly displayed.

13. An adult age 21 or older must supervise all youth hunters age 15 and younger. Youth hunters must remain in sight and normal voice contact with the adult. On small game hunts, the adult may supervise no more than two youths; on big game hunts, the adult may supervise no more than one youth.

14. All persons born after January 1, 1975, must possess a valid hunter education card while hunting.

15. We prohibit the use of centerfire weapons when hunting crow.

16. We allow dogs for waterfowl, small game, and fall turkey hunting. Hunters must control all dogs by leash or chain if they are not legally using them for hunting. Dog owners/handlers must have a collar on each dog with the owner's name, address, and telephone number.

17. Waterfowl hunters must cease hunting and pick up decoys and equipment (see §§27.93 and 27.94 of this chapter), unload firearms used for hunting (see §27.42(b) of this chapter), by 12 p.m. (noon) daily during the State waterfowl season.

18. Waterfowl hunters must remove decoys, blinds, boats, and all other equipment (see §27.93 of this chapter) and be out of the field daily by 2 p.m.

19. We close to all entry as posted the Sharpe-Elva Water Management Units from November 1 through March 31 with the exception of drawn permit holders (name/address/phone) and their guests.

20. We only allow waterfowl hunting on the Sharpe-Elva Water Management Units on specified days during the State waterfowl season. We only allow hunting by individuals in possession of a refuge draw permit and their guests. State regulations and the following conditions apply:

i. Application procedures and eligibility requirements are available from the refuge office.

ii. We allow permit holders and up to three guests to hunt their assigned zone and/or provided blind on the designated date. We prohibit guests on the Sharpe-Elva Water Management Units without the attendance of the permit holder.

iii. We prohibit selling, trading, or bartering of permits. This permit is nontransferable.

iv. You may place decoys out the first morning of the drawn hunt, and you must remove them at the close of the drawn hunt (see §27.93 of this chapter).

v. We prohibit watercraft on the Sharpe-Elva Water Management Units, except for drawn permit holders to access their blinds and retrieve downed birds as needed.

B. Upland Game Hunting. We allow hunting of squirrel, rabbit, quail, raccoon, opossum, and coyote on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A1 through A16 apply.

2. We close squirrel, rabbit, crow, woodcock, snipe, dove, and quail seasons during muzzleloader and modern gun deer hunts.

* * * * *

C. Big Game Hunting. * * *

1. Conditions A1 through A16 and B3 apply.

* * * * *

5. Ground blinds used for the purpose of hunting any species during the deer modern gun, muzzleloader, and youth firearms seasons must display solid, unbroken, hunter orange visible from all sides.

D. Sport Fishing. We allow fishing on designated areas of the refuge in accordance with State law subject to the following conditions:

* * * * *

2. * * *

* * * * *

viii. We prohibit the hunting or harvesting of frog.

* * * * *

13. Amend §32.37 Louisiana by:

a. Revising paragraphs A.1., A.4., A.10., removing paragraph A.11., redesignating paragraphs A.12. through A.15. as paragraphs A.11. through A.14., revising newly redesignated paragraphs A.12. and A.14., adding new paragraphs A.15. and A.16., revising paragraphs B.1. and B.2., removing paragraph B.5., redesignating paragraph B.6. as paragraph B.5. and revising newly redesignated paragraph B.5., revising paragraphs C.1., C.2., and C.7., removing paragraph C.8., redesignating paragraphs C.9. through C.12. as paragraphs C.8. through C.11., revising newly redesignated paragraph C.11., adding new paragraph C.12., revising paragraph D.3., and adding paragraph D.7. of Bayou Cocodrie National Wildlife Refuge;

b. Revising paragraph D.6. and adding paragraphs D.9. and D.10. of Bayou Sauvage National Wildlife Refuge;

c. Revising the introductory text of paragraph A., revising paragraphs A.3., and A.8. through A.10., adding paragraphs A.13. through A.17., revising paragraphs B.3., B.4., B.6., and C.3. through C.9., adding paragraphs C.10. and C.11., and revising paragraphs D.4. and D.5. of Bayou Teche National Wildlife Refuge;

d. Revising paragraphs A.3., A.6., and A.7., adding paragraph A.8., revising paragraphs A.9., A.10., A.11., and A.12., adding paragraphs A.15. through A.17., revising paragraphs B.2., B.4., C.1., C.4., C.5., C.7., and C.8., adding paragraphs C.9. and C.10., and revising paragraphs D.6. and D.7. of Big Branch Marsh National Wildlife Refuge;

e. Revising paragraph A., revising the introductory text of paragraph B., revising paragraphs B.1., B.2., and B.4., revising the introductory text of paragraph C., and revising paragraph C.1., removing paragraph C.5., redesignating paragraph C.6. as paragraph C.5., and revising paragraph D.8. of Black Bayou Lake National Wildlife Refuge;

f. Revising paragraphs A.1., A.3., A.5. through A.7., A.10., and A.11., adding paragraphs A.12. through A.15., revising paragraphs B., C.1. through C.3., C.5., C.7., C.8., C.10., and D.2. through D.4., and adding paragraph D.7. of Bogue Chitto National Wildlife Refuge;

g. Revising paragraph D. of Breton National Wildlife Refuge;

h. Revising Cameron Prairie National Wildlife Refuge;

i. Revising Cat Island National Wildlife Refuge;

j. Revising Catahoula National Wildlife Refuge;

k. Revising paragraphs A., B.1., B.3., the introductory text of paragraph C., C.1., and C.6. through C.10., and removing paragraph C.11. of D'Arbonne National Wildlife Refuge;

l. Revising paragraphs A., B.4., C.1. through C.3., and C.5., adding paragraphs C.7. through C.9., and revising paragraph D.4. of Delta National Wildlife Refuge;

m. Revising Grand Cote National Wildlife Refuge;

n. Revising paragraphs A., C., D.1., D.10. through D.12., and adding paragraphs D.13. and D.14. of Lacassine National Wildlife Refuge;

o. Revising Lake Ophelia National Wildlife Refuge;

p. Revising Red River National Wildlife Refuge;

q. Revising Sabine National Wildlife Refuge;

r. Revising Tensas River National Wildlife Refuge; and

s. Revising the introductory text of paragraph A., revising paragraphs A.1. through A.4., and A.11., revising the introductory text of paragraph B., revising paragraphs B.2., B.3., C.1., and C.3., removing paragraph C.5., redesignating paragraphs C.6. through C.12. as paragraphs C.5. through C.11., revising the introductory text of paragraph D., revising paragraph D.4., and adding paragraphs D.7. and D.8. of Upper Ouachita National Wildlife Refuge.

The revisions and additions read as follows:

§32.37 Louisiana.

* * * * *

Bayou Cocodrie National Wildlife Refuge

A. Migratory Game Bird Hunting. * * *

1. We require a $15 Annual Public Use Permit (signature required) for all hunters and anglers age 17 and older. The user must sign and carry the permit.

* * * * *

4. Hunters must remove harvested waterfowl, temporary blinds, and decoys (see §27.93 of this chapter) used for duck hunting by 1 p.m. daily.

* * * * *

10. Refuge users must check all game taken before leaving the refuge at one of the self-clearing check stations indicated on the map in the Refuge Public Use Brochure.

* * * * *

12. We allow all-terrain vehicles (ATVs) and utility vehicles as per State Wildlife Management Area (WMA) regulations and size specifications on designated trails (see §27.31 of this chapter) from September 1 through the hunting season. An ATV is an off-road vehicle with factory specifications not to exceed the following: weight 750 pounds (337.5 kg), length 85 inches (212.5 cm), and width 48 inches (120 cm). We restrict ATV tires to those no larger than 25 x12 with a maximum 1 inch (2.5 cm) lug height and a maximum allowable tire pressure of 7 psi as indicated on the tire by the manufacturer.

* * * * *

14. You may possess only approved nontoxic shot while hunting on the refuge (see §32.2(k)). This requirement only applies to the use of shotgun ammunition.

15. Each refuge user must obtain a daily use reporting card (one per person) and place it on the dashboard of their vehicle or in their boat where their personal information is readable and in plain view. Users must complete all the information requested and return the cards to the refuge kiosk/check stations upon departure from the refuge.

16. Refuge users may enter the refuge no earlier than 4 a.m. and must exit the refuge by 2 hours after legal sunset except that raccoon and opossum hunters during the month of February may use the refuge at night.

B. Upland Game Hunting. * * *

1. We allow squirrel and rabbit hunting within the State season. We will list specific refuge season dates annually in the Refuge Public Use Brochure.

2. Conditions A1, A3, and A7 through A16 apply.

* * * * *

5. Youth hunters under age 17 must have completed a hunter education course and possess and carry evidence of completion. An adult age 21 or older must closely supervise youth hunters (within sight and normal voice contact). One adult may supervise no more than one youth hunter while hunting upland game.

C. Big Game Hunting. * * *

1. Conditions A1, A3, and A7 through A16 apply.

2. The bag limit is one deer (of either sex) per day. The State season limit and tagging regulations apply.

* * * * *

7. We allow deer hunting within the State season. We will list specific refuge season dates annually in the Refuge Public Use Brochure.

* * * * *

11. Youth hunters under age 17 must have completed a hunter education course and possess and carry evidence of completion. An adult age 21 or older must closely supervise youth hunters (within sight and normal voice contact). One adult may supervise no more than one youth hunter while hunting big game.

12. There is a $5 application fee per person for each lottery hunt application.

D. Sport Fishing. * * *

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3. We prohibit commercial fishing.

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7. We prohibit wire traps, slat traps, wire nets, hoop nets, trotlines, yo-yos, and jug lines on the refuge.

Bayou Sauvage National Wildlife Refuge

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D. Sport Fishing. * * *

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6. We prohibit air-thrust boats, aircraft, mud boats, and air-cooled propulsion engines on the refuge.

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9. We prohibit motorized vehicles on all levees.

10. Persons possessing, transporting, or carrying firearms on national wildlife refuges must comply with all provisions of State and local law. Persons may only use (discharge) firearms in accordance with refuge regulations (§27.42 of this chapter and refuge-specific regulations in part 32).

Bayou Teche National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of duck, goose, and coot on designated areas of the refuge in accordance with State regulations subject to the following conditions:

* * * * *

3. An adult at least age 21 must supervise youth hunters under age 16 during all hunts. One adult may supervise two youths during small game and migratory game bird hunts but may supervise only one youth during big game hunts. Youth must remain within normal voice contact of the adult who is supervising them. Parents or adult guardians are responsible for ensuring that hunters under age 16 do not engage in conduct that would constitute a violation of refuge regulations.

* * * * *

8. We prohibit possession or distribution of bait while in the field and hunting with the aid of bait, including any grain, salt, minerals, or any nonnaturally occurring food attractant on the refuge (see §32.2(h)).

9. We allow hunting until 12 p.m. (noon). Hunters may only enter the refuge after 4 a.m.

10. We allow waterfowl hunting in Centerville, Garden City, Bayou Sale, North Bend East, and North Bend West Units during the State waterfowl season. We open no other units to migratory waterfowl hunting.

* * * * *

13. We prohibit horses and ATVs.

14. We prohibit the use of any type of material used as flagging or trail markers except bright eyes.

15. We prohibit target shooting on the refuge.

16. We prohibit any person or group to act as a hunting guide, outfitter, or in any other capacity that any other individual(s) pays or promises to pay directly or indirectly for services rendered to any other person or persons hunting on the refuge, regardless of whether such payment is for guiding, outfitting, lodging, or club membership.

17. Persons possessing, transporting, or carrying firearms on national wildlife refuges must comply with all provisions of State and local law. Persons may only use (discharge) firearms in accordance with refuge regulations (§27.42 and specific refuge regulations in part 32).

B. Upland Game Hunting. * * *

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3. We allow hunters to enter the refuge after 4 a.m., but they must leave the refuge 1 hour after legal sunset.

4. We allow hunting 7 days per week beginning with the opening of the State season through the last day of the State waterfowl season in the West Zone in the following refuge units: Centerville, Garden City, Bayou Sale, North Bend—East, and North Bend—West Units. We

open no other units to the hunting of upland game.

* * * * *

6. Conditions A1 through A3, A5 through A8, and A12 through A17 apply, except we allow the use of .17 and .22 caliber rimfire or smaller while hunting small game.

C. Big Game Hunting. * * *

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3. We allow hunting in the Centerville, Garden City, Bayou Sale, North Bend—East, and North Bend—West. We do not open the Bayou Sale Unit for any big game firearm hunts.

4. We allow each hunter to possess only one deer per day, the deer may be a buck or a doe. State season limits apply.

5. You may take no other native or feral wildlife other than white-tailed deer while engaged in big game hunting (see §27.21 of this chapter).

6. Hunters may use only portable deer stands. Hunters may erect deer stands one day before the deer archery season and must remove them from the refuge within 1 day after the season closes. Hunters may place only one deer stand on a refuge. Deer stands must have owner's name, address, and phone number clearly printed on the stand. Hunters must place stands in a nonhunting position when not in use (see §§27.93 and 27.94 of this chapter).

7. All hunters (including archery hunters) except waterfowl hunters must wear and display 400 square inches (2,600 cm^2) of unbroken hunter orange as the outermost layer of clothing on the chest and back and a hunter-orange cap during deer gun seasons. Deer hunters hunting from concealed ground blinds must display a minimum of 400 square inches of hunter orange above or around their blinds which is visible from 360 degrees.

8. Conditions A1 through A3, A5 through A8, A13 through A17, B3, and B5 apply.

9. We prohibit the use of trail cameras.

10. We prohibit the use of deer decoys.

11. We prohibit dogs and driving deer.

D. Sport Fishing. * * *

* * * * *

4. The Franklin Unit canals (birdfoot canals) will be open for motorized boats between April 15 and August 31. This unit is open to nonmotorized boats all year.

5. Conditions A6, A13, A15, and A17 apply.

Big Branch Marsh National Wildlife Refuge

A. Migratory Game Bird Hunting. * * *

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3. We allow only temporary blinds, and hunters must remove the blinds and decoys by 1 p.m. (see §27.93 of this chapter).

* * * * *

6. We prohibit air-thrust boats, aircraft, motorized pirogues, mud boats, and air-cooled propulsion engines on the refuge.

7. An adult age 21 or older must supervise youth hunters under age 16 during all hunts. One adult may supervise two youths during small game and migratory bird hunts but may supervise only one youth during big game hunts. Youth must remain within normal voice contact of the adult who is supervising them. Parents or adult guardians are responsible for ensuring that hunters under age 16 do not engage in conduct that would constitute a violation of refuge regulations.

8. We prohibit camping.

9. Persons possessing, transporting, or carrying firearms on national wildlife refuges must comply with all provisions of State and local law. Persons may only use (discharge) firearms in accordance with refuge regulations (§27.42 and specific refuge regulations in part 32).

10. We prohibit hunting within 150 feet (45 m) from the centerline of any road open to vehicle travel, Boy Scout Road, any maintained trails, or from any residence. We prohibit hunting in refuge-designated closed areas which we post on the refuge and identify in the refuge hunt permits (see §27.31 of this chapter).

11. Hunters may possess only approved nontoxic shot while hunting on the refuge (see §32.2(k)).

12. Hunters may not enter the refuge before 4 a.m. and must exit the refuge no later than 2 hours after legal sunset for that day.

* * * * *

15. We prohibit all-terrain vehicles.

16. We prohibit target shooting on the refuge.

17. We prohibit the use of any type of material used as flagging or trail markers except bright eyes.

B. Upland Game Hunting. * * *

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2. You may only use dogs for hunting squirrel and rabbit after the close of the State archery deer season.

* * * * *

4. Conditions A5 through A10, A11 except nontoxic shot must be shot size 4 or smaller, and we allow .17 and .22 caliber rimfire rifles, and A12 through A17 apply.

C. Big Game Hunting. * * *

1. We are open only during the State season for archery hunting of deer.

* * * * *

4. You may take deer of either sex in accordance with State-approved archery equipment and regulations. The State season limits apply. Longbow, compound bow, and crossbow or any bow drawn, held, or released by mechanical means will be a legal means of take during the deer archery season.

5. Hunters may erect temporary deer stands 1 day prior to the start of deer archery season. Hunters must remove all deer stands within 1 day after the archery deer season closes. Hunters may place only one deer stand on a refuge. Deer stands must have the owner's name, address and phone number clearly printed on the stand. Hunters must place stands in a nonhunting position when not in use (see §§27.93 and 27.94 of this chapter).

* * * * *

7. We prohibit possession or distribution of bait while in the field and hunting with the aid of bait, including any grain, salt, minerals, or any nonnaturally occurring food attractant on the refuge. (see §32.2(h)).

8. Conditions A5 through A10 and A12 through A17 apply.

9. We prohibit the use of trail cameras.

10. We prohibit the use of deer decoys.

D. Sport Fishing. * * *

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6. Conditions A6, A8, and A13 through A16 apply.

7. We prohibit the taking of turtle (see §27.21 of this chapter).

Black Bayou Lake National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of duck, goose, coot, and woodcock on designated areas of the refuge as indicated in the refuge brochure in accordance with State regulations subject to the following conditions:

1. You must possess and carry a signed refuge hunt permit (signed refuge brochure).

2. We allow waterfowl hunting until 12 p.m. (noon) during the State season, except we do not open during the special teal season and State youth waterfowl hunt.

3. We prohibit accessing the hunting area by boat from Black Bayou Lake.

4. You may enter the refuge no earlier than 4 a.m.

5. We prohibit hunting within 100 feet (45 m) of the maintained right-of-way of roads and from or across ATV trails (see §27.31 of this chapter). We prohibit hunting within 50 feet (15 m), or trespassing on above-ground oil or gas production facilities.

6. We prohibit leaving boats, blinds, and decoys unattended.

7. We allow dogs to only locate, point, and retrieve when hunting for migratory game birds.

8. An adult at least age 21 must supervise youth hunters under age 16 during all hunts. One adult may supervise two youths during small game and migratory bird hunts but may supervise only one youth during big game hunts. Youth must remain within normal voice contact of the adult who is supervising them. Parents or adult guardians are responsible for ensuring that hunters under age 16 do not engage in conduct that would constitute a violation of refuge regulations.

9. We prohibit any person or group to act as a hunting guide, outfitter, or in any other capacity that any other individual(s) pays or promises to pay directly or indirectly for services rendered to any other person or persons hunting on the refuge, regardless of whether such payment is for guiding, outfitting, lodging, or club membership.

10. We only allow ATVs on trails (see §27.31of this chapter) designated for their use and marked by signs. We do not open ATV trails March 1 through August 31. An all-terrain vehicle (ATV) is an off-road vehicle with factory specifications not to exceed the following: Weight 750 lbs. (337.5 kg), length 85 inches (212.5 cm), and width 48 inches (120 cm). We restrict ATV tires to those no larger than 25 inch x12 inch (62.5 cm x 30 cm) with a maximum of 1 inch (2.5 cm) lug height and a maximum allowable tire pressure of 7 psi as indicated on the tire by the manufacturer.

B. Upland Game Hunting. We allow hunting of quail, squirrel, rabbit, raccoon, and opossum on designated areas as indicated in the refuge brochure and in accordance with State regulations subject to the following conditions:

1. Conditions A1, A3, A5, A8, and A9 apply.

2. We prohibit taking small game with firearms larger than .22 caliber rimfire, shotgun slugs, and buckshot.

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4. We allow use of dogs to hunt squirrel and rabbit during January and February only.

* * * * *

C. Big Game Hunting. We allow hunting of white-tailed deer on designated areas of the refuge as indicated in the refuge brochure in accordance with State regulations subject to the following conditions:

1. Conditions A1, A3, A5, A8, A9, A10, and B7 apply.

* * * * *

D. Sport Fishing. * * *

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8. We prohibit crossing the boat lane booms.

Bogue Chitto National Wildlife Refuge

A. Migratory Game Bird Hunting. * * *

1. We allow hunting from 30 minutes before legal sunrise until 12 p.m. (noon), including the State special teal season and State youth waterfowl hunt. You must remove blinds and decoys by 1 p.m. (see §27.93 of this chapter). We do not open the refuge to goose hunting for that part of the season that extends beyond the regular duck season.

* * * * *

3. We allow public hunting refuge-wide during the open State season for listed migratory game bird species.

* * * * *

5. We require possession of a signed refuge hunt permit (signed refuge brochure) while hunting.

6. An adult at least age 21 must supervise youth hunters under age 16 during all hunts. One adult may supervise two youths during small game and migratory bird hunts but may supervise only one youth during big game hunts. Youth must remain within normal voice contact of the adult who is supervising them. Parents or adult guardians are responsible for ensuring that hunters under age 16 do not engage in conduct that would constitute a violation of refuge regulations.

7. We prohibit hunting within 150 feet (45 m) from the centerline of any public road, refuge road, designated or maintained trail, building, residence, designated public facility, or from or across aboveground oil or gas or electric facilities.

* * * * *

10. We prohibit horses and ATVs.

11. You may only possess approved nontoxic shot while hunting on the refuge (see §32.2(k)).

12. We prohibit the use of any type of material used as flagging or trail markers, except bright eyes.

13. Persons possessing, transporting, or carrying firearms on national wildlife refuges must comply with all provisions of State and local law. Persons may only use (discharge) firearms in accordance with refuge regulations (see §27.42 and specific refuge regulations in part 32).

14. We prohibit possession or distribution of bait while in the field and hunting with the aid of bait, including any grain, salt, minerals, or any nonnaturally occurring food attractant on the refuge (see §32.2(h)).

15. We prohibit target shooting on the refuge.

B. Upland Game Hunting. We allow hunting of squirrel, rabbit, raccoon, and opossum on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. You may use dogs for rabbit and squirrel from November 1 to the end of the State season except during the refuge gun and primitive firearm season.

2. You may use dogs for raccoon and opossum from January 1 through the last day of February.

3. We will close the refuge to hunting (except waterfowl) and camping when the Pearl River reaches 15.5 feet (4.65 m) on the Pearl River Gauge at Pearl River, Louisiana.

4. We prohibit the take of feral hog during any upland game hunts.

5. All hunters (including archery hunters and small game hunters) except waterfowl hunters must wear and display 400 square inches (2,600 cm^2) of unbroken hunter orange as the outermost layer of clothing on the chest and back and a hunter-orange cap during deer gun seasons. We require hunters participating in dog season for squirrels and rabbits to wear a hunter-orange cap. All other hunters including archers (while on the ground), except waterfowl hunters, also must wear a hunter-orange cap during the dog season for squirrels and rabbits. Deer hunters hunting from concealed ground blinds must display a minimum of 400 square inches of hunter orange above or around their blinds which is visible from 360 degrees.

6. We prohibit the use of trail cameras.

7. Conditions A5 through A15 apply, except that you may use .17- and .22-cal rifles, and the nontoxic shot in your possession must be size 4 or smaller.

C. Big Game Hunting. * * *

1. Conditions A5 through A10, A12 through A15, B3, B5, and B6 apply.

2. You may use only portable deer stands. You may erect deer stands one day before the deer archery season and remove them from the refuge within 1 day after this season closes. Hunters may place only one deer stand on a refuge. Deer stands must have owner's name, address, and phone number clearly printed on the stand. Hunters must place stands in a nonhunting

position when not in use (see §§27.93 and 27.94 of this chapter).

3. We allow archery deer and hog hunting during the open State deer archery season. You may take deer of either sex in accordance with State-approved archery equipment and regulations. The State season limits apply. Longbow, compound bow, and crossbow or any bow drawn, held, or released by mechanical means will be a legal means of take during the deer archery season.

* * * * *

5. We list specific dates for primitive weapons big game hunts in the refuge hunt brochure. Legal primitive firearms used for hunting for primitive firearms season include:

i. Rifles, .44 caliber minimum, all of which must load exclusively from the muzzle or cap and ball cylinder; use of black powder or approved substitute only; use of ball or bullet projectile only, including saboted bullets, including muzzleloaders known as "in line" muzzleloaders; and

ii. Single shot, breech-loading rifles, .38 caliber or larger of a kind or type manufactured prior to 1900; and replicas, reproductions, or reintroductions of that type of rifle having an exposed hammer that use metallic cartridges loaded with black powder or modern smokeless powder. Hunters may fit all of the above with magnified scopes.

* * * * *

7. We prohibit using shot larger than No. 2 while hunting during turkey season.

8. You may take hog as incidental game while participating in the refuge archery, primitive weapon, and general gun deer hunts only. We list specific dates for the special hog hunts in January and February in the refuge hunt brochure. During the special hog hunts you must use trained hog-hunting dogs to aid in the take of hog. During the special hog hunts you may take hog from ½ hour before legal sunrise to ½ hour after legal sunset, and you must use pistol or rifle ammunition not larger than .22 caliber rimfire or shotgun with nontoxic shot to take the hog after it has been caught by dogs. A8 applies during special hog hunts.

* * * * *

10. We prohibit the use of deer and turkey gobbler decoys.

D. Sport Fishing. * * *

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2. Conditions A8 and A10 apply.

3. We close the fishing ponds at the Pearl River Turnaround to fishing and boating during the months of April, May, and June.

4. When open, we allow boats in the fishing ponds at the Pearl River Turnaround that do not have gasoline-powered engines attached. Anglers must hand launch these boats into the ponds.

* * * * *

7. We prohibit all commercial finfishing and shellfishing.

Breton National Wildlife Refuge

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D. Sport Fishing. We allow sport finfishing and shellfishing on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Crabbers must tend crabbing equipment at all times.

2. Anglers may not use trotlines, slat traps, or nets.

3. We prohibit camping.

4. We will post as closed to all entry portions of the refuge during migratory bird nesting seasons to reduce disturbance to colonies of brown pelicans and other shore birds.

Cameron Prairie National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of goose, duck, coot, gallinule, snipe, and dove on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. The refuge will be open on selected days for migratory game bird hunting as identified in the refuge hunt permit (signed brochure) and regulations brochure.

2. We prohibit entrance to the waterfowl hunting area earlier than 4 a.m. Shooting hours for waterfowl hunts ends at 12 p.m. (noon) each day. Hunters must leave the refuge no later than 1 hour after legal sunset.

3. We require every hunter to possess and carry a valid, signed refuge hunt permit and regulations brochure.

4. Every hunter must complete and turn in a Migratory Bird Hunt Report (FWS Form 3-2361) available from a self-clearing check station after each hunt.

5. We prohibit hunting within 50 yards (45 m) of any public road, refuge road, trail, building, resident, or designated public facility.

6. We prohibit all persons or groups from acting as guides, outfitters, or in any other capacity in which any individual(s) pays or promises to pay directly or indirectly for service rendered to any person or persons hunting on the refuge, regardless of whether such payment is for guiding, outfitting, lodging, or club membership.

7. We prohibit overnight camping on the refuge.

8. We allow dogs when migratory bird hunting for the purpose of locating, pointing, and retrieving only.

9. We prohibit the use or possession of alcoholic beverages while hunting (see §32.2(j)).

10. Hunters must remove all hunting-related equipment (see §27.93 of this chapter) from the refuge immediately following each day's hunt.

11. Persons possessing, transporting, or carrying firearms on national wildlife refuges must comply with all provisions of State and local law. Persons may only use (discharge) firearms in accordance with refuge regulations (see §27.42 and specific refuge regulations in part 32 of this chapter).

12. An adult at least age 21 must supervise youth hunters under age 16 during all hunts. One adult may supervise two youths during small game and migratory bird hunts but may supervise only one youth during big game hunts. Youth must remain within normal voice contact of the adult who is supervising them. Parents or adult guardians are responsible for ensuring that hunters under age 16 do not engage in conduct that would constitute a violation of refuge regulations.

B. Upland Game Hunting. [Reserved]

C. Big Game Hunting. We allow hunting of white-tailed deer on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. The refuge will be open for hunting on selected days as identified in the refuge hunt permit (signed brochure) and regulations brochure.

2. Conditions A3, A5 through A7, and A9 through A12 apply.

3. Each hunter must complete and turn in a Big Game Harvest Report (FWS Form 3-2359), available from a self-clearing check station, after each hunt.

4. We prohibit entrance to the hunting area earlier than 4 a.m. Hunters must leave the refuge no later than 1 hour after legal sunset.

D. Sport Fishing. We allow fishing, boating, crabbing, and cast netting on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We allow fishing with a rod and reel or a pole and line. We prohibit possession of any other type of fishing gear, including limb lines, gill nets, jug lines, yo-yos, or trotlines.

2. We allow recreational fishing, crabbing, or cast netting in the East Cove Unit year-round from legal sunrise to legal sunset, except during the Louisiana west zone waterfowl season or when the Grand Bayou Boat Bay is closed.

3. We prohibit fishing, crabbing, or cast netting from or trespassing on refuge water control structures at any time.

4. On the East cove Unit, we prohibit walking, wading, or climbing in or on the marsh, levees, or structures.

5. We allow sport fishing, crabbing, and cast netting in the Gibbstown Unit's Outfall Canal from March 15 through October 15.

6. We allow only nonpowered boats in the Bank Fishing Road waterways.

7. We allow only recreational crabbing with cotton hand lines or drop nets up to 24 inches (60 cm) outside diameter. We prohibit using floats on crab lines.

8. Anglers must attend all lines, nets, and bait and remove same from the refuge when through fishing (see §27.93 of this chapter).

9. The daily limit of crabs is 5 dozen (60) per boat or vehicle, regardless of the number of people thereon.

10. Cast net size is in accordance with State regulations.

11. The daily shrimp limit during the Louisiana inshore shrimp season is 5 gallons (19 L) of heads-on shrimp per day, per vehicle or boat.

12. We allow cast netting for bait on both the East Cove Unit and the Gibbstown Unit in accordance with State regulations when the units are open for public fishing only. Anglers must empty cast nets directly into the container from the net. The daily bait shrimp limit is one gallon (3.8 L) per day, per boat, outside the Louisiana inshore shrimp season.

13. Shrimp must remain in your actual custody while on the refuge.

14. We prohibit ATVs, air-thrust boats, and personal motorized watercraft (jet skis) in any refuge area (see §27.31(f) of this chapter).

15. We allow operation of outboard motors in refuge canals, bayous, and lakes. We allow only trolling motors in the marsh.

16. We prohibit all persons or groups from acting as guide, outfitter, or an any capacity in which any other individual(s) pay or promise to pay directly or indirectly for service rendered to any other person or persons fishing on the refuge, regardless of whether such payment is for guiding, outfitting, lodging, or club membership, unless authorized by a refuge Special Use Permit (FWS Form 3-1383).

17. We prohibit the taking of turtle (see §27.21 of this chapter).

18. We prohibit the commercialization of plants and wildlife unless authorized.

Cat Island National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of duck, goose, coot, and woodcock on designated areas of the refuge as shown on the refuge hunt brochure map in accordance with State regulations subject to the following conditions:

1. We require a $15 Annual Public Use Permit (signature only required) for all hunters and anglers age 17 and older. The refuge user must sign and carry this permit at all times while on the refuge.

2. Refuge users may enter the refuge no earlier than 4 a.m. and must exit the refuge by 2 hours after legal sunset.

3. You may possess only approved nontoxic shot while hunting on the refuge (see §32.2(k)).

4. You must use designated parking areas to participate in any refuge public use activity.

5. Youth hunters under age 17 must successfully complete a State-approved hunter education course. While hunting each youth must possess and carry a card or certificate of completion. Each youth hunter must remain within sight and normal voice contact of an adult age 21 or older. Each adult must possess and carry a refuge permit (Public Use Permit/signature only required) and may supervise no more than two youth hunters during waterfowl/upland game hunting.

6. We allow take of beaver, feral hog, nutria, raccoon, and coyote incidental to any refuge hunt with weapons legal for that hunt until you take the daily bag limit of game.

7. Refuge users must check all game taken leaving the refuge at one of the self-clearing check stations indicated on the map in the Refuge Public Use Brochure.

8. We allow all-terrain vehicles (ATVs) and utility-type vehicle (UTVs) as per State WMA regulations and size specifications on designated trails (see §27.31 of this chapter) from September 1 through the hunting season. An ATV is an off-road vehicle with factory specifications not to exceed the following: Weight 750 pounds (337.5 kg), length 85 inches (212.5 cm), and width 48 inches (120 cm). We restrict ATV tires to those no larger than 25 inches x12 inches (62.5 cm x 30 cm) with a maximum 1 inch (2.5 cm) lug height and a maximum allowable tire pressure of 7 psi as indicated on the tire by the manufacturer.

9. We prohibit hunting within 150 feet (45 m) of any public road, refuge road, trail or ATV trail, building, residence, or designated public facility.

10. We prohibit the possession or use of any type of trail-marking material.

11. We prohibit horses or mules.

12. We allow parking only in designated parking areas.

13. We prohibit camping or overnight parking on the refuge.

14. We prohibit air-thrust boats on the refuge.

15. We prohibit all other hunting during refuge lottery deer hunts.

16. We allow waterfowl hunting on Tuesdays, Thursdays, Saturdays, and Sundays until 12 p.m. (noon) during the designated State duck season.

17. Hunters must remove harvested waterfowl, temporary blinds, and decoys (see §27.93 of this chapter) used for duck hunting by 1 p.m. daily.

18. We allow dogs to only locate, point, and retrieve when hunting for migratory game birds.

19. We prohibit accessing refuge property by boat from the Mississippi River.

20. We prohibit trapping.

21. We prohibit the possession of saws, saw blades, or machetes.

22. We prohibit possession of alcohol while hunting (see §32.2(j)).

23. We prohibit all commercial activities (including, but not limited to, guiding).

B. Upland Game Hunting. We allow hunting of squirrel and rabbit on designated areas of the refuge as shown on the refuge hunt brochure map in accordance with State regulations subject to the following conditions:

1. Conditions A1 through A15, A19, A20, A23, and A24 apply.

2. While upland game hunting, we prohibit the possession of firearms larger than .22 caliber rimfire, shotgun slugs, and buckshot (see §27.42 of this chapter).

3. We allow the use of squirrel and rabbit dogs from the day after the close of the State-designated season. We allow up to two dogs per hunting party for squirrel hunting.

4. We require the owner's name and phone number on the collars of all dogs.

5. We prohibit possession or distribution of bait or hunting with the aid of bait, including any grain, salt, minerals, or other feed or nonnaturally occurring attractant on the refuge (see §32.2(h)).

*C. Big Game Hunting.*We allow hunting of white-tailed deer on designated areas of the refuge as shown on the refuge hunt brochure map in accordance with State regulations subject to the following conditions:

1. Condition B1 applies.

2. We allow archery-only deer hunting on the refuge during the State archery deer season.

3. There is a $5 application fee per person for each lottery hunt application

(name/address/telephone number only required).

4. Hunters may not leave stands on the refuge until the opening day of archery season. Hunters must remove all stands by the end of the last day of the archery season. Hunters must clearly mark all stands used on the refuge with the name, address, and phone number of the owner. Hunters must use only portable deer stands, remove them from trees daily, and place freestanding stands in a nonhunting position daily (see §§27.93 and 27.94 of this chapter).

5. We prohibit the use of dogs to trail wounded game.

6. You may only take one deer of either sex per day during the deer season. State season limits apply.

7. We require a minimum of 400 square inches (2,600 cm^2) of unbroken-hunter orange as the outermost layer of clothing on the chest and back, and in addition we require a hat or cap of unbroken-hunter orange.

8. We prohibit driving or screwing nails, spikes, or other metal objects into trees or hunting from any tree into which such an object has been driven (see §32.2(i)).

9. We allow "still hunting" only. We prohibit man drives or use of dogs.

10. We prohibit use of climbing spurs.

D. Sport Fishing. We allow fishing on designated areas of the refuge as shown on the refuge hunting and fishing brochure map in accordance with State regulations subject to the following conditions:

1. We prohibit commercial fishing or commercial crawfishing.

2. Conditions A1, A2, A7, A8 (on the open portions of Wood Duck ATV trail for wildlife-dependent activities throughout the year), A11 through A13, A19, A20, A23, and A24 apply.

3. We prohibit slat traps or hoop nets on the refuge.

4. We prohibit possession of cleaned or processed fish on the refuge.

5. We allow recreational crawfishing on the refuge subject to specific dates (see refuge brochure for details). The harvest limit is 100 pounds (45 kg) per permit per day.

6. You must attend all crawfish traps and nets at all times and may not leave them on the refuge overnight. We allow up to and not to exceed 20 traps per angler on the refuge.

7. We prohibit harvest of frog or turtle on the refuge (see §27.21 of this chapter).

8. We prohibit boat launching by trailer from all refuge roads and parking lots.

Catahoula National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of duck, goose, and coot only on designated areas of the Bushley Bayou Unit in accordance with State hunting regulations subject to the following conditions:

1. We allow migratory hunting of duck, goose, and coot on Tuesdays, Thursdays, Saturdays, and Sundays from ½ hour before legal sunrise until 12 p.m. (noon) during the State season.

2. We prohibit migratory game bird hunting during deer-gun and primitive firearms hunts.

3. We allow the use of dogs only to locate, point, and retrieve game when hunting migratory game birds.

4. We allow the use of shotguns only for hunting migratory birds.

5. An adult at least age 21 must supervise youth hunters under age 16 during all hunts. One adult may supervise two youths during small game and migratory bird hunts but may supervise only one youth during big game hunts. Youth must remain within normal voice contact of the adult who is supervising them. Parents or adult guardians are responsible for ensuring that hunters under age 16 do not engage in conduct that would constitute a violation of refuge regulations.

6. Hunters must check-in and check out in accordance with refuge-specific terms (see refuge hunting brochure for details).

7. We require hunters age 16 and older to purchase and carry a signed special refuge recreational activity permit (name/address/phone only).

8. Hunters may enter the refuge no earlier than 4 a.m. and must exit no later than 2 hours after legal sunset for that day. Waterfowl hunting must cease by 12 p.m. (noon), and hunters must remove all decoys, blinds and boats from the hunting area by 1 p.m.

9. We prohibit hunting or the discharge of firearms within 150 feet (45 m) from the centerline of roads and maintained trails.

10. We prohibit parking, walking, or hunting within 150 feet (45 m) of any active oil and gas facility or equipment.

11. We prohibit the use of mules or horses.

12. We prohibit the use or possession of saws, saw blades, or machetes.

13. We allow the use of nonmotorized boats or boats with motors of 10 horsepower or less on refuge lakes and waters as designated. We prohibit the use of air-thrust boats, water-thrust boats, or personal watercraft.

14. Refuge users must enter and exit the refuge only at designated parking areas on the refuge. We prohibit accessing adjacent lands from the refuge parking areas or any other part of the refuge.

15. We prohibit the use or possession of any type of material used as flagging or trail markers except bright eyes or reflective tape.

16. We prohibit camping or parking overnight on the refuge.

17. We restrict use of all-terrain vehicles (ATVs) to designated trails. We allow ATVs only for hunting and fishing and other wildlife-related activities. ATVs will not exceed 25 miles per hour (mph) when operated on the refuge. ATVs used on the refuge will not exceed the following: Weight 750 pounds (337.5 kg), length 85 inches (212.5 cm), width 48 inches (120 cm). We restrict ATV tires to those no larger than 25 inches x 12 inches (62.5 cm x 30 cm) with a maximum one inch (2.5 cm) lug height and maximum allowable tire pressure of 7 pounds per square inch (psi) as indicated on the tire by the manufacturer.

18. We allow the incidental take of feral hog, raccoon, beaver, nutria, and coyote while hunting with firearms or archery equipment authorized for that hunt.

19. We prohibit the possession or use of remote cameras.

B. Upland Game Hunting. We allow hunting of squirrel and rabbit on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A5 through A19 apply.

2. At the Headquarters Unit, we only allow squirrel and rabbit hunting from the first day of the State season until October 31.

3. At the Bushley Unit, we allow squirrel and rabbit hunting in accordance with the State season.

4. We prohibit squirrel and rabbit hunting during deer-gun and primitive firearms hunts.

5. At the Bushley Unit, we allow the use of dogs to hunt squirrels and rabbits only after the last primitive firearms season for deer on the refuge. Hunters must place their names and phone numbers on the collars of all their dogs.

6. We require hunters participating in the dog season for rabbits to wear a hunter-orange cap.

7. We allow the use of shotguns with nontoxic shot and rifles .22 magnum or smaller when hunting. We prohibit possession of toxic shot when hunting.

C. Big Game Hunting. We allow hunting of white-tailed deer and feral hog on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A5 through A19 apply.

2. At the Headquarters Unit, we allow archery hunting of deer and feral hog during the State archery season except the area south of the French Fork of the

Little River, which we close during deer-gun hunt in that area.

3. We allow deer-gun hunting on the area south of the French Fork of the Little River for 2 days in December with these dates being set annually.

4. At the Bushley Unit, we allow archery hunting for deer and feral hog during the State archery season except we close during deer-gun hunt and primitive firearms hunts.

5. We allow hunting of deer with primitive firearms during the first segment of the State season for area 1, weekdays only (Monday through Friday) and the third weekend after Thanksgiving Day.

6. We allow the use of portable deer stands. Hunters may place deer stands on the refuge 1 day before the deer archery season and must remove them from the refuge within 1 day after this season closes. Hunters may place only one stand on the refuge. Deer stands must have the owner's name, address, and phone number clearly printed on the stand. Hunters must place stands in a nonhunting position when not in use (see §§27.93 and 27.94 of this chapter).

7. We prohibit the possession of buckshot when hunting.

8. All hunters (including archery and small game hunters), except waterfowl hunters on refuges, must wear and display 400 square inches (2,600 cm^2) of hunter orange and a hunter-orange cap during the deer-gun and primitive firearms seasons. Deer hunters hunting from concealed ground blinds must display a minimum of 400 square inches of hunter orange above or around their blinds which is visible from 360 degrees.

9. You may take only one deer per day during any refuge hunt. The State season limits apply.

10. We prohibit the use of organized drives for taking or attempting to take game or the use of pursuit dogs.

11. We prohibit the use of dogs to trail wounded deer.

12. At the Headquarters Unit, we close hunting during high water conditions, elevation 42 feet (12.6 m) or above as measured at the Corp of Engineers center of the gauge on Catahoula Lake. On the Bushley Unit, we close hunts when the gauge measures elevation 44 feet (13.2 m) or above.

D. Sport Fishing. We allow fishing on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A10 through A17 apply.

2. We require anglers age 16 and older to possess and carry a signed special refuge recreational activity permit (name/address/phone only).

3. Anglers may enter the refuge no earlier than 4 a.m. and must exit no later than 2 hours after legal sunset for that day.

4. At the Headquarters Unit, we allow year-round fishing on Cowpen Bayou and the Highway 28 borrow pits. We allow fishing on Duck Lake, its tail-waters Muddy Bayou, Willow Lake, and the Highway 84 borrow pits from March 1 through October 31. We allow only rod and reel or pole and line fishing. We prohibit snagging.

5. At the Bushley Bayou Unit, we allow fishing year-round. We allow trotlines, but anglers must tend them at least once every 24 hours and reset them when receding water levels expose them. Anglers must attach lines with a length of cotton line that extends into the water. We allow the use of yo-yos, but you must attend and only use them from 1 hour before legal sunrise until ½ hour after legal sunset. We allow the use of only recreational gear.

6. At the headquarters unit, we allow the launching of only trailered boats at designated boat ramps. Anglers may launch small hand-carried boats from the bank in other areas. We prohibit dragging of boats or driving onto road shoulders to launch boats.

7. We allow fishing from 1 hour before legal sunrise to ½ hour after legal sunset.

8. We prohibit bank fishing on Bushley Creek and fishing in Black Lake, Dempsey Lake, Long Lake, Rhinehart Lake, and Round Lake during deer-gun and primitive firearms hunts.

9. We prohibit fishing in Black Lake, Dempsey Lake, Long Lake, Round Lake, and Rhinehart Lake during waterfowl hunts.

10. We prohibit taking or possessing snake, frog, turtle, salamander, and mollusk by any means (see §27.21 of this chapter).

D'Arbonne National Wildlife Refuge

*A. Migratory Game Bird Hunting.*We allow hunting of duck, goose, coot, and woodcock on designated areas of the refuge as indicated in the refuge brochure in accordance with State regulations subject to the following conditions:

1. Hunters must possess and carry a signed refuge permit (signed refuge brochure).

2. We allow migratory game bird hunting on designated areas as indicated in the refuge brochure.

3. We allow waterfowl hunting until 12 p.m. (noon) during the State season except when closed during the special teal season and State youth waterfowl hunt.

4. Hunters may enter the refuge no earlier than 4 a.m.

5. We prohibit hunting within 100 feet (30 m) of the maintained rights of way of roads (see §27.31 of this chapter), and from above-ground oil or gas or electrical transmission facilities.

6. We prohibit leaving boats, blinds, and decoys unattended.

7. We allow dogs to only locate, point, and retrieve when hunting for migratory game birds.

8. An adult at least age 21 must supervise youth hunters under age 16 during all hunts. One adult may supervise two youths during small game and migratory bird hunts but may supervise one only youth during big game hunts. Youth must remain within normal voice contact of the adult who is supervising them. Parents or adult guardians are responsible for ensuring that hunters under age 16 do not engage in conduct that would constitute a violation of refuge regulations.

9. We prohibit any person or group to act as a hunting guide, outfitter, or in any other capacity that any other individual(s) pays or promises to pay directly or indirectly for services rendered to any other person or persons hunting on the refuge, regardless of whether such payment is for guiding, outfitting, lodging, or club membership.

B. Upland Game Hunting. * * *

1. Conditions A1, A5, A8, and A9 apply.

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3. We prohibit taking small game with firearms larger than .22 caliber rimfire, shotgun slugs, and buckshot.

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C. Big Game Hunting. We allow hunting of white-tailed deer on designated areas of the refuge as indicated in the refuge brochure in accordance with State regulations subject to the following conditions:

1. Conditions A1, A5, A9, and B7 apply.

* * * * *

6. We prohibit leaving deer stands, blinds, and other equipment unattended.

7. Deer hunters must wear hunter orange as per State deer hunting regulations on Wildlife Management areas.

8. We prohibit hunters placing or hunting from stands on pine trees with white-painted bands or rings.

9. An adult at least age 21 must supervise youth hunters under age 16 during all hunts. One adult may supervise two youths during small game and migratory bird hunts but may supervise only one youth during big

game hunts. Youth must remain within normal voice contact of the adult who is supervising them. Parents or adult guardians are responsible for ensuring that hunters under age 16 do not engage in conduct that would constitute a violation of refuge regulations.

10. We prohibit possession or distribution of bait or hunting with the aid of bait, including any grain, salt, minerals, or other feed or any nonnaturally occurring attractant on the refuge (see §32.2(h).

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Delta National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of duck, goose, and coot on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We allow waterfowl hunting on Wednesdays, Thursdays, Saturdays, and Sundays from ½ hour before legal sunrise until 12 p.m. (noon), including the State special teal season, State youth waterfowl season, and State light goose special conservation season.

2. We only allow temporary blinds. You must remove both blinds and decoys (see §27.93 of this chapter) by 1 p.m.

3. We allow dogs to only locate, point, and retrieve when hunting for migratory game birds.

4. You may possess only approved nontoxic shot while hunting on the refuge (see §32.2(k)).

5. Hunters must possess and carry a valid refuge hunt permit (signed brochure).

6. We allow hunting only on those portions of the refuge that lie northwest of Main Pass and south of Raphael Pass.

7. Persons possessing, transporting, or carrying firearms on national wildlife refuges must comply with all provisions of State and local law. Persons may only use (discharge) firearms in accordance with refuge regulations (§27.42 of this chapter and specific refuge regulations part 32).

8. We prohibit air-thrust boats, mud boats, aircraft, and air-cooled propulsion engines on the refuge.

9. We close all refuge lands between Raphael Pass and Main Pass to all entry during the State waterfowl hunting season.

10. We prohibit discharge of firearms (see §27.42 of this chapter) within 250 yards (225 m) of buildings or worksites, such as oil or gas production facilities.

11. An adult at least age 21 must supervise youth hunters under age 16 during all hunts. An adult may supervise two youths during small game and migratory bird hunts but may supervise only one youth during big game hunts. Youth must remain within normal voice contact of the adult who is supervising them. Parents or adult guardians are responsible for ensuring that hunters under age 16 do not engage in conduct that would constitute a violation of refuge regulations.

12. We prohibit any person or group to act as a hunting guide, outfitter, or in any other capacity that any other individual(s) pays or promises to pay directly or indirectly for services rendered to any other person or persons hunting on the refuge, regardless of whether such payment is for guiding, outfitting, lodging, or club membership.

13. We open the refuge from ½ hour before legal sunrise to ½ hour after legal sunset with the exception that hunters may enter the refuge earlier, but not before 4 a.m.

14. We prohibit camping.

15. We prohibit target shooting on the refuge.

16. We prohibit the use of any type of material used as flagging or trail markers, except bright eyes.

B. Upland Game Hunting. * * *

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4. Conditions A4 through A16 apply.

C. Big Game Hunting. * * *

1. Conditions A5 through A16 apply with the following exception to condition A11: Each adult may only supervise one youth hunter.

2. We allow archery deer hunting, bucks only, October 1 through 15. We allow either-sex archery deer hunting October 16 through 31 and from the day after the close of the State duck season through the end of the State deer archery season.

3. Hunters may use only portable deer stands (see §27.93 of this chapter). Hunters may erect deer stands 1 day before the deer archery season and must remove them from the refuge within 1 day after the season closes. Hunters may place only one deer stand on a refuge. Deer stands must have the owner's name, address and phone number clearly printed on the stand. Hunters must place stands in a nonhunting position when not in use.

* * * * *

5. You may take hog only with archery equipment during the archery deer season.

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7. Longbow, compound bow, and crossbow or any bow drawn, held, or released by mechanical means will be a legal means of take during the deer archery season.

8. We prohibit the use of trail cameras.

9. We prohibit the use of deer decoys.

D. Sport Fishing. * * *

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4. Conditions A7, A8, A9, A14, and A15 apply.

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Grand Cote National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of duck, goose, coot, and woodcock on designated areas of the refuge as depicted on the refuge hunting brochure map in accordance with State regulations subject to the following conditions:

1. We allow waterfowl (duck, goose, coot) hunting on Wednesdays and Saturdays from ½ hour before legal sunrise until 12 p.m. (noon) during the State season.

2. We prohibit teal hunting during the State September season.

3. There will be lottery-spaced-blind-waterfowl hunts on designated sections of the refuge during the regular State waterfowl season subject to refuge-specific dates, terms, and selection process (see refuge hunting brochure for details).

4. We allow the use of shotguns only utilizing approved nontoxic shot for hunting migratory game birds.

5. We allow the use of dogs only to locate, point, and retrieve game when hunting migratory game birds.

6. Hunters may enter the refuge no earlier than 4 a.m. and must exit no later than 2 hours after legal sunset for that day. Waterfowl hunting must cease by 12 p.m. (noon), and hunters must remove all decoys, blinds, and boats from the hunt area by 1 p.m.

7. An adult at least age 21 must supervise youth hunters under age 16 during all hunts. One adult may supervise two youths during small game and migratory bird hunts but may supervise only one youth during big game hunts. Youth must remain within normal voice contact of the adult who is supervising them. Parents or adult guardians are responsible for ensuring that hunters under age 16 do not engage in conduct that would constitute a violation of refuge regulations.

8. We allow the incidental take of raccoon, feral hog, beaver, nutria, and coyote using only approved nontoxic shot while hunting migratory game birds.

9. We require hunters age 16 and older to purchase and carry a signed refuge special recreational activity permit (name/address/phone number only).

10. We prohibit hunting or the discharge of firearms within 150 feet

(3.7 m) from the centerline of roads and maintained trails.

11. Hunters must check-in and check out in accordance with refuge-specific terms (see refuge hunting brochure for details).

12. We prohibit possession or distribution of bait while in the field, hunting with the aid of bait, including any grain, salt, minerals, or any nonnaturally occurring food attractant on the refuge (see §32.2(h)).

13. We prohibit camping or overnight parking on the refuge.

14. Refuge users must enter and exit the refuge only at designated parking areas occurring on the refuge. We prohibit accessing adjacent lands from refuge parking areas or any other part of the refuge.

15. We restrict the use of all-terrain vehicles (ATVs) to designated trails. We allow ATVs only for hunting, fishing, and other wildlife-related activities. ATVs will not exceed 25 mph when driven on the refuge. ATVs used on refuges will not exceed the following: Weight-750 lbs. (337.5 kg), length-85 inches (2.12 m), and width-48 inches (120 cm). We restrict ATV tires to those no larger than 25 inches (62.5 cm) x 12 inches (30 cm) with a maximum 1-inch (2.5 cm) lug height and a maximum allowable tire pressure of 7 p.s.i. as indicated on the tire by the manufacturer.

16. We allow only electric-powered or nonmotorized boats.

17. We prohibit the use of horses or mules.

18. We prohibit the use or possession of any type of material used as flagging or trail markers, except for bright eyes or reflective tape.

19. We prohibit the use or possession of saws, saw blades, or machetes.

20. We prohibit the use or possession of remote cameras.

B. Upland Game Hunting. We allow hunting of rabbit on designated areas of the refuge as depicted on the refuge hunting brochure map in accordance with State regulations subject to the following conditions:

1. Conditions A9 through A20 apply.

2. We only allow the use of shotguns and rifles that are .22 magnum caliber rimfire or less for upland game hunting. Hunters may use only approved nontoxic shot in shotguns. We prohibit possession of toxic shot (see §32.2(k)) for hunting.

3. We allow incidental take of raccoon, feral hog, beaver, nutria, and coyote with firearms that are authorized for use during upland game hunting.

4. We allow the use of rabbit dogs only after the close of the State deer rifle season. Dog owners must place their name and phone number on the collars of all their dogs.

5. We require hunters participating in the special dog season for rabbits to wear a hunter-orange cap.

C. Big Game Hunting. We allow hunting of white-tailed deer on designated areas of the refuge as depicted on the refuge hunting brochure map in accordance with State regulations subject to the following conditions:

1. Conditions A9 through A20 apply.

2. We allow archery hunting in special designated areas (see refuge hunting brochure map) during the State archery deer season subject to refuge closures resulting from high water conditions.

3. You may only harvest one buck or doe per day during the refuge archery season. Deer harvested on the refuge count towards the State bag limit.

4. We allow incidental take of raccoon, feral hog, beaver, nutria, and coyote while deer hunting with weapons authorized for use.

5. You may use only portable deer stands (see §27.93 of this chapter). Hunters must place deer stands on the refuge 1 day before the deer archery season and must remove them from the refuge within 1 day after the season closes. Hunters may place only one deer stand on the refuge and deer stands must have the owner's name, address, and phone number clearly printed on the stand. Hunters must be place the stand in a nonhunting position and at ground level when not in use.

6. Deer hunters hunting from concealed ground blinds must display a minimum of 400 square inches (2,600 cm^2) of hunter orange above or around their blinds which is visible from 360 degrees.

7. We prohibit the use of deer decoys.

8. We prohibit the use of dogs to trail wounded deer.

9. We prohibit organized drives for taking or attempting to take game or the use of pursuit dogs.

D. Sport Fishing. We allow fishing in designated areas as depicted in the refuge hunting brochure in accordance with State regulations subject to the following conditions:

1. Conditions A13 through A19 apply.

2. We allow bank fishing in Coulee Des Grues only along Little California Road from legal sunrise to legal sunset.

3. Anglers may enter the refuge no earlier than 4 a.m. and must exit no later than 2 hours after legal sunset for that day.

4. We require anglers age 16 and older to purchase and carry a signed refuge special recreational activity permit.

5. We prohibit the use of gear or equipment other than hook and line to catch fish.

6. We prohibit the possession of cleaned or processed fish on the refuge.

7. We prohibit the harvest of frog, turtle, snake, or mollusk (see §27.21 of this chapter).

8. We prohibit crawfishing.

Lacassine National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of goose, duck, gallinule, and coot on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. The refuge will be open on selected days for migratory game bird hunting as identified in the refuge hunt permit and regulations brochure.

2. We require every hunter to possess and carry a valid signed refuge hunt permit (signed brochure) and regulations brochure.

3. We prohibit entrance to the hunting area earlier than 4 a.m. Shooting hours end at 12 p.m. (noon) each day. Hunters must remove all decoys and blinds from the hunting area by 1 p.m. Hunters must leave the refuge no later than 1 hour after legal sunset.

4. Each hunter must complete and turn in a Migratory Bird Hunt Report (FWS Form 3-2361), available from a self-clearing check station, after each hunt.

5. Persons possessing, transporting, or carrying firearms on national wildlife refuges must comply with all provisions of State and local law. Persons may only use (discharge) firearms in accordance with refuge regulations (see §27.42 of this chapter and specific refuge regulations in part 32).

6. We prohibit all mechanized equipment including motorized boats within the designated wilderness area.

7. We prohibit all boat motors, including trolling motors, within refuge marshes. We prohibit air-thrust boats and ATVs on the refuge (see §27.31(f) of this chapter), unless otherwise permitted.

8. We prohibit hunting within 50 yards (45 m) of refuge canals; waterways; public roads; buildings; above-ground oil, gas, or electrical transmission facilities; or designated public facilities. Hunting parties must remain a distance of no less than 150 yards (135 m) away from another hunter.

9. You must remove all hunting-related equipment (see §27.93 of this chapter) from the refuge immediately following each day's hunt.

10. We prohibit overnight camping on the refuge.

11. We prohibit the use or possession of alcoholic beverages while hunting (see §32.2(j)).

12. We allow the use of dogs when migratory bird hunting only for the purpose of locating, pointing, and retrieving.

13. We prohibit all persons or groups from acting as guides, outfitters, or in any other capacity in which any individual(s) pay or promise to pay directly or indirectly for service rendered to any person or persons hunting on the refuge, regardless of whether such payment is for guiding, outfitting, lodging, or club membership.

14. An adult at least age 21 must supervise youth hunters under age 16 during all hunts. One adult may supervise two youths during small game and migratory bird hunts but may supervise only one youth during big game hunts. Youth must remain within normal voice contact of the adult who is supervising them. Parents or adult guardians are responsible for ensuring that hunters under age 16 do not engage in conduct that would constitute a violation of refuge regulations.

* * * * *

C. Big Game Hunting. We allow hunting for white-tailed deer on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. The refuge will be open for hunting white-tailed deer on selected days as identified in the refuge hunt permit (signed brochure) and regulations brochure.

2. Conditions A2, and A5 through A14 apply.

3. We prohibit entrance to the hunting area earlier than 4 a.m. Hunters must leave no later than 1 hour after legal sunset.

4. We prohibit hunting in the headquarters area along Nature Road and along the Lacassine Pool Wildlife Drive (see refuge map).

5. We allow boats of all motor types and of 40 hp or less in Lacassine Pool.

6. We prohibit boats in Lacassine Pool and Unit D from October 16 through March 14. We prohibit boats in Units A and C.

7. We prohibit possession or distribution of bait or hunting with the aid of bait, including any grain, salt, minerals, or other feed or any nonnaturally occurring attractant on the refuge (see §32.2(h)).

8. Each hunter must complete and turn in a Big Game Harvest Report (FWS Form 3-2359), available from a self-clearing check station, after each hunt.

D. Sport Fishing. * * *

1. Conditions A6, A7, A10, C5, and C6 apply.

* * * * *

10. We prohibit all boat motors, including trolling motors, in refuge marshes outside Lacassine Pool. We prohibit air-thrust boats and ATVs on the refuge (see §27.31(f) of this chapter), unless otherwise allowed.

11. We prohibit all mechanized equipment, including motorized boats, within the designated wilderness area.

12. We allow fishing only with rod and reel or pole and line in refuge waters.

13. Anglers can travel the refuge by boat from 1 hour before legal sunrise until 1 hour after legal sunset in order to access fishing areas. We prohibit fishing activities before legal sunrise and after legal sunset.

14. We prohibit the taking of turtle (see §27.21 of this chapter).

Lake Ophelia National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of duck, goose, coot, and woodcock on designated areas of the refuge as depicted on the refuge hunting brochure map in accordance with State regulations subject to the following conditions:

1. We allow waterfowl (duck, goose, coot) hunting on Tuesdays, Thursdays, and Saturdays from ½ hour before legal sunrise until 12 p.m. (noon) during the Statewide duck season.

2. We allow the use of shotguns only utilizing approved nontoxic shot for hunting migratory game birds.

3. We allow the use of dogs only to locate, point, and retrieve game when hunting for migratory birds.

4. Hunters may enter the refuge no earlier than 4 a.m. and must exit no later than 2 hours after legal sunset for that day. Waterfowl hunting must cease by 12 p.m. (noon), and hunters must remove all decoys, blinds, and boats from the hunt area by 1 p.m.

5. An adult at least age 21 must supervise youth hunters under age 16 during all hunts. One adult may supervise two youths during small game and migratory bird hunts but may supervise only one youth during big game hunts. Youth must remain within normal voice contact of the adult who is supervising them. Parents or adult guardians are responsible for ensuring that hunters under age 16 do not engage in conduct that would constitute a violation of refuge regulations.

6. We prohibit migratory game bird hunting during refuge deer primitive firearm hunts.

7. We allow the incidental take of raccoon, feral hog, beaver, nutria, and coyote using only nontoxic shot while hunting migratory game birds.

8. We restrict the use of all-terrain vehicles (ATVs) to designated trails. We allow ATVs only for hunting, fishing, and other wildlife-related activities. ATVs will not exceed 25 mph when driven on the refuge. ATVs used on refuges will not exceed the following: Weight 750 lbs. (337.5 kg), length 85 inches (2.12 m), and width 48 inches (120 cm). We restrict ATV tires to those no larger than 25 inches (62.5 cm) x 12 inches (30 cm) with a maximum 1-inch (2.5 cm) lug height and a maximum allowable tire pressure of 7 p.s.i. as indicated on the tire by the manufacturer.

9. We restrict the special all-terrain vehicle trails for physically challenged persons to ATV physically challenged permittees. Individuals that qualify must obtain a Special Use Permit (FWS Form 3-1383) from the refuge office to use these trails.

10. We require hunters age 16 and older to purchase and carry a signed refuge special recreational activity permit (name/address/phone number only).

11. We prohibit hunting or the discharge of firearms within 150 feet (45 m) from the centerline of roads and maintained trails.

12. Hunters must check-in and check out in accordance with refuge-specific terms (see refuge hunting brochure for details).

13. We prohibit possession or distribution of bait while in the field, hunting with the aid of bait, including any grain, salt, minerals, or any nonnaturally occurring food attractant on the refuge (see §32.2(h)).

14. We allow watercraft with motors up to 36 hp in Possum Bayou (north of boat ramp), Palmetto Bayou, Duck Lake, Westcut Lake, Point Basse, and Nicholas Lake.

15. We allow electric-powered or nonmotorized boats in Doomes Lake, Lake Long, Possum Bayou (south of boat ramp), and Lake Ophelia.

16. We prohibit camping or overnight parking on the refuge.

17. Refuge users must enter and exit the refuge only at designated parking areas occurring on the refuge. We prohibit accessing adjacent lands from refuge parking areas or any other part of the refuge.

18. We prohibit the use of horses or mules.

19. We prohibit the use or possession of any type of material used as flagging or trail markers, except for bright eyes or reflective tape.

20. We prohibit the use or possession of saws, saw blades, or machetes.

21. We prohibit the use or possession of remote cameras.

B. Upland Game Hunting. We allow hunting of squirrel and rabbit on designated areas of the refuge as depicted on the refuge hunting brochure map in accordance with State regulations subject to the following conditions:

1. Conditions A5 and A8 through A21 apply.

2. Hunters may enter the refuge no earlier than 4 a.m. and must exit no later than 2 hours after legal sunset for that day.

3. We only allow the use of shotguns and rifles that are .22 magnum caliber rimfire or less for upland game hunting. We allow only nontoxic shot in shotguns and prohibit possession of toxic shot when hunting.

4. We allow incidental take of raccoon, feral hog, beaver, nutria, and coyote with firearms authorized for use during upland game hunting.

5. We prohibit upland game hunting during refuge deer primitive firearm hunts.

6. We allow the use of squirrel and rabbit dogs only after the close of the State deer rifle season. Dog owners must place their name and phone number on the collars of all their dogs.

7. We require hunters participating in the special dog season for rabbits to wear a hunter-orange cap.

C. Big Game Hunting. We allow hunting of white-tailed deer and turkey on designated areas of the refuge as depicted on the refuge hunting brochure map in accordance with State regulations subject to the following conditions:

1. Conditions A5 and A9 through A21 apply.

2. Hunters may enter the refuge no earlier than 4 a.m. and must exit no later than 2 hours after legal sunset for that day.

3. We restrict the use of all-terrain vehicles (ATVs) to designated trails from the first Saturday in September until the last day of refuge turkey season. We allow ATVs only for hunting, fishing, and other wildlife-related activities. ATVs will not exceed 25 mph when driven on the refuge. ATVs used on refuges will not exceed the following: Weight 750 lbs. (337.5 kg), length 85 inches (2.12 m), and width 48 inches (120 cm). We restrict ATV tires to those no larger than 25 inches (62.5 cm) x 12 inches (30 cm) with a maximum 1-inch (2.5 cm) lug height and a maximum allowable tire pressure of 7 p.s.i. as indicated on the tire by the manufacturer.

4. You may harvest only one buck or doe per day during the refuge archery season. You may harvest only one buck or doe during each of the primitive firearm lottery deer hunts. Deer harvested on the refuge count towards the State bag limit.

5. We allow incidental take of raccoon, feral hog, beaver, nutria, and coyote while deer hunting with weapons authorized for use.

6. You may use only portable deer stands. Hunters may place deer stands on the refuge 1 day before the deer archery season and must remove them from the refuge within 1 day after the season closes. Hunters may place only one deer stand on the refuge, and deer stands must have the owner's name, address, and phone number clearly printed on the stand. Hunters must place stands in a nonhunting position and at ground level when not in use.

7. All deer gun hunters must wear and display 400 square inches (2,600 cm^2) of hunter orange and a hunter-orange cap during the deer gun seasons and lottery deer hunts. Deer hunters hunting from concealed ground blinds must display a minimum of 400 square inches of hunter orange above or around their blinds which is visible from 360 degrees.

8. There will be lottery deer primitive firearm hunts subject to refuge-specific dates, terms, and selection process, as outlined in the refuge hunting brochure. Applicants may not apply for more than one hunt. There is a $5 nonrefundable application fee per person for each hunt application.

9. We allow youth deer hunting in the closed area of the refuge during lottery youth deer gun hunts subject to the refuge-specific dates, terms, and selection process outlined in the refuge hunting brochure. Youths selected in prior years may not apply.

10. We prohibit all other hunting during refuge deer primitive firearm hunts as described in the refuge hunting brochure.

11. We prohibit the use of deer or turkey gobbler decoys.

12. We allow turkey hunting only during the first 16 days of the State season until 12 p.m. (noon). We prohibit incidental hunting of hog. We allow the use and possession of lead shot for turkey hunting (see §32.2(k)).

13. We prohibit the use of dogs to trail wounded deer.

14. We prohibit organized drives for taking or attempting to take game or the use of pursuit dogs.

D. Sport Fishing. We allow fishing in designated areas as depicted in the refuge hunting brochure in accordance with State regulations subject to the following conditions:

1. Conditions A14 through A21 and C3 apply.

2. We require anglers age 16 and older to purchase and carry a signed refuge special recreational activity permit (name/address/phone number only).

3. Anglers may enter the refuge no earlier than 4 a.m. and must exit no later than 2 hours after legal sunset for that day.

4. We allow fishing from legal sunrise to legal sunset.

5. We allow the use of ATVs on the designated trails to the Duck and Westcut Lake boat ramps from March 1 through October 15.

6. We allow sport fishing in Duck Lake, Westcut Lake, Lake Long, and in the immediate vicinity of the Lake Agnes drainage culverts on the Red River during March 1 through October 15 from legal sunrise to legal sunset.

7. We prohibit the use of gear or equipment other than hook and line to catch fish.

8. We prohibit the possession of cleaned or processed fish on the refuge.

9. We prohibit the harvest of frog, turtle, snake, or mollusk (see §27.21 of this chapter).

10. We prohibit crawfishing.

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Red River National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of duck, goose, coot, woodcock, and dove on designated areas of the refuge as indicated in the refuge brochure in accordance with State regulations subject to the following conditions:

1. Hunters must possess and carry a signed refuge permit (signed refuge brochure).

2. We allow waterfowl and woodcock hunting on designated areas as indicated in the refuge brochure until 12 p.m. (noon) during the State season.

3. We allow dove hunting only during the first 3 days of the State season on all refuge lands as indicated in the refuge brochure.

4. Hunters may enter the refuge no earlier than 4 a.m.

5. We prohibit hunting within 150 feet (45 m) of any public road, refuge road, trail, or ATV trail, residence, building, aboveground oil or gas or electrical transmission facilities, or designated public facility.

6. We prohibit leaving boats, blinds, and decoys unattended.

7. We allow dogs only to locate, point, and retrieve when hunting for migratory game birds.

8. An adult at least age 21 must supervise youth hunters under age 16 during all hunts. One adult may supervise two youths during small game

and migratory bird hunts but may supervise only one youth during big game hunts. Youth must remain within normal voice contact of the adult who is supervising them. Parents or adult guardians are responsible for ensuring that hunters under age 16 do not engage in conduct that would constitute a violation of refuge regulations.

9. We prohibit any person or group to act as a hunting guide, outfitter, or in any other capacity that any other individual(s) pays or promises to pay directly or indirectly for services rendered to any other person or persons hunting on the refuge, regardless of whether such payment is for guiding, outfitting, lodging, or club membership.

10. Hunters may use only approved nontoxic shot shotgun ammunition for hunting on the refuge (see §32.2(k)).

11. We prohibit the possession or distribution of bait or hunting with the aid of bait, including any grain, salt, mineral or other feed or nonnaturally occurring attractant on the refuge (see §32.2(h)).

B. Upland Game Hunting. We allow hunting of quail, squirrel, rabbit, raccoon, and opossum on designated areas of the refuge as indicated in the refuge brochure in accordance with State regulations subject to the following conditions:

1. Conditions A1, A6, and A8 through A11 apply.

2. We allow hunting on all refuge lands on designated areas as indicated in the refuge brochure.

3. We prohibit the use of firearms (see §27.42 of this chapter) larger than .22 caliber rimfire, shotgun slugs, and buckshot while hunting on the refuge.

4. We allow hunting of raccoon and opossum during the daylight hours of rabbit and squirrel season. We allow night hunting during December and January, and you may use dogs for night hunting. We prohibit selling of raccoon and opossum taken on the refuge for human consumption.

5. We allow use of dogs to hunt squirrel and rabbit after December 31.

6. If you want to use horses and mules to hunt raccoon and opossum at night, you must first obtain a Special Use Permit (FWS Form 3-1383) at the refuge office.

7. Hunters may enter the refuge no earlier than 4 a.m. and must exit the refuge no later than 1 hour after legal shooting hours.

C. Big Game Hunting. We allow hunting of white-tailed deer on designated areas of the refuge as indicated in the refuge brochure in accordance with State regulations subject to the following conditions:

1. Conditions A1, A6, A8 through A11, and B7 apply.

2. We allow only archery hunting.

3. We allow deer hunting on all refuge lands on designated areas as indicated in the refuge brochure.

4. The daily bag limit is one deer of either sex. The State season limit applies.

5. We allow use of portable deer stands as indicated in the refuge brochure.

6. We allow hog hunting during all open refuge hunts with weapons legal for the ongoing hunt.

7. We allow turkey hunting on the days noted in the brochure.

D. Sport Fishing. We allow fishing on designated areas of the refuge as indicated in the refuge brochure in accordance with State regulations subject to the following conditions:

1. We prohibit leaving boats and other personal property on the refuge unattended.

2. We allow use of only electric trolling motors on all refuge waters.

3. You must tend trotlines daily. You must attach ends of trotlines by a length of cotton line that extends into the water.

4. We prohibit commercial fishing. Recreational fishing using commercial gear (slat traps, etc.) requires a special refuge permit that you must possess and carry available at the refuge office.

5. We prohibit the taking of alligator snapping turtle (see §27.21 of this chapter).

Sabine National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of goose, duck, gallinule, and coot on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We will open the refuge on selected days for migratory game bird hunting as identified in the refuge hunt permit and regulations brochure.

2. We require all hunters to possess and carry a valid signed refuge hunt permit (signed brochure) and regulations brochure.

3. We prohibit entrance to the hunting area earlier than 4 a.m. Shooting hours end at 12 p.m. (noon) each day. Hunters must remove all decoys and blinds from the hunting area by 1 p.m. and must leave the refuge no later than 1 hour after legal sunset.

4. Each hunter must complete and turn in a Migratory Bird Hunt Report (FWS Form 3-2361) from a self-clearing check station after each hunt.

5. You may access the hunt areas by boat using the boat launches at the West Cove Public Use Area or by access through Burton Canal. You may access hunt areas by vehicle from Vastar Road or designated turnouts within the refuge public hunt area along State Highway 27 (see §27.31 of this chapter) unless otherwise posted.

6. We allow hand launching of small boats along Vastar Road (no trailers allowed).

7. We allow operation of outboard motors in designated refuge canals only. We allow trolling motors within the refuge marshes.

8. We prohibit air-thrust boats, personal motorized watercraft (e.g., Jet Skis), and ATVs on the refuge (see §27.31(f) of this chapter) unless otherwise posted.

9. We allow only portable blinds and those made of native vegetation. Hunters must remove portable blinds, decoys, spent shells, and all other personal equipment (see §§27.93 and 27.94 of this chapter) after each day's hunt.

10. We prohibit hunting within 50 yards (45 m) of refuge canals, waterways, public roads, buildings, above-ground oil, gas or electrical transmission facilities, or designated public facilities. Hunting parties must maintain a distance of no less than 150 yards (135 m) away from another hunter.

11. We prohibit all persons or groups from acting as guides, outfitters, or in any other capacity in which any other individual(s) pay or promise to pay directly or indirectly for service rendered to any other person or persons hunting on the refuge, regardless of whether such payment is for guiding, outfitting, lodging, or club membership.

12. We allow dogs when migratory bird hunting only for the purpose of locating, pointing and retrieving.

13. Persons possessing, transporting, or carrying firearms on national wildlife refuges must comply with all provisions of State and local law. Persons may only use (discharge) firearms in accordance with refuge regulations (see §27.42 and specific refuge regulations in part 32).

14. We prohibit the use or possession of alcoholic beverages while hunting (see §32.2(j)).

15. We prohibit overnight camping on the refuge.

16. An adult at least age 21 must supervise youth hunters under age 16 during all hunts. One adult may supervise two youths during small game and migratory bird hunts. Youth must remain within normal voice contact of the adult who is supervising them. Parents or adult guardians are responsible for ensuring that hunters under age 16 do not engage in conduct

that would constitute a violation of refuge regulations.

B. Upland Game Hunting. [Reserved]

C. Big Game Hunting. [Reserved]

D. Sport Fishing. We allow fishing, crabbing, and cast netting in designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Bank and wharf access for fishing are available year-round at the Public Use Areas along State Highway 27. Anglers may access the refuge for fishing by boat only during the March 15 to October 15 open period. You may launch boats at designated boat ramps only.

2. We allow fishing with a rod and reel, pole and line, or jug and line. We prohibit possession of any other type of fishing gear, including limb lines, gill nets, or trot lines. Jug line limit is up to 10 per boat, and you must attend them at all times. The angler must mark all jugs with their fishing license number (State requirement) and remove the jugs (see §27.93 of this chapter) from the refuge daily.

3. We allow hand launching of nonmotorized boats into Units 1A and 1B from Blue Crab Recreation Area for recreational paddling year-round. We prohibit fishing October 16 through March 14.

4. We allow operation of outboard motors in designated refuge canals and Management Unit 3 (40 hp maximum in Unit 3). We allow use of trolling motors within the refuge marshes.

5. Conditions A8, A11 (fishing guide), and A15 apply.

6. Anglers can travel the refuge by boat from 1 hour before legal sunrise until 1 hour after legal sunset in order to access fishing areas. We prohibit fishing activities, however, before legal sunrise and after legal sunset.

7. Crabbing: We allow recreational crabbing in designated areas of the refuge subject to the following conditions:

i. We allow only recreational crabbing with cotton hand lines or drop nets up to 24 inches (60 cm) outside diameter. We prohibit using floats on crab lines.

ii. Anglers must remove all hand lines, drop nets, and bait (see §27.93 of this chapter) from the refuge upon leaving.

iii. We allow a daily limit of 5 dozen (60) crabs per vehicle or boat.

8. Cast Netting: We allow recreational cast netting in designated areas of the refuge subject to the following conditions:

i. We allow recreational cast netting from 12 p.m. (noon) to legal sunset during the Louisiana Inshore Shrimp Season.

ii. Anglers must empty cast nets directly into container from net. Anglers must immediately return all incidental take (by catch) to the water before continuing to cast net.

iii. The daily shrimp limit during the Louisiana Inshore shrimp season is 5 gallons (19 L) of heads-on shrimp per day, per vehicle or boat.

iv. The daily bait shrimp limit is one gallon (3.8 L) per day, per boat, outside the Louisiana inshore shrimp season, and before 12 p.m. (noon) during the Louisiana inshore shrimp season.

v. Shrimp must remain in your actual custody while on the refuge.

vi. We allow cast netting from the banks and wharves at designated refuge recreation areas or sites along Hwy. 27 that provide developed safe access and that we do not post and sign as closed areas.

vii. We prohibit cast netting at or around any recreation area and boat launch not designated as open for cast netting.

viii. We allow cast netting throughout the refuge except where posted and signed as closed.

ix. We prohibit reserving a place or saving as space for yourself or others by any means to include placing unattended equipment in designated cast-netting areas.

x. We prohibit swimming and/or wading in the refuge canals and waterways.

9. We prohibit the taking of turtle (see §27.21 of this chapter).

Tensas River National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of duck, coot, woodcock, and snipe on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We allow hunting of duck and coot on Tuesdays, Thursdays, Saturdays, and Sundays until 12 p.m. (noon) during the State season. We prohibit migratory bird hunting during refuge gun hunts for deer.

2. We allow refuge hunters to enter the refuge no earlier than 4 a.m., and they must leave no later than 2 hours after legal sunset unless they are participating in the refuge nighttime raccoon hunt.

3. In areas posted "Area Closed" or "No Waterfowl Hunting Zone," we prohibit hunting of migratory birds at any time. The Public Use Regulations brochure will be available at the refuge headquarters no later than August.

4. We allow shotguns equipped with a single-piece magazine plug that allows the gun to hold no more than two shells in the magazine and one in the chamber. We prohibit target practicing or shooting to unload modern firearms on the refuge at any time. Shotgun hunters must possess only an approved nontoxic shot when hunting migratory birds (see §32.2(k)). Persons possessing, transporting, or carrying firearms on national wildlife refuges must comply with all provisions of State and local law. Persons may only use (discharge) firearms in accordance with refuge regulations (see §27.42 and specific refuge regulations in part 32).

5. We prohibit permanent or pit blinds on the refuge. You must remove all blind materials and decoys by 1 p.m. daily.

6. We allow nonmotorized boats, electric motors, and boats with motors 10 hp or less in refuge lakes, streams, and bayous. Boaters must follow State boating regulations, including those for navigation lights. We prohibit boat storage on the refuge. Hunters/anglers must remove boats daily (see §27.93 of this chapter).

7. We prohibit possession or distribution of bait while in the field and hunting with the aid of bait, including any grain, salt, minerals, or any nonnaturally occurring food attractant while on the refuge at any time (see §32.2(h)).

8. We allow all-terrain vehicle (ATV) travel on designated trails for access typically from September 15 to the last day of the refuge squirrel season. We open designated trails from 4 a.m. to no later than 2 hours after legal sunset unless otherwise specified. We define an ATV as an off-road vehicle (not legal for highway use) with factory specifications not to exceed the following: Weight 750 pounds (337.5 kg), length 85 inches (212.5 cm), and width 48 inches (120 cm). We restrict ATV tires to those no larger than 25 inches (62.5 cm) x 12 inches (30 cm) with a 1-inch (2.5 cm) lug height and maximum allowable tire pressure of 7 psi. We require a permanently affixed refuge ATV permit that hunters may obtain from the refuge headquarters, typically in July. Hunters/anglers using the refuge physically challenged all-terrain trails must possess the State's Physically Challenged Program Hunter Permit or be age 60 or older. Additional physically challenged access information will be available at the refuge headquarters.

9. While visiting the refuge, we prohibit: use of artificial light to locate wildlife (see §27.73 of this chapter), littering (see §27.94 of this chapter), fires (see §27.95 of this chapter), trapping, man-drives for game, use or

possession of alcoholic beverages while hunting (see §§32.2(j) and 27.81 of this chapter), flagging, engineers tape, paint, unleashed pets (see §26.21(b) of this chapter), and parking/blocking trail and gate entrances (see §27.31(h) of this chapter). We also prohibit hunting or shooting within 150 feet (45 m) of a designated public road, maintained road, trail, fire breaks, dwellings, and above-ground oil and gas production facilities. We define a maintained road or trail as one which has been mowed, disked, or plowed.

10. We prohibit field dressing of game within 150 feet (45 m) of parking areas, maintained roads, and trails.

11. An adult at least age 21 must supervise youth hunters under age 16 during all hunts. One adult may supervise two youths during small game and migratory bird hunts but may supervise only one youth during big game hunts. Youth must remain within normal voice contact of the adult who is supervising them. Parents or adult guardians are responsible for ensuring that hunters under age 16 do not engage in conduct that would constitute violation of refuge regulations.

B. Upland Game Hunting. We allow hunting of raccoon, squirrel, and rabbit on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We allow nighttime raccoon hunting beginning typically the fourth Saturday in December and typically ending the fourth Sunday in January. We allow raccoon hunters to hunt from legal sunset to legal sunrise with the aid of dogs, horses, mules, and use of lights. We allow such use of lights on the refuge only at the point of kill. We prohibit all other use of lights for hunting on the refuge. Hunt dates will be available at refuge headquarters typically in July. We prohibit ATVs during the raccoon hunt. Hunters must attempt to take treed raccoons.

2. We allow squirrel and rabbit hunting with and without dogs. We will allow hunting without dogs from the beginning of the State season to a date typically ending the day before the refuge deer primitive firearms hunt. We do not require hunters to wear hunter orange during the squirrel and rabbit season without dogs. Squirrel and rabbit hunting with or without dogs will begin typically the second Monday in December and will conclude January 31. We require a minimum of a solid-hunter-orange cap during the squirrel season with or without dogs. We allow no more than three dogs per hunting party.

3. We close squirrel and rabbit hunting during the following gun hunts for deer: refuge-wide youth hunt, primitive firearms hunt, and modern firearms hunt.

4. In areas posted "Area Closed" and "No Hunting Zone," we prohibit upland game hunting at any time.

5. When hunting we allow .22 caliber and smaller rimfire weapons and shotguns equipped with a single-piece magazine plug that allows the shotgun to hold no more than two shells in the magazine and one in the chamber. We prohibit target practicing or shooting to unload modern firearms on the refuge at any time. Shotgun hunters must possess only an approved nontoxic shot when hunting upland game (see §32.2(k)). Persons possessing, transporting, or carrying firearms on national wildlife refuges must comply with all provisions of State and local law. Persons may only use (discharge) firearms in accordance with refuge regulations (see §27.42 and specific refuge regulations in part 32).

6. Conditions A2, A6, A7, A8, A9, A10, and A11 apply.

C. Big Game Hunting. We allow hunting of white-tailed deer and turkey on designated areas of refuges in accordance with State regulations subject to the following conditions:

1. Deer archery season will begin the first Saturday in November and will conclude on January 31. We prohibit archery hunting during the following refuge-wide deer hunts: youth gun hunt and modern firearms hunts. We prohibit possession of pods, drug-tipped arrows, or other chemical substances.

2. The deer primitive firearms season will occur between November 1 and January 31. Legal primitive firearms for primitive season include:

i. Rifles, .44 caliber minimum, all of which must load exclusively from the muzzle or cap and ball cylinder; use of black powder or approved substitute only; use of ball or bullet projectile only, including saboted bullets, including muzzleloaders known as "in line" muzzleloaders; and

ii. Single-shot, breech-loading rifles, .38 caliber or larger of a kind or type manufactured prior to 1900 and relics, reproductions, or reintroductions of that type of rifle having an exposed hammer that use metallic cartridges loaded with black powder or modern smokeless powder.

3. During the deer primitive firearms season, hunters may fit any legal primitive firearms with magnified scopes. We will allow hunters using primitive weapons described as muzzleloader (including in-line) (see 2.i.) to hunt reforested areas. We will prohibit hunters using primitive weapons described in 2.ii. to hunt in reforested areas.

4. We will conduct two quota-modern-firearms hunts for deer typically in the months of November and/or December. Hunt dates and permit application (Quota Deer Hunt Application FWS Form 3-2354) procedures will be available at refuge headquarters no later than August. We restrict hunters using a primitive firearm during this hunt access to areas where we allow modern firearms. We prohibit hunting and/or shooting into or across any reforested area during the quota hunt for deer. We require a quota hunt permit for these hunts.

5. We will conduct guided quota youth deer hunts and guided quota deer hunts for the wheelchair-bound in the Greenlea Bend area typically in December and January. Hunt dates and permit application procedures will be available at the refuge headquarters typically in July. For this specific hunt, we consider youth to be ages 8 through 15.

6. We will conduct a refuge-wide youth deer hunt. Hunt dates will be available at refuge headquarters typically in July. An adult at least age 21 must supervise youth hunters under age 16 during all hunts. One adult may supervise two youths during small game and migratory bird hunts but may supervise only one youth during big game hunts. Youth must remain within normal voice contact of the adult who is supervising them. Parents or adult guardians are responsible for ensuring that hunters under age 16 do not engage in conduct that would constitute violation of refuge regulations.

7. Hunters may take only one deer (one buck or one doe) per day during refuge deer hunts except during guided youth and wheelchair-bound hunts where the limit will be one antlerless and one antlered deer per day.

8. We allow turkey hunting the first 16 days of the State turkey season. We will conduct a youth turkey hunt the Saturday and Sunday before the regular State turkey season. Hunters may harvest two bearded turkeys per season. We allow the use and possession of lead shot while turkey hunting on the refuge (see §32.2(k)). We allow use of nonmotorized bicycles on designated all-terrain vehicle trails. Although you may hunt turkey without displaying a solid-hunter-orange cap or vest during your turkey hunt, we do recommend its use.

9. Conditions A2, A6, A7, A8, A9, and A10 apply.

10. In areas posted "Area Closed" or "No Hunting Zone," we prohibit big game hunting at any time. We close "Closed Areas" (designated on the Public Use Regulations brochure map)

to all hunts. We prohibit shooting into or across any closed area with a gun or archery equipment.

11. We prohibit any hunter from using climbing spikes or to hunt from a tree that contains screw-in steps, nails, screw-in umbrellas, or any metal objects that could damage trees (see §32.2(i)).

12. We allow muzzleloader hunters to discharge their primitive firearms at the end of each hunt safely into the ground at least 150 feet (135 m) from any designated public road, maintained road, trail, fire break, dwelling, or above-ground oil and gas production facility. We define a maintained road or trail as one that has been mowed, disked, or plowed, or one that is free of trees.

13. We prohibit deer hunters leaving deer stands unattended before the opening day of the refuge archery season. Hunters must remove stands by the end of the last day of the refuge archery season (see §27.93 of this chapter). Hunters must clearly mark stands left unattended on the refuge with the name and address of the stand owner. Hunters must remove portable stands from trees daily and place freestanding stands in a nonhunting position when unattended.

14. We require deer hunters using primitive firearms or modern firearms to display a solid-hunter-orange cap on their head and a solid-hunter-orange vest over their outermost garment covering their chest and back. Hunters must display the solid-hunter-orange items the entire time while in the field.

15. We require primitive firearms and modern firearms hunters using ground blinds to display outside of the blind 400 square inches (2,600 cm^2) of hunter orange, which is visible from all sides of the blind. Hunters must wear orange vests and hats as their outermost garments while inside the blind.

16. We allow hunting with slugs, rifle, or pistol ammunition larger than .22 caliber rimfire only during the quota hunts for deer. We prohibit use of buckshot when hunting. Persons possessing, transporting, or carrying firearms on national wildlife refuges must comply with all provisions of State and local law. Persons may only use (discharge) firearms in accordance with refuge regulations (see §27.42 and specific refuge regulations in §32).

17. We require that hunters tag all deer and turkey per State tagging requirements.

D. Sport Fishing. We allow fishing on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We allow anglers to enter the refuge no earlier than 4 a.m., and they must depart no later than 2 hours after legal sunset.

2. In areas open to fishing, State creel limits and regulations apply.

3. We prohibit the taking of turtle (see §27.21 of this chapter).

4. Conditions A6, A7, and A9 apply.

5. We prohibit fish cleaning within 150 feet (45 m) of parking areas, maintained roads, and trails.

Upper Ouachita National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of waterfowl (duck, goose, coot, gallinule, rail, snipe), woodcock, and dove on designated areas of the refuge as indicated in the refuge brochure in accordance with State regulations subject to the following conditions:

1. Hunters must possess and carry a signed refuge permit (signed refuge brochure).

2. We allow waterfowl hunting on designated areas as indicated in the refuge brochure.

3. We allow woodcock hunting on designated areas as indicated in the refuge brochure.

4. We allow dove hunting during the first 3 days of the State season on designated areas as indicated in the refuge brochure.

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11. An adult at least age 21 must supervise youth hunters under age 16 during all hunts. One adult may supervise two youths during small game and migratory bird hunts but may supervise only one youth during big game hunts. Youth must remain within normal voice contact of the adult who is supervising them. Parents or adult guardians are responsible for ensuring that hunters under age 16 do not engage in conduct that would constitute a violation of refuge regulations.

* * * * *

B. Upland Game Hunting. We allow hunting of quail, squirrel, rabbit, raccoon, beaver, coyote, and opossum on designated areas of the refuge as indicated in the refuge brochure in accordance with State regulations subject to the following conditions:

* * * * *

2. We allow hunting in designated areas only.

3. We prohibit taking small game with firearms larger than .22 caliber rimfire, shotgun slugs, and buckshot.

* * * * *

C. Big Game Hunting. * * *

1. Conditions A1, A8, A9, A11, A12 (to hunt big game), and B7 apply.

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3. We allow deer and feral hog hunting on designated area as indicated in the refuge brochure.

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D. Sport Fishing. We allow fishing on designated areas of the refuge as indicated in the refuge brochure in accordance with State regulations subject to the following conditions:

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4. You must tend trotlines and yo-yos daily. You must attach ends of trotlines by a length of cotton line that extends into the water.

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7. We prohibit launching boats from areas other than designated boat launches within the Mollicy unit.

8. We prohibit the possession of juglines, limblines, and snag hooks.

14. Amend §32.39 Maryland by:

a. Revising Blackwater National Wildlife Refuge;

b. Revising paragraphs C. and D. of Eastern Neck National Wildlife Refuge; and

c. Revising paragraphs A.9. through A.12., B., C.1., C.2., C.4. through C.6., C.8., C.9., C.13. through C.15., and D. of Patuxent Research Refuge to read as follows:

§32.39 Maryland.

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Blackwater National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of goose and duck on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We require you to submit a Waterfowl Lottery Application (FWS Form 3-2355) to be selected to hunt waterfowl. If you are selected, we require you to then obtain a permit (name/address/signature required). Hunting brochures containing hunting application procedures, seasons, bag limits, methods of hunting, maps depicting areas open to hunting, and the terms and conditions under which we issue hunting permits are available at the refuge administration office and on the refuge's website.

2. We require you to abide by the terms and conditions of the refuge permit and brochure. Hunters may have their permits revoked if they are found to be in violation of §32.2 or other Federal and State laws.

3. We allow only hunters possessing a permit issued by the refuge to hunt/scout during designated days.

4. Except in accordance with condition A5, we require hunters to possess a valid Maryland hunting license and all required stamps, a valid

government-issued photo identification, and a valid hunting permit issued by the refuge at all times while on refuge property.

5. We require hunters accompanying a permit holder as part of a hunt party to possess a valid Maryland hunting license and all required stamps, and a valid government-issued photo identification at all times while on refuge property.

6. You must remove all hunting blind materials and decoys (see §27.93 of this chapter) at the end of each hunting day.

7. We allow hunters to access hunting areas only by boat, unless otherwise authorized by the refuge manager.

8. We prohibit the use of all-terrain vehicles (ATVs) or amphibious vehicles of any type.

9. We prohibit the use of air boats on the refuge.

10. We encourage hunters to use trained dogs to retrieve game on designated waterfowl hunt days at designated blind areas. We require that hunters confine dogs not engaged in retrieving waterfowl to a vehicle, boat, kennel, blind area, or other container.

11. We require all hunters to remain within 50 feet (15 m) of the designated hunt site while hunting.

B. Upland Game Hunting. [Reserved]

C. Big Game Hunting. We allow the hunting of white-tailed and sika deer and turkey on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We require you to submit a Big/Upland Game Hunt Application (FWS Form 3-2356) and/or a Quota Deer Hunt Application (FWS Form 3-2354) to be selected to hunt on the refuge. If you are selected, we require you to then obtain a permit (name/address/signature required). Hunting brochures containing hunting application procedures, seasons, bag limits, methods of hunting, maps depicting areas open to hunting, and the terms and conditions under which we issue hunting permits are available at the refuge administration office and on the refuge's website.

2. We allow only hunters possessing a permit issued by the refuge to hunt/scout during designated days.

3. We require hunters to possess a valid Maryland hunting license and all required stamps, a valid government-issued photo identification, and a valid hunting permit issued by the refuge at all times while on refuge property.

4. We require hunters to notify a refuge representative if they need to enter a closed area to retrieve game.

5. We prohibit the use of rimfire or centerfire rifles and handguns for hunting.

6. We prohibit the use of boats, ATVs, motorized off-road vehicles, and amphibious vehicles to access the refuge unless authorized by the refuge manager for use by disabled hunters.

7. We require hunters participating during muzzleloader and shotgun hunts to wear a minimum of 400 square inches (2,600 cm^2) of solid-colored-daylight-fluorescent-orange clothing on their head, chest, and back. We require hunters to wear an orange hat at all times.

8. We require the use of a temporary tree stand that elevates you a minimum of 8 feet (240 cm) above the ground for hunting in designated areas.

9. We prohibit screw-in steps, spikes, or other objects that may damage trees (see §32.2(i)).

10. We prohibit hunting from a permanently constructed tree stand or blind.

11. We require you to remove all stands and blinds within 24 hours of legal sunset of the final hunting day of the season. We are not responsible for damage, theft, or use of the stand by other hunters (see §27.93 of this chapter).

12. We prohibit organized deer drives, unless otherwise authorized by the refuge manager.

13. Hunters may use marking devices, including flagging or tape, but they must remove them within 24 hours of legal sunset of the final hunting day of the season (see §27.93 of this chapter).

14. We require all disabled hunters to provide certification of their disability.

15. Disabled persons may have an assistant during the hunt on designated areas of the refuge. Persons assisting disabled hunters must be at least age 18 and obey all refuge, State, and Federal laws and regulations. Persons assisting disabled hunters must not be afield with a hunting firearm, bow, or other hunting device.

16. Hunters may use bicycles to access hunt areas on designated hunt/scout days. We prohibit hunters taking bicycles off of designated roads and trails while on refuge lands.

17. We require that you abide by the terms and conditions of the refuge permit and brochure. Hunters may have their permits revoked if we find them to be in violation of §32.2 or other Federal and State laws.

D. Sport Fishing. We allow fishing and crabbing on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We allow fishing and crabbing only from April 1 through September 30 during daylight hours in refuge waters, unless otherwise authorized by the refuge manager.

2. We allow fishing and crabbing from boats and from the Key Wallace roadway (bridge) across the Little Blackwater River, unless otherwise authorized by the refuge manager.

3. We require you to possess a valid Maryland sport fishing license, all required stamps, and a valid, government-issued photo identification while fishing on the refuge. We do not require a refuge permit to fish on the refuge.

4. We require anglers to attend all fish and crab lines.

5. We prohibit boat launching from refuge lands except for canoes/kayaks at the canoe/kayak ramp located near the Blackwater River Bridge on Route 335.

6. We prohibit the use of airboats on refuge waters.

Eastern Neck National Wildlife Refuge

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C. Big Game Hunting. We allow hunting of white-tailed deer and turkey on designated areas of the refuge in accordance with State hunting regulations subject to the following conditions:

1. We require hunters to submit a Big Game Hunt Application (FWS Form 3-2356) to be selected to hunt on the refuge. We require you to obtain a permit (name/address/signature required). Hunting brochures containing hunting application procedures, seasons, bag limits, methods of hunting, maps depicting areas open to hunting, and the terms and conditions under which we issue hunting permits are available at the refuge administration office and on the refuge's website.

2. We allow only hunters possessing a permit issued by the refuge to hunt/scout during designated days.

3. We require hunters to possess a valid Maryland hunting license and all required stamps, a valid government-issued photo identification, and a valid hunting permit issued by the refuge at all times while on refuge property.

4. We require hunters to notify a refuge representative if they need to enter a closed area to retrieve game.

5. We prohibit the use of rimfire or centerfire rifles and handguns for hunting.

6. We prohibit the use of boats, ATVs, motorized off-road vehicles, and amphibious vehicles to access the refuge, unless authorized by the refuge manager for use by disabled hunters.

7. We require a minimum of 400 square inches (2,600 cm^2) of solid-

colored-daylight-fluorescent-orange clothing to be worn on the head, chest, and back of all hunters participating during muzzleloader and shotgun hunts. We require you to wear an orange hat at all times.

8. We prohibit screw-in steps, spikes, or other objects that may damage trees (see §32.2(i)).

9. We prohibit hunting from a permanently constructed tree stand or blind.

10. We require you to remove all stands and blinds within 24 hours of legal sunset of the final hunting day of the season. We are not responsible for damage, theft, or use of the stand by other hunters (see §27.93 of this chapter).

11. We allow use of marking devices, including flagging or tape, but hunters must remove them within 24 hours of legal sunset of the final hunting day of the season (see §27.93 of this chapter). We prohibit paint or any other permanent marker to mark trails.

12. We require all disabled hunters to provide certification of their disability.

13. Disabled persons may have an assistant during the hunt on designated areas of the refuge. Persons assisting disabled hunters must be at least age 18 and obey all refuge, State, and Federal laws and regulations. Persons assisting disabled hunters must not be afield with a hunting firearm, bow, or other hunting device.

14. We require that you abide by the terms and conditions of the refuge permit and brochure. Hunters may have their permits revoked if we find them to be in violation of §32.2 or other Federal and State laws.

15. We allow parking only in designated parking areas.

16. We prohibit hunting in the No Hunting Zones.

D. Sport Fishing. We allow fishing and crabbing in designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We allow fishing and crabbing from Eastern Neck Island bridge and from the boardwalk adjacent to that bridge.

2. We allow fishing and crabbing at the Ingleside Recreation Area only from April 1 through September 30 during daylight hours.

3. We allow fishing from the Boxes Point and Duck Inn Trails only during daylight hours.

4. We require you to possess a valid Maryland sport fishing license and all required stamps and a valid government-issued photo identification while fishing on the refuge. We do not require a refuge permit to fish on the refuge.

Patuxent Research Refuge

A. Migratory Game Bird Hunting. * * *

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9. We prohibit hunting on or across any road (paved, gravel, dirt, opened, and/or closed), within 50 yards (45 m) of a road (paved, gravel, dirt, opened and/or closed), within 150 yards (135 m) of any building or shed, and within 25 yards (22.5 m) from any designated "No Hunting" or "Safety Zone" areas, except:

i. You may hunt only from the road 50 yards (135 m) beyond the gate at Blue Heron Pond.

ii. You may hunt from the road 50 yards (135 m) beyond the barricade at Wood Duck Pond.

iii. You may hunt from any refuge permanent photo/hunt blind.

iv. You may hunt from the roadside, at designated areas, if you possess a Maryland State "Hunt from a Vehicle Permit."

v. You may hunt waterfowl from the roadside at the five designated hunting blind sites at Lake Allen.

vi. You may hunt waterfowl from the roadside in the designated posted portion, 77 yards (69 m), of Wildlife Loop at Bailey Marsh.

10. You must wear fluorescent orange in accordance with State regulations subject to the additional following conditions:

i. Your fluorescent orange must be visible 360 degrees while carrying-in and carrying-out equipment (e.g., portable blinds).

ii. "Jump shooters" must wear at least a solid-colored, fluorescent-hunter-orange cap while hunting. If you stop and stand, you may remove it.

11. We allow the taking of only Canada goose during the early and late resident Canada goose seasons. Resident Canada goose hunters may hunt on Range 1 and Lake Allen in Area "D" during the early resident season Monday through Thursday, from ½ hour before legal sunrise to 12 pm (noon). We will open areas D, E, F, and G Monday through Thursday from ½ hour before legal sunrise until 8 am. On Fridays and Saturdays, we will open Areas D, E, F, and G all day.

12. We prohibit goose, duck, and dove hunting during the early deer muzzleloader season, youth deer hunts, and deer firearms seasons. However, Blue Heron Pond, Lake Allen, and Area Z will remain open for ducks during the early muzzleloader season and for Junior Duck hunters during the Junior Waterfowl hunt day. Hunters may harvest these species during the late muzzleloader season.

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B. Upland Game Hunting. We allow hunting of turkey, gray squirrel, eastern cottontail rabbit, and woodchuck on the North Tract and turkey on the Central Tract in accordance with State regulations subject to the following conditions:

1. Conditions A1 through A9 apply.

2. Hunters may possess only approved nontoxic shot while in the field (see §32.2(k)).

3. We prohibit hunting of upland game during the deer muzzleloader and firearms seasons, including the youth deer hunts.

4. Hunters must wear fluorescent orange in accordance with State regulations.

5. We restrict spring turkey hunters to shotguns loaded with #4, #5, or #6 nontoxic shot, crossbows, or vertical bows.

6. We select turkey hunters by a computerized lottery for youth, disabled, mobility impaired, and general public hunts. We require documentation for disabled and mobility-impaired hunters.

7. We require turkey hunters to show proof they have attended a turkey clinic sponsored by the National Turkey Federation.

8. We require turkey hunters to pattern their weapons prior to hunting. Contact refuge headquarters for more information.

9. We prohibit the use of dogs to hunt upland game.

C. Big Game Hunting. * * *

1. Conditions A1 through A9 apply.

2. Prior to issuing hunting permit, we require you to pass a yearly proficiency test with each weapon used. See A1 for issuing information.

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4. We require hunters to secure longbows, recurve bows, compound bows, and crossbows, with weapons inaccessible, and/or cased, with no arrows nocked, while inside the vehicle.

5. We prohibit possession or use of buckshot for hunting.

6. You must wear fluorescent orange in accordance with State regulations subject to the additional following conditions:

i. Your fluorescent orange must be visible 360 degrees while carrying-in and carrying-out equipment (e.g., portable tree stands).

ii. We require bow hunters to wear 250 square inches (1,625 cm^2) of solid-fluorescent orange when walking from their vehicle to their hunting location and while tracking.

iii. We require bow hunters hunting during the North Tract youth deer hunts

to wear 250 square inches of solid-fluorescent orange.

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8. All deer harvested will have a jaw extracted at the hunter check station before leaving the refuge.

9. We allow the use of portable tree stands with full-body safety harnesses on the refuge. Hunters must use portable tree stands and at minimum of 10 feet (3 m) off the ground at Schafer Farm, Central Tract, and South Tract. Hunters must remove all tree stands when not in use (see §27.93 of this chapter). We will make limited accommodations for disabled hunters for Central Tract lottery hunts. We allow ground blinds only at North Tract.

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13. **North Tract**: We allow shotgun, muzzleloader, and bow hunting in accordance with the following regulations: Conditions C1 through C12 apply.

14. **Central Tract**:

i. **Headquarters/MR Lottery Hunt**: We allow only shotgun and bow hunting in accordance with the following regulations:

a. Conditions C1, C2, and C4 through C12 apply.

b. We select Central Tract shotgun and bow hunters by a computerized lottery. We will assign you a specific hunting location.

ii. **Schafer Farm Hunt**: We allow bow hunting only in accordance with the following regulations: Conditions C1, C2, and C4 through C12 apply.

15. **South Tract**: We allow shotgun, muzzleloader, and bow hunting in accordance with the following regulations:

i. Conditions C1 through C12 apply.

ii. You must access South Tract hunting areas A, B, and C off Springfield Road through the Old Beltsville Airport; and South Tract hunting area D from MD Rt. 197 through Gate #4. You must park in designated parking areas.

iii. We prohibit driving or parking along the entrance and exit roads to and from the National Wildlife Visitor Center, and parking in the visitor center parking lot when checked in to hunt any area.

D. Sport Fishing. We allow sport fishing in accordance with State hook and line fishing regulations subject to the following conditions:

1. We require all anglers, age 16 and older, to obtain a free Fishing Application (FWS Form 3-2358) as well as a Maryland State fishing license, which they must carry with them at all times while fishing.

2. We require anglers age 17 or younger to have a parent or guardian cosign to receive a fishing permit.

3. An adult age 21 or older possessing a fishing permit must accompany anglers age 17 or younger. They must maintain visual contact with each other within a 50-yard (45-m) distance.

4. We publish the Refuge Fishing Regulations, which include the daily and yearly creel limits and fishing dates, in early January. We provide a copy of the regulations with your free refuge fishing permit, and we require you to know the specific fishing regulations.

5. Anglers must carry a copy of their refuge fishing permit and their Maryland State fishing license in the field.

6. Anglers must display a fishing pass (received once they fill out the Fishing Application) in their vehicle windshield.

7. We prohibit the use and/or possession of lead sinkers.

8. We prohibit the use or possession of alcoholic beverages (see §27.81 of this chapter).

9. We prohibit the following activities: Swimming, sunbathing, littering, camping, campfires, picnicking, and disturbance to or removal of vegetation or wildlife (see §27.51 of this chapter).

10. We require anglers to keep all pets on a leash no longer than 10 feet (3 m) (see §26.21(b) of this chapter). We prohibit pets from being in any refuge waterways.

11. Anglers may take three youths, age 15 or younger, to fish under the adult's permit and in the presence and control of the adult. They must maintain visual contact with each other within a 50-yard (45-m) distance.

12. Organized groups need a Fishing Application (FWS Form 3-2358). The group leader must carry a copy of the application/pass and stay with the group at all times while fishing.

13. We allow the use of earthworms as the only source of live bait. We prohibit bloodworms, fish, or other animals or parts of animals to be used as bait.

14. We prohibit harvesting bait on the refuge.

15. Anglers must attend all fishing lines.

16. Anglers may take the following species: chain pickerel, catfish, golden shiner, eel, and sunfish (includes bluegill, black crappie, warmouth, and pumpkinseed). Maryland State daily harvest limits apply unless otherwise noted.

i. All bluegill taken must be 6 inches (15 cm) or larger.

ii. We allow take of one chain pickerel per day.

iii. Anglers must release all bass that they catch.

17. We prohibit fishing from all bridges except the downstream side of Bailey Bridge.

18. **North Tract**: We allow sport fishing in accordance with the following regulations:

i. Conditions D1 through D17 apply.

ii. We allow sport fishing year-round at Lake Allen, Rieve's Pond, New Marsh, Cattail Pond, and Little Patuxent River (downstream only from Bailey's Bridge) except Mondays through Saturdays from September 1 through January 31 during the hunting season. We also reserve the right to close Lake Allen at any time.

iii. We allow wading, for fishing purposes only, downstream from Bailey Bridge on the Little Patuxent River. We prohibit wading in all other bodies of water.

iv. We prohibit the use of any type of watercraft.

19. **South Tract**: We allow sport fishing in accordance with the following regulations:

i. Conditions D1 through D16 apply.

ii. Anglers must park their vehicles in the parking lot located behind Refuge Gate #8 off MD Rt. 197. Anglers may not access Cash Lake from the National Wildlife Visitor Center.

iii. We allow sport fishing at the pier and designated shorelines at Cash Lake. See Refuge Fishing Regulations for areas opened to fishing. We post other areas with, "No fishing beyond this point" signs.

iv. Anglers may fish from mid-June until mid-October, as posted.

v. We allow fishing between the hours of 6 a.m. and 8 p.m. June through August and between 7 a.m. and 6:30 p.m. in September and October.

vi. We prohibit the use of the public trails near Cash Lake after 4:30 pm.

vii. Anglers may use watercraft for fishing in accordance with Maryland State boating laws subject to the additional following conditions:

a. You may use car-top boats that are 14 feet (4.2m) or less, canoes, kayaks, and inflatable boats.

b. You may use only electric motors that are 4 hp or less.

c. We prohibit sailboats.

d. Maryland State law requires personal flotation devices in boats.

viii. We prohibit boat trailers except by individuals possessing a refuge handicapped permit.

15. Amend §32.41 Michigan by:

a. Revising paragraph C. of Harbor Island National Wildlife Refuge;

b. Adding Michigan Wetland Management District in alphabetical order; and

c. Revising paragraph A., adding paragraph B.3., and revising paragraphs

C., and D. of Seney National Wildlife Refuge.

The revisions and additions read as follows:

§32.41 Michigan.

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Harbor Island National Wildlife Refuge

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C. Big Game Hunting. We allow hunting of white-tailed deer and black bear in accordance with State regulations.

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Michigan Wetland Management District

A. Migratory Game Bird Hunting. We allow hunting of migratory game birds throughout the district in accordance with State regulations subject to the following conditions:

1. We prohibit the use of motorized boats, motorized vehicles, ATVs, horses, and bicycles except in designated parking areas.

2. Hunters must remove boats, decoys, blinds, and blind materials at the end of each day.

3. We allow the use of hunting dogs, provided the dog is under the immediate control of the hunter at all times during the State-approved hunting season.

4. We prohibit camping.

B. Upland Game Hunting. We allow hunting of upland game in accordance with State regulations subject to the following conditions: Conditions A1, A3, and A4 apply.

C. Big Game Hunting. We allow the hunting of big game throughout the district in accordance with State regulations subject to the following conditions:

1. We prohibit the construction or use of permanent blinds, platforms, or ladders (see §27.93 of this chapter).

2. Conditions A1 and A4 apply.

D. Sport Fishing. We allow fishing throughout the district in accordance with State regulations subject to the following conditions:

1. Conditions A1, A3, and A4 apply.

2. Anglers must remove ice fishing shelters and personal property from the Waterfowl Production Area each day (see §27.93 of this chapter).

Seney National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of woodcock and snipe on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Shotgun hunters may possess only approved nontoxic shot while in the field (see §32.2(k)).

2. We prohibit the use of ATVs and snowmobiles.

3. We prohibit baiting and the possession of bait while on the refuge (see §32.2(h)).

4. We allow the use of hunting dogs, provided the dog is under the immediate control of the hunter at all times during the State-approved hunting season (see §26.21(b) of this chapter).

B. Upland Game Hunting. * * *

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3. Conditions A1 through A4 apply.

C. Big Game Hunting. We allow the hunting of deer and bear on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A2 and A3 apply.

2. We prohibit the use of dogs while deer or bear hunting.

D. Sport Fishing. We allow fishing on designated areas of the refuge subject to the following conditions:

1. We prohibit the use of fishing weights or lures containing lead.

2. We allow ice fishing from January 1 through the end of February.

3. Anglers must remove ice fishing shelters and all other personal property from the refuge each day (see §27.93 of this chapter).

4. Condition A2 applies.

5. We allow fishing on designated refuge pools and the Creighton, Driggs, and Manistique Rivers from May 14 through September 30.

6. We prohibit boats and flotation devices on the refuge pools.

7. We prohibit motorized boats on the Creighton and Driggs Rivers.

8. We allow fishing only during daylight hours.

* * * * *

16. Amend §32.42 Minnesota by:

a. Revising the introductory text of paragraph A., revising paragraph B., and revising the introductory text of paragraphs C. and D. of Fergus Falls Wetland Management District; and

b. Revising the introductory text of paragraph A., revising paragraphs A.1., A.3., and A.6., removing paragraph A.7., revising paragraphs B. and C.1. through C.3., removing paragraph C.4., and redesignating paragraphs C.5. through C.7. as paragraphs C.4. through C.6. of Minnesota Valley National Wildlife Refuge.

The revisions read as follows:

§32.42 Minnesota.

* * * * *

Fergus Falls Wetland Management District

A. Migratory Game Bird Hunting. We allow hunting of migratory game birds throughout the district (except that we allow no hunting on the Townsend, Mavis, and Gilmore Waterfowl Production Areas [WPA] and the building and administrative area of Knollwood WPA in Otter Tail County, and Larson WPA in Douglas County) in accordance with State regulations subject to the following conditions:

* * * * *

B. Upland Game Hunting. We allow upland game hunting throughout the district (except that we prohibit hunting on the Townsend, Mavis, and Gilmore Waterfowl Production Areas [WPA] and the building and administrative area of Knollwood WPA in Otter Tail County, and Larson WPA in Douglas County) in accordance with State regulations subject to the following conditions: Conditions A3 and A6 apply.

C. Big Game Hunting. We allow big game hunting throughout the district (except that we prohibit hunting on the Townsend, Mavis, and Gilmore Waterfowl Production Areas [WPA] and the building and administrative area of Knollwood WPA in Otter Tail County, and Larson WPA in Douglas County) in accordance with State regulations subject to the following conditions:

* * * * *

D. Sport Fishing. We allow sport fishing throughout the district (except that we prohibit hunting on the Townsend, Mavis, and Gilmore Waterfowl Production Areas [WPA] and the building and administrative area of Knollwood WPA in Otter Tail County, and Larson WPA in Douglas County) in accordance with State regulations subject to the following conditions:

* * * * *

Minnesota Valley National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow the hunting of goose, duck, merganser, moorhen, coot, rail, woodcock, common snipe, and mourning dove on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We require refuge-specific authorization for special hunts.

* * * * *

3. We prohibit hunting on, from, across, or within 100 feet (30 m) of any service road, parking area, or designated trail.

* * * * *

6. We prohibit entry into the refuge earlier than 2 hours before legal shooting time and require hunters to leave the refuge no later than 1 hour after legal shooting time.

B. Upland Game Hunting. We allow hunting of ruffed grouse, gray partridge, ring-necked pheasant, gray and fox

squirrel, snowshoe hare, cottontail rabbit, jackrabbit, and wild turkey on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A1 and A3 through A6 apply.

2. Hunters may use only shotguns and bows and arrows.

3. When hunting we prohibit the use of single projectile ammunition.

4. We allow turkey hunters to use shot containing lead.

C. Big Game Hunting. * * *

1. Conditions A1, A3, and A6 apply.

2. Hunters must remove all personal property, which include portable stands, climbing sticks, decoys, and blinds, brought onto the refuge each day (see §27.93 of this chapter).

3. We prohibit the use of handguns for hunting.

* * * * *

17. Amend §32.43 Mississippi by:

a. Adding paragraph B.8., revising the introductory text of paragraph C., and revising paragraphs C.1., C.3., C.5., and C.8. of Hillside National Wildlife Refuge;

b. Adding paragraph B.15., revising the introductory text of paragraph C., and revising paragraphs C.1., C.3., C.5., and C.8. of Holt Collier National Wildlife Refuge;

c. Adding paragraph B.7., revising the introductory text of paragraph C., and revising paragraphs C.1., C.4., and C.6. of Mathews Brake National Wildlife Refuge;

d. Removing paragraph B.5., redesignating paragraphs B.6. and B.7. as paragraphs B.5. and B.6., adding new paragraph B.7., revising the introductory text of paragraph C., and revising paragraphs C.1., C.3., C.8., and D.2. of Morgan Brake National Wildlife Refuge;

e. Revising paragraphs A.1., A.5., A.8., B.4., B.10., C.2., and C.3., and adding paragraphs C.9. and D.9. of Noxubee National Wildlife Refuge;

f. Adding paragraph B.8., revising the introductory text of paragraph C., and revising paragraphs C.1., C.5., C.7., and C.10. of Panther Swamp National Wildlife Refuge;

g. Revising St. Catherine Creek National Wildlife Refuge; and

h. Revising paragraph A.8., adding paragraph B.9., revising paragraph C.1., removing paragraph C.3., redesignating paragraphs C.4. through C.13. as paragraphs C.3. through C.12., and revising newly redesignated paragraphs C.6. and C.9. of Yazoo National Wildlife Refuge.

The revisions and additions read as follows:

§32.43 Mississippi.

* * * * *

Hillside National Wildlife Refuge

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B. Upland Game Hunting. * * *

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8. We prohibit hunting over or the placement of bait (see §32.2(h)). Baiting means the direct or indirect placing, exposing, depositing, or scattering of any salt, grain, powder, liquid or other feed substance to attract game.

C. Big Game Hunting. We allow hunting of white-tailed deer, turkey, and feral hog on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A1 through A10, B5, and B8 apply.

* * * * *

3. We prohibit organized drives for deer and feral hog.

* * * * *

5. We prohibit hunting or shooting into a 100-foot (30-m) zone along either side of pipelines, power line rights-of-way, designated roads, trails, or around parking lots (see refuge brochure map). We consider you to be hunting if you occupy a stand or a blind, have a loaded hunting firearm, or have an arrow nocked in a bow.

* * * * *

8. During designated muzzleloader hunts, we allow archery equipment and muzzleloaders loaded with a single ball. While hunting, we prohibit breech-loading firearms of any type.

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Holt Collier National Wildlife Refuge

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B. Upland Game Hunting. * * *

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15. We prohibit hunting over or the placement of bait (see §32.2(h)). Baiting means the direct or indirect placing, exposing, depositing, or scattering of any salt, grain, powder, liquid, or other feed substance to attract game.

C. Big Game Hunting. We allow hunting of white-tailed deer and feral hog on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions B1 through B7, B9, and B13 through B15 apply.

* * * * *

3. We prohibit organized drives for deer and feral hog.

* * * * *

5. We prohibit hunting or shooting into a 100-foot (30-m) zone along either side of pipelines, power line rights-of-way, designated roads, trails, or around parking lots (see refuge brochure map). We consider it hunting if you occupy a stand or blind, have a loaded hunting firearm, or have an arrow nocked in a bow.

* * * * *

8. During designated muzzleloader hunts, we allow archery equipment and muzzleloaders loaded with a single ball. While hunting, we prohibit breech-loading firearms of any type.

* * * * *

Mathews Brake National Wildlife Refuge

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B. Upland Game Hunting. * * *

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7. We prohibit hunting over or the placement of bait (see §32.2(h)). Baiting means the direct or indirect placing, exposing, depositing, or scattering of any salt, grain, powder, liquid, or other feed substance to attract game.

C. Big Game Hunting. We allow hunting of white-tailed deer and feral hog on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A1 through A9, A15, and B5 through B7 apply.

* * * * *

4. We prohibit organized drives for deer and feral hog.

* * * * *

6. We prohibit hunting or shooting into a 100-foot (30-m) zone along either side of pipelines, power line rights-of-way, designated roads, trails, or around parking lots (see refuge brochure map). We consider it hunting if you occupy a stand or blind, have a loaded hunting firearm, or have an arrow nocked in a bow.

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Morgan Brake National Wildlife Refuge

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B. Upland Game Hunting. * * *

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7. We prohibit hunting over or the placement of bait (see §32.2(h)). Baiting means the direct or indirect placing, exposing, depositing, or scattering of any salt, grain, powder, liquid or other feed substance to attract game.

C. Big Game Hunting. We allow hunting of white-tailed deer and feral hog on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A1 through A7, A9, A10, and B5 through B7 apply.

* * * * *

3. We prohibit organized drives for deer and feral hog.

* * * * *

8. During designated muzzleloader hunts, we allow archery equipment and muzzleloaders loaded with a single ball. While hunting, we prohibit breech-loading firearms of any type.

* * * * *

*D. Sport Fishing. * * **

* * * * *

2. From November 16 to February 28, we allow fishing in refuge waters north of Providence Road except Providence Ponds, which we close from the first day of waterfowl season until March 1.

* * * * *

Noxubee National Wildlife Refuge

*A. Migratory Game Bird Hunting. * * **

1. We require waterfowl hunters to sign and carry the refuge brochure signifying that they have read and understood the rules of the hunt. The brochure must be in the hunter's possession at all times while hunting on the refuge. We also conduct a waterfowl drawing. There is a $15 fee per submission (one submission per individual), and we ask prospective hunters to submit their name and address for the drawing. We will send letters to those hunters selected and deposit those hunters' money orders or checks. The drawn name will be on a list and checked off at the refuge the morning of the hunt. We allow only two companions to accompany each selected hunter. If an individual is not drawn, we will return the $15 entry fee to the unsuccessful applicant.

* * * * *

5. All youth hunters age 15 and younger must remain within sight and normal voice contact of an adult age 21 or older. One adult may supervise not more than two youth hunters.

* * * * *

8. Handguns must be in compliance with State regulations.

* * * * *

*B. Upland Game Hunting. * * **

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4. The refuge allows the use of dogs for hunting rabbit and squirrel. We allow use of dogs for rabbit hunting only after January 1. We allow dogs for squirrel hunting between December 16 and December 23 and after January 1.

* * * * *

10. We require hunters to sign and carry the refuge brochure signifying they have read and understood the rules of the hunt. This brochure must be in the hunter's possession at all times while hunting on the refuge.

* * * * *

*C. Big Game Hunting. * * **

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2. We identify hunts and hunt dates in the refuge brochure/permit, which is available at the refuge headquarters.

3. We require hunters to sign and carry the refuge brochure signifying they have read and understood the rules of the hunt. This brochure must be in the hunter's possession at all times while hunting on the refuge. We also charge a $15 fee to hunt white-tailed deer. Hunters must provide their name either by mail or in person at the refuge, and we will issue a numbered permit containing tags. The hunter must sign each tag and must attach one tag to game at the time of harvest.

* * * * *

9. We prohibit hanging and/or cleaning deer within the refuge's picnic area, boat ramp, parking lots, and other public use areas.

*D. Sport Fishing. * * **

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9. We require anglers to obtain a refuge fishing permit brochure. The angler must sign this permit and have it in their possession at all times while fishing on the refuge.

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Panther Swamp National Wildlife Refuge

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*B. Upland Game Hunting. * * **

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8. We prohibit hunting over or the placement of bait (see §32.2(h)). Baiting means the direct or indirect placing, exposing, depositing, or scattering of any salt, grain, powder, liquid, or other feed substance to attract game.

C. Big Game Hunting. We allow hunting of white-tailed deer, turkey, and feral hog on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A1 through A7, A9, A10, and B6 through B8 apply.

* * * * *

5. We prohibit organized drives for deer or feral hog.

* * * * *

7. We prohibit hunting or shooting into a 100-foot (30-m) zone along either side of pipelines, power line rights-of-way, designated roads, trails, or around parking lots (see refuge brochure map). We consider it hunting if you occupy a stand or blind, have a loaded hunting firearm, or have an arrow nocked in a bow.

* * * * *

10. During designated muzzleloader hunts, we allow archery equipment and muzzleloaders loaded with a single ball. While hunting, we prohibit breech-loading firearms of any type.

* * * * *

St. Catherine Creek National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of duck, goose, and coot during the State season in accordance with State regulations subject to the following conditions:

1. We allow hunting in Butler Lake, Salt Lake, and Gillard Lake from ½ hour before legal sunrise until 12 p.m. (noon) on Tuesdays, Thursdays, Saturdays, and Sundays.

2. If you are a hunter age 16 or older, you must possess and carry a valid, signed refuge Public Use Permit (only signature required) certifying that you understand and will comply with all regulations.

3. The refuge will close for hunting when flooding restricts safe access.

4. We restrict access to Butler Lake for waterfowl hunting only to Butler Lake Road.

5. Hunters must remove harvested waterfowl, temporary blinds and decoys (see §27.93 of this chapter) used for duck hunting by 1 p.m. daily.

6. You may possess only approved nontoxic shot while hunting on the refuge (§32.2(k)).

7. You must use portable blinds.

8. Refuge users may enter the refuge no earlier than 4 a.m. and must exit the refuge by 2 hours after legal sunset.

9. All persons in all underway boats must wear U.S. Coast Guard-approved personal flotation devices.

10. You must hand-launch boats except at designated boat ramps, where you may trailer-launch them.

11. We allow all-terrain vehicles (ATVs) and utility-type vehicles (UTVs) as per State WMA regulations and size specifications on designated trails (see §27.31 of this chapter) from September 1 through the hunting season. An ATV is an off-road vehicle with factory specifications not to exceed the following: Weight 750 pounds (337.5 kg), length 85 inches (212.5 cm), and width 48 inches (120 cm). We restrict ATV tires to those no larger than 25 inches (62.5 cm) x 12 inches (30 cm) with a maximum 1 inch (2.5 cm) lug height and a maximum allowable tire pressure of 7 psi as indicated on the tire by the manufacturer.

12. Hunters must be age 16 or older to operate an ATV on the refuge.

13. State bag limits apply.

14. We prohibit the following acts: Possession of alcohol while hunting (see §32.2(j)); entering the refuge from private property; hunters entering the refuge from public waterways; overnight parking; parking or hunting within 150 feet (45 m) of any petroleum facility or equipment, or refuge residences and buildings; parking by hunters in refuge headquarters parking lot; and use of handguns for hunting on the refuge.

B. Upland Game Hunting. We allow hunting of squirrel, rabbit, raccoon, opossum, and woodcock in designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We only allow shotguns, .22 caliber rimfire rifles or smaller, and muzzleloading rifles under .38 caliber shooting patched round balls, except for raccoon hunting (see condition 3iv below). We prohibit the possession of .22 caliber magnum rifles, slugs, buckshot, or rifle ammunition larger than .22 rimfire.

2. You must wear a hunter-orange hat and upper garment when hunting in open fields or reforested areas.

3. We allow raccoon hunting only during the month of February from legal sunset to legal sunrise with the following conditions:

i. We require dogs.

ii. We prohibit hunting along/from Carthage-Linwood Road.

iii. We prohibit the use of boats and ATVs.

iv. You may use only .22 caliber rimfire rifles for hunting.

4. You may take beaver, nutria, coyote, and hog incidental to the hunt.

5. Conditions A2 and A6 through A14 apply.

6. We prohibit the following acts: Target practice; marking trails with tape, paper, paint, or any other artificial means; and riding horses or mules.

C. Big Game Hunting. We allow deer and lottery youth turkey hunting in accordance with State regulations subject to the following conditions:

1. We allow only still hunting.

2. Hunters may take only one deer per day. State regulations apply.

3. We require hunters to wear a minimum of 400 square inches (2,600 cm^2) of unbroken hunter orange as the outermost layer of clothing on the chest and back, and in addition, we require a hat or cap of unbroken hunter orange. You must wear the solid-hunter-orange items while in the field.

4. Youth hunters age 15 and under must possess and carry a hunter safety course card or certificate. Each youth hunter must remain within sight and normal voice contact of an adult age 21 or older.

5. We must receive all applications for the limited youth lottery draw turkey hunt by February 28 of each year.

6. Youth (ages 10 to 15) gun deer and waterfowl hunts will coincide with designated State youth hunts each year. Youth deer hunters may use any weapon deemed legal by the State except for buckshot, which we prohibit.

7. We prohibit insertion of metal objects into trees or hunting from trees that contain inserted metal objects (see §32.2(i)).

8. We prohibit the use or possession of climbing spurs.

9. You must dismantle blinds and tripods, and you must remove stands from the tree each day. You must remove all stands, blinds, and tripods (see §27.93 of this chapter) from the refuge before February 7 of each year.

10. You must check all deer harvested on the refuge at one of the three self-clearing, mandatory deer check stations.

11. State season bag limits apply.

12. Conditions A2, A6 through A14, B4, and B6 apply.

D. Sport Fishing. We allow fishing during daylight hours only from February 1 until the day prior to the State firearms season opening each year in accordance with State regulations subject to the following conditions:

1. We require a Public Use Permit (only signature required) for all anglers between ages 16 and 65.

2. We prohibit the use of ATVs (see §27.31(f) of this chapter).

3. On the Sibley Unit, we prohibit motorized boats north of the Ring Levee. Anglers may hand-launch boats in Swamp Lake during nonflood conditions.

4. An adult age 21 or older must supervise youth age 15 and younger who may fish in the Kid's Pond. We prohibit adults from fishing in this pond.

5. We allow bow fishing. Bow anglers must abide by State law.

6. We allow nighttime bow fishing on the refuge but only through a Special Use Permit (FWS Form 3-1383) issued by the refuge manager.

7. We prohibit the following acts: Crawfishing and commercial fishing or possession of trotline equipment including limb lines, nets, traps, yo-yos, or jugs.

8. Conditions A10, A11, and A14 apply.

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Yazoo National Wildlife Refuge

A. Migratory Game Bird Hunting. * **

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8. We are open for hunting within specific dates and areas during the State season except during limited draw deer hunts.

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*B. Upland Game Hunting. * * **

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9. We prohibit hunting over or the placement of bait (see §32.2(h)). Baiting means the direct or indirect placing, exposing, depositing, or scattering of any salt, grain, powder, liquid, or other feed substance to attract game.

*C. Big Game Hunting. * * **

1. Conditions A1 through A7, A9, B6, B7, and B9 apply.

* * * * *

6. We prohibit hunting or shooting into a 100-foot (30-m) zone along either side of pipelines, power line rights-of-way, designated roads, trails, or around parking lots (see refuge brochure map). We consider it hunting if you occupy a stand or blind, have a loaded hunting firearm, or have an arrow nocked in a bow.

* * * * *

9. During designated muzzleloader hunts, we allow archery equipment and muzzleloaders loaded with a single ball. While hunting, we prohibit breech-loading firearms of any type.

* * * * *

18. Amend §32.44 Missouri by:

a. Revising paragraphs C.1., C.2., C.4., and D.2. of Clarence Cannon National Wildlife Refuge;

b. Removing paragraph C.4.iv. and redesignating paragraph C.4.v. as C.4.iv. of Great River National Wildlife Refuge; and

c. Revising paragraphs A.1. and A.2., adding paragraphs A.6. through A.8., revising paragraph B., revising the introductory text of paragraph C., and revising paragraphs C.1., C.2., C.3., C.5., C.7., and D. of Mingo National Wildlife Refuge.

The revisions and additions read as follows:

§32.44 Missouri.

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Clarence Cannon National Wildlife Refuge

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*C. Big Game Hunting. * * **

1. We allow hunting only during the State-designated managed deer hunts.

2. We require hunters to sign in and out of the refuge each day.

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4. We allow use of portable stands, but hunters must remove them at the end of each day. If assigned a specific

blind location, you may hunt only from that location.

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D. Sport Fishing. * * *

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2. We allow only boat fishing. We allow bank fishing during managed refuge special events.

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Mingo National Wildlife Refuge

A. Migratory Game Bird Hunting. * * *

1. We allow the use of hunting dogs only for waterfowl hunting, provided the dogs are under the immediate control of the hunter at all times (see §26.21(b) of this chapter).

2. We allow waterfowl hunting from ½ hour before legal sunrise until 1 pm.

* * * * *

6. We require hunters to go through the Missouri Department of Conservation daily draw process at Duck Creek Conservation Area to hunt in Pool 8.

7. We require hunters to read the current refuge hunting brochure that contains a hunting permit (signature only required). We require hunters to sign the permit and carry the signed brochure while hunting.

8. We prohibit the discharging of firearms, including air guns or any other weapons, on the refuge unless you are a hunter with a valid refuge brochure engaged in authorized activities during established seasons.

B. Upland Game Hunting. We allow hunting of squirrel only in the Public Hunting Area of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A3, A7, and A8 apply.

2. We allow hunter access to the public hunting from 1½ hours before legal shooting time until 1½ hours after legal shooting time.

3. We require that all hunters register at the hunter sign-in stations and complete an Upland Game Hunt Report (FWS Form 3-2362) located at the exit kiosks prior to exiting the refuge.

4. We allow squirrel hunting from the State opening day through September 30.

5. We allow upland game hunting only with shotguns and .22 caliber rimfire rifles.

6. We require squirrel hunters to wear a hunter-orange (i.e., blaze or international orange) hat and a hunter-orange shirt, vest, or coat. These hunter-orange clothes need to be plainly visible from all sides while scouting or hunting during the overlapping portion of the squirrel, archery deer, and turkey seasons. Camouflage orange does not satisfy this requirement.

C. Big Game Hunting. We allow big game hunting in designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A3, A5, A7, A8, and B2 apply.

2. We require that all hunters register at the hunter sign-in stations and complete the Big Game Harvest Report (FWS Form 3-2359) located at the exit kiosks prior to exiting the refuge.

3. We allow archery hunting for deer and turkey during the fall season.

* * * * *

5. We require archery deer hunters to wear a hunter-orange (i.e., blaze or international orange) hat and a hunter-orange shirt, vest, or coat. These hunter-orange clothes need to be plainly visible from all sides while scouting or hunting during the overlapping portion of the squirrel, archery deer, and turkey seasons. Camouflage orange does not satisfy this requirement.

* * * * *

7. We prohibit the distribution of bait or hunting with the aid of bait, salt, or other ingestible attractant (see §32.2(h)).

* * * * *

D. Sport Fishing. We allow fishing in designated areas of the refuge in accordance with State "impounded waters" regulations subject to the following conditions:

1. We allow fishing year-round from ½ hour before legal sunrise until ½ hour after legal sunset in Red Mill Pond, Mingo River (south of Ditch 6 Road), Stanley Creek, May Pond, Fox Pond, and Ditches 2, 6, 10, and 11.

2. We allow fishing in moist soil units, Monopoly Marsh, Rockhouse Marsh, and Ditches 3, 4, and 5 only from March 1 through September 30.

3. We allow fishing in May Pond and Fox Pond only with rod and reel or pole and line. Anglers may only take bass greater than 12 inches (30 cm) in length from May Pond.

4. We prohibit the use or possession of gasoline-powered boat motors. We allow the use of electric trolling motors, except that we prohibit all motors within the Wilderness Area.

5. We require the removal of watercraft (see §27.93 of this chapter) from the refuge at the end of each day's fishing activity.

6. We allow anglers to take nongame fish by nets and seines for personal use only from March 1 through September 30.

7. Anglers must attend trammel and gill nets at all times and plainly label them with the owner's name, address, and phone number.

8. We only allow the use of trotlines, throwlines, limb lines, bank lines, and jug lines from ½ hour before legal sunrise until ½ hour after legal sunset. Anglers must remove all fishing lines (see §27.93 of this chapter) from the refuge at the end of each day's fishing. Anglers must mark each line with their name, address, and phone number.

9. We allow the take of common snapping turtle and soft-shelled turtle using only pole and line. We require all anglers to immediately release all alligator snapping turtles (see §27.21 of this chapter).

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19. Amend §32.46 Nebraska by adding paragraph C. of Fort Niobrara National Wildlife Refuge to read as follows:

§32.46 Nebraska.

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Fort Niobrara National Wildlife Refuge

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C. Big Game Hunting. We allow hunting of deer and elk on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We require the submission of a Big/Upland Game Hunt Application (FWS Form 3-2356). We require hunters to carry a refuge hunting access permit (hunt application signed by the refuge officer) while hunting. We require hunters to complete a Big Game Harvest Report (FWS Form 3-2359) and return it to the refuge at the conclusion of the hunting season.

2. We allow deer and elk hunting with muzzleloader and archery equipment. We prohibit deer and elk hunting with firearms capable of firing cartridge ammunition.

3. We establish the dates when the refuge is open to hunting access annually. We specify the hunting access dates on the refuge hunting access permit.

4. We allow deer and elk hunting in the area defined as, "Those refuge lands situated north and west of the Niobrara River." We allow access to this area only from public road right-of-ways, the Niobrara River, or designated refuge parking areas. We prohibit hunting within 200 yards (180 m) of any public use facility.

5. We allow hunter access from 2 hours before legal sunrise until 2 hours after legal sunset. We prohibit overnight parking or camping.

6. We allow horses within the wilderness area. We limit horse use to three groups at a time and no more than five horses per group. We prohibit horses from 2 hours after legal sunset

until 2 hours before legal sunrise. We require registration at the refuge headquarters prior to horse use during the hunting season. We limit horse access to the wilderness area via the refuge corrals and buffalo bridge.

7. We allow canoes, kayaks, and float tubes capable of carrying no more than four people on the Niobrara River below Cornell Dam.

8. We prohibit permanent tree stands, nails, screw-in steps, or other items that penetrate the outer bark of a tree. We prohibit tree stands and ground blinds from being left in the same location for more than 7 consecutive days (see §27.93 of this chapter). We require hunters to clearly mark (readable from the ground), with the hunter's name and date of erection, unattended tree stands and ground blinds.

* * * * *

20. Amend §32.49 New Jersey by:

a. Revising paragraph A., adding paragraph B., and revising paragraph C. of Cape May National Wildlife Refuge; and

b. Revising Wallkill River National Wildlife Refuge to read as follows:

§32.49 New Jersey.

* * * * *

Cape May National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of waterfowl, coot, moorhen, rail, common snipe, and woodcock on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We allow hunting only on those refuge tracts located west of Route 47 in the Delaware Bay Division and on those tracts north of Route 550 in the Great Cedar Swamp Division. We prohibit hunting on the Two Mile Beach Unit.

2. Any time the State hunting regulations specify the requirement that hunters wear orange-colored clothing, you must wear, in a visible manner on head, chest, and back, a minimum of 400 square inches (2,600 cm^2) of solid-colored, hunter-orange clothing or material. This must consist of a vest and hat or a jacket and hat. We prohibit blaze-orange camouflage.

3. You must remove all hunting blind materials, boats, and decoys at the end of each hunting day (see §27.93 of this chapter). We prohibit permanent or pit blinds.

4. The common snipe season on the refuge begins with the start of the State early woodcock south zone season and continues through the end of the State common snipe season.

5. You may possess only approved nontoxic shot in the field while hunting migratory game birds (see §32.2(k)).

6. We allow the use of retrieving and/or pointing dogs; however, the dogs must be under the hunter's control at all times (see §26.21(b) of this chapter), and we prohibit groups of three or more dogs per hunter. We prohibit dog training at all times

7. We prohibit hunting on Sunday.

8. We prohibit falconry.

9. We prohibit motorized and nonmotorized vehicles on refuge lands. This includes, but is not limited to, vehicles, all-terrain vehicles, dirt bikes, motorcycles, and bicycles.

10. We prohibit hunting on all areas posted "Area Closed" and all areas marked as closed on the refuge "Hunt Map."

B. Upland Game Hunting. We allow hunting of rabbit and squirrel on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A1, A2, and A7 through A11 apply.

2. We will allow rabbit and squirrel hunting following the end of the State's Six-Day Firearm Season for white-tailed deer, and it will end at the close of the regular rabbit and squirrel season.

3. We prohibit the use of dogs for hunting rabbit and squirrel. We prohibit dog training at all times.

4. You must remove all hunting stands, blinds, and hunting materials at the end of each hunting day (see §27.93 of this chapter). We prohibit permanent stands or blinds. We prohibit marking (this includes but is not limited to, the use of flagging, bright eyes, tacks, and paint), cutting, and/or removal of trees or vegetation (see §27.61 of this chapter).

C. Big Game Hunting. We allow hunting of white-tailed deer and turkey on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We allow hunting of white-tailed deer on all areas of the refuge except for the Two Mile Beach Unit, areas posted "Area Closed," and all areas marked as closed on the refuge "Hunt Map."

2. We allow turkey hunting only on refuge tracts located north of County Route 550 in the Great Cedar Swamp Division. We prohibit hunting on the Two Mile Beach Unit, areas posted "Area Closed," and all areas marked as closed on the refuge "Hunt Map."

3. We prohibit the use of dogs for deer and turkey hunting.

4. Conditions A2, A7 through A9, and A11 apply.

5. We prohibit the marking (this includes but is not limited to, the use of flagging, bright eyes, tacks, and paint), cutting, and/or removal of trees or vegetation (see §27.61 of this chapter).

6. You must remove all deer hunting stands, blinds, and hunting materials at the end of the State deer hunting season (see §27.93 of this chapter). We prohibit permanent stands or blinds. You should mark tree stands with owner information (name, address, and phone number).

7. You must remove all turkey hunting stands, blinds, hunting materials, and decoys at the end of each hunting day (see §27.93 of this chapter).

* * * * *

Wallkill River National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of waterfowl, moorhen, rail, common snipe, and woodcock on designated areas of the refuge in accordance with State of New Jersey regulations and subject to the following conditions:

1. You must submit a Migratory Bird Hunt Application (FWS Form 3-2357) to hunt on the refuge. We require hunters to possess a signed refuge hunt permit (name and address only) at all times while scouting and hunting on the refuge. We charge a fee for all hunters except youth age 16 and younger.

2. We issue one companion permit (no personal information) at no charge to each hunter. We allow companions to observe and/or call but not to shoot a firearm or bow. Companion and hunters must set up in the same location.

3. We provide hunters with hunt maps and parking permits (name only) which they must clearly display in their vehicle. Hunters who park on the refuge must park in identified hunt parking areas.

4. We provide a designated hunting area at 119 Owens Station Road, Vernon, New Jersey. We reserve this property for the exclusive use of those physically challenged individuals who have produced evidence of the NJ Permit to Shoot or Hunt from a Stationary Vehicle and possess a signed, disabled hunter refuge permit.

5. We prohibit the use of all-terrain vehicles (ATVs) on the refuge.

6. We require hunters to wear, in a conspicuous manner, a minimum of 400 square inches (2,600 cm^2) of solid-color, hunter-orange clothing or material on the head, chest and back, except when hunting ducks and geese.

7. We prohibit hunters using or erecting permanent or pit blinds.

8. We require hunters to remove all hunting blind material, boats, and decoys from the refuge at the end of each hunting day (see §27.93 of this chapter).

9. We allow pre-hunt scouting; however, we prohibit the use of dogs during scouting.

10. We limit the number of dogs per hunting party to no more than two dogs.

11. We allow hunters to enter the refuge 2 hours before shooting time, and they must leave no later than 2 hours after the end of shooting time.

12. We prohibit the hunting of crows on the refuge.

B. Upland Game Hunting. [Reserved]

C. Big Game Hunting. We allow hunting of white-tailed deer and wild turkey on designated areas of the refuge in accordance with State of New Jersey regulations and subject to the following conditions:

1. You must submit a Big Game Hunt Application (FWS Form 3-2356) to hunt on the refuge. We require hunters to possess a signed refuge hunt permit (name and address only) at all times while scouting and hunting on the refuge. We charge a fee for all hunters except youth age 16 and younger.

2. Conditions A2 through A5 and A11 apply.

3. We require firearm hunters to wear, in a conspicuous manner, a minimum of 400 square inches (2,600 cm^2) of solid-color, hunter-orange clothing or material on the head, chest and back. Bow hunters must meet the same requirements when firearm season is also open. We do not require turkey hunters to wear orange at any time.

4. We require hunters to remove all stands and other hunting material from the refuge at the end of each hunting day (see §27.93 of this chapter).

5. We allow pre-hunt scouting; however, we prohibit the use of dogs during scouting or while turkey hunting.

6. We allow deer drives on the last day of each hunt season.

7. We prohibit baiting on refuge lands (see §32.2(h)).

D. Sport Fishing. We allow fishing in designated sections of the refuge in both New York and New Jersey in accordance with State regulations and subject to the following conditions:

1. We allow fishing in and along the banks of the Wallkill River. We allow shore fishing only in the pond at refuge headquarters and the ponds located at 285 Lake Wallkill Road, Vernon, New Jersey.

2. Anglers may fish from legal sunrise to legal sunset.

3. We require that anglers park in designated parking areas to access the Wallkill River through the refuge.

4. On refuge ponds, you may perform only catch-and-release fishing. We prohibit the use of live bait fish on refuge ponds.

5. We prohibit ice fishing on refuge ponds.

6. We prohibit the taking of reptiles and amphibians.

7. We prohibit the digging or collecting of bait.

8. We prohibit commercial fishing on the refuge.

21. Amend §32.50 New Mexico by:

a. Revising paragraph C.1. of Bitter Lake National Wildlife Refuge; and

b. Revising the introductory text of paragraph C. and adding paragraphs C.5. through C.16. of Bosque del Apache National Wildlife Refuge.

The revisions and additions read as follows:

§32.50 New Mexico.

* * * * *

Bitter Lake National Wildlife Refuge

* * * * *

C. Big Game Hunting. * * *

1. We restrict all hunting to the North Tract (including Salt Creek Wilderness Area and the portion of the refuge located north of U.S. Highway 70) in accordance with State seasons and regulations, with the specification that you may hunt and take feral hog (no bag limit) only while legally hunting deer and only with the weapon legal for deer on that day in that area.

* * * * *

Bosque del Apache National Wildlife Refuge

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C. Big Game Hunting. We allow hunting of mule deer, oryx, and male Rio Grande turkey on designated areas of the refuge in accordance with State regulations subject to the following conditions:

* * * * *

5. We prohibit hunting from a vehicle and hunting from blinds along roads.

6. Youth hunters age 17 and under must successfully complete a State-approved hunter education course prior to the refuge hunt. While hunting, each youth must possess and carry a card or certificate of completion.

7. Each youth hunter must remain within sight and normal voice contact of an adult companion age 21 or older. Each adult companion can supervise no more than one youth hunter. We issue one adult companion permit at no charge to each youth hunter drawn. We allow adult companions to observe and call, but they cannot shoot a firearm or bow. Adult companions and youth hunters must set up at the same location.

8. We allow male Rio Grande turkey hunting for youth in two areas of the refuge: the north hunting area and the south hunting area. We provide maps with the refuge permit, which each hunter must carry, that show these areas in detail.

9. You must possess and carry a Big/Upland Game Hunting Application (FWS Form 3-2356) for hunting of male Rio Grande turkey. The permit is available only to youth hunters and is available through a lottery drawing. You must postmark applications by March 1 of each year. A $6 nonrefundable application fee must accompany each hunt application.

10. We allow hunting of male Rio Grande turkey for youth hunters only on dates determined by refuge staff. We will announce hunt dates by September 1 of each year. Hunters must report to the refuge headquarters by 4:45 a.m. each hunt day. Legal hunting hours run from ½ hour before legal sunrise and will not extend past 5 p.m. local time.

11. We will limit the Youth Rio Grande Turkey Hunt to four weekends during the New Mexico Spring Turkey Hunting Season. We will publish specific dates and bag limits every year in the hunting brochure.

12. We will select a minimum of four hunters and a maximum of eight hunters in a random drawing of qualified applicants every year depending on annual male Rio Grande turkey population census.

13. We allow scouting of the turkey hunt units only on the Friday before the actual hunt weekend. Scouting can occur only during normal refuge hours of visitation. Drawn hunters and their parents or legal guardians should contact the refuge in advance for more information regarding scouting of proposed hunt units.

14. We allow temporary blinds for turkey hunts, and hunters must remove them from the refuge daily (see §27.93 of this chapter). It is unlawful to mark any tree or other refuge structure with paint, flagging tape, ribbon, cat-eyes, or any similar marking device (see §32.2(i)).

15. We allow youth hunters only one legally harvested male Rio Grande turkey per hunt.

16. Hunters must check out of the designated hunt unit and have their harvested turkey checked by refuge staff prior to leaving the refuge.

* * * * *

22. Amend §32.52 North Carolina by:

a. Revising the introductory text of paragraph D. and revising paragraph D.1. of Mackay Island National Wildlife Refuge;

b. Removing paragraph A.3., redesignating paragraphs A.4. and A.5.

as paragraphs A.3. and A.4., revising paragraphs B.1., C.1., C.2., and C.4., removing paragraph C.6., redesignating paragraphs C.7. through C.14. as paragraphs C.6. through C.13., revising newly redesignated paragraphs C.7. and C.13., and adding paragraph C.14. of Pee Dee National Wildlife Refuge; and

c. Revising paragraphs A.1., A.6., and B.6., adding paragraph C.1., and revising paragraphs C.3., C.5. through C.7., C.9., and D.1. of Pocosin Lakes National Wildlife Refuge.

The revisions and additions read as follows:

§32.52 North Carolina.

* * * * *

Mackay Island National Wildlife Refuge

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D. Sport Fishing. We allow fishing on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We allow fishing only from legal sunrise to legal sunset from March 15 through October 15 with the exception that we allow bank fishing in Corey's Ditch and the canal adjacent to the Kotts Island Causeway year-round. The 0.3 Mile Loop Trail and the terminus of the canal immediately adjacent to the Visitor's Center are open year-round, but we close them during Refuge Permit Deer Hunts.

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Pee Dee National Wildlife Refuge

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B. Upland Game Hunting. * * *

1. Conditions A1 through A4 apply (with the following exception to condition A2: Each adult may supervise no more than one youth hunter).

* * * * *

C. Big Game Hunting. * * *

1. Conditions A1 through A4 apply (with the following exception to condition A2: Each adult may supervise no more than one youth hunter).

2. We require each person participating in a muzzleloader or firearms quota hunt to possess a nontransferable refuge Special Use Quota Hunt Permit. You may apply for Quota Hunt Permits by submitting a completed Quota Deer Hunt Application (FWS Form 3-2354) available at the refuge office.

* * * * *

4. Youth quota hunts are for hunters ages 10-15. We prohibit supervising adults from hunting while participating in a youth quota hunt. We allow no more than one supervising adult for each youth possessing a permit on quota hunts.

* * * * *

7. We prohibit placing a tree stand on the refuge more than 4 days prior to the opening day of the deer hunt in which hunters will be participating. Hunters must remove the tree stands (see §27.93 of this chapter) by the last day of that hunt.

* * * * *

13. During refuge muzzleloader and firearms deer hunts, we prohibit all other public use in refuge hunting areas.

14. We prohibit big game hunting within 100 feet (30 m) of any vehicle or road open to vehicle traffic.

* * * * *

Pocosin Lakes National Wildlife Refuge

A. Migratory Game Bird Hunting. * * *

1. We prohibit hunting on the Davenport and Deaver tracts (which include the area surrounding the Headquarters/Visitor Center and the Scuppernong River Interpretive Boardwalk), the Pungo Shop area, New Lake, refuge lands between Lake Phelps and Shore Drive, that portion of the Pinner Tract east of SR 1105, the portion of Western Road between the intersection with Seagoing Road and the gate to the south, and the unnamed road at the southern boundary of the refuge land located west of Pettigrew State Park's Cypress Point Access Area. During November, December, January, and February, we prohibit all public entry on Pungo and New Lakes, Duck Pen Road, and the Pungo Lake, Riders Creek, and Dunbar Road banding sites.

* * * * *

6. We prohibit the discharge of any firearm and the use of any other weapons on the refuge except for hunting as authorized in this section. We prohibit taking and attempting to take wildlife and discharging a firearm within 100 feet (30 m) of any vehicle on any road or trail.

* * * * *

B. Upland Game Hunting. * * *

* * * * *

6. You may possess only approved nontoxic shot (see §32.2(k)) while hunting upland game on and west of Evans Road.

* * * * *

C. Big Game Hunting. * * *

1. Conditions A1 through A7 apply.

* * * * *

3. We allow the use of only shotguns, muzzleloaders, and bow and arrow for deer and feral hog hunting. We allow disabled hunters to use crossbows but only while possessing the required State permit. We allow hunters to take feral hog in any area when the area is open to hunting deer. We allow hunters to take feral hog using bow and arrow (during the State bow and arrow and gun deer seasons), muzzleloaders (during the State muzzleloader and gun deer seasons), and firearms (during the State gun deer season). In addition, hunters may take feral hog on the Frying Pan Unit during all open firearm seasons.

* * * * *

5. We only allow deer hunting with shotguns and muzzleloaders on the Pungo Unit while possessing a valid permit from the North Carolina Wildlife Resources Commission for the Pocosin Lakes National Wildlife Refuge – Pungo Unit – Either Sex deer special hunts. We schedule these special 2–day (Friday and Saturday) hunts for certain weeks in late September and October. We require a fee that validates the State permit to participate in these special hunts.

6. During the special hunts described in condition C5, we allow only permitted hunters on the Pungo Unit. We allow only permitted hunters on the Pungo Unit from 1 hour before legal shooting time until 1 hour after legal shooting time.

7. Prior to December 1, we allow deer hunting with bow and arrow on the Pungo Unit during all State deer seasons, except during the muzzleloading season and except during the special hunts described in condition C5.

* * * * *

9. We allow the use of only portable deer stands (tree climbers, ladders, tripods, etc.). Hunters may use ground blinds, chairs, buckets, and other such items for hunting, but we require that you remove all of these items (see §27.93 of this chapter) at the end of each day, except that hunters with a valid permit for the special hunts described in condition C5 may install one deer stand on the Pungo Unit the day before the start of their hunt and leave it until the end of the 2nd day of their 2–day hunt. You must tag any stands left overnight on the refuge with the hunter's name, address, and telephone number.

* * * * *

D. Sport Fishing. * * *

1. We allow fishing only in Pungo Lake and New Lake from March 1 through October 31, except that we close Pungo Lake and the entire Pungo Unit to fishing during the special hunts described in condition C5.

* * * * *

23. Amend §32.53 North Dakota by revising paragraphs B., C., and D. of Upper Souris National Wildlife Refuge to read as follows:

§32.53 North Dakota.

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Upper Souris National Wildlife Refuge

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B. Upland Game Hunting. We allow hunting of sharp-tailed grouse, Hungarian partridge, and pheasant on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We allow the use of dogs for hunting and retrieving of upland game birds. Dogs must be under direct control of the hunter (see §26.21(b) of this chapter).

2. We open for hunting on Unit I during the State hunting season. Unit I includes all refuge land north of the township road that runs east of Tolley, across Dam 41 (Carter Dam), and east to State Route 28.

3. We open for hunting on Unit II during the State hunting season, except we close from the first day of the regular State waterfowl season through the last day of State deer gun season. Unit II includes refuge land between Lake Darling Dam and Unit I .

4. We open all areas of the refuge for hunting the day following the State deer gun season.

5. We prohibit hunting the area around refuge headquarters, buildings, shops, and residences. We post these areas with Closed to Hunting signs.

6. We prohibit remaining on the refuge between the hours of 10 p.m. to 5 a.m.

7. We prohibit the use of snowmobiles, all-terrain vehicles (ATVs), off-highway vehicles (OHVs), utility-terrain vehicles (UTVs), bicycles, or similar vehicles on the refuge.

8. We prohibit accessing refuge lands from refuge waters, including Lake Darling and the Souris River.

9. We prohibit horses, mules, or similar livestock on the refuge.

10. We require the use of approved nontoxic shot for all upland game hunting as identified in §20.21(j) of this chapter.

C. Big Game Hunting. We allow deer hunting on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We only allow the use of portable tree stands and ground blinds. We prohibit leaving stands and blinds overnight (see §27.93 of this chapter) on the refuge.

2. We prohibit the use of flagging, trail markers, paint, reflective tacks, or other types of markers (see §27.93 of this chapter).

3. We prohibit the use of trail cameras and other electronic equipment left overnight.

4. We prohibit remaining on the refuge between the hours of 10 p.m. to 5 a.m.

5. Conditions B5 through B9 apply.

6. We prohibit entry to the refuge before 12 p.m. (noon) on the first day of the respective bow, gun, or muzzleloader deer hunting seasons.

D. Sport Fishing. We allow sport fishing on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We allow the use of fishing boats, canoes, kayaks, and float tubes in designated boat fishing areas from Lake Darling Dam north to State Highway 28 (Greene) crossing for fishing from May 1 through September 30.

2. We allow fishing from nonmotorized vessels only on the Beaver Lodge Canoe Trail from May 1 through September 30.

3. We allow boating and fishing from vessels on the Souris River from Mouse River Park to the north boundary of the refuge from May 1 through September 30.

4. We allow shore fishing in designated areas. Consult with the refuge manager or refuge fishing brochure for specific areas.

5. You may ice fish in all ice-covered waters of the Souris River and Lake Darling.

6. We prohibit remaining on the refuge between the hours of 10 p.m. and 5 a.m.

7. We prohibit the use of snowmobiles, all-terrain vehicles (ATVs), off-highway vehicles (OHVs), utility-terrain vehicles (UTVs), amphibious vehicles, personal watercraft (PWCs), bicycles, or similar vehicles on the refuge.

8. We prohibit swimming, sailing, water skiing, pleasure boating, and overnight use or camping.

9. You may drive licensed cars and pickups on the ice from Lake Darling Dam north to Carter Dam (Dam 41) for ice fishing.

10. We allow access to sites for ice fishing. Consult with the refuge manager or refuge fishing brochure for specific areas.

11. We allow walk-in access only at designated sites on the Souris River north of Carter Dam (Dam 41) and south of Lake Darling Dam for ice fishing.

12. We allow you to place fish houses overnight on the ice of Lake Darling subject to State regulations.

13. We prohibit leaving fish houses overnight or unattended on refuge uplands or in parking areas.

14. We allow anglers to place portable fish houses on the Souris River north of Carter Dam (Dam 41) and south of Lake Darling Dam for ice fishing, but anglers must remove the fish houses from the refuge daily (see §27.93 of this chapter).

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24. Amend §32.54 Ohio by revising paragraphs A.1., C.1., and C.2. of Ottawa National Wildlife Refuge to read as follows:

§32.54 Ohio.

* * * * *

Ottawa National Wildlife Refuge

*A. Migratory Game Bird Hunting. * * **

1. You must possess and carry a State-issued permit. All hunters must check-in and out at the State hunter check station.

* * * * *

*C. Big Game Hunting. * * **

1. We require hunters to possess and carry a State-issued permit.

2. We require that hunters check out at the refuge check station with a Big Game Harvest Report (FWS Form 3-2359) no later than 6 p.m.

* * * * *

25. Amend §32.55 Oklahoma by:

a. Revising paragraph A.1., adding paragraphs A.7. through A.9., revising paragraphs B.1. and B.2., adding paragraph B.10., revising paragraphs C. and D.5., and adding paragraphs D.10. and D.11. of Deep Fork National Wildlife Refuge; and

b. Revising paragraph A., the introductory text of paragraph B., and B.1. of Sequoyah National Wildlife Refuge.

The revisions and additions read as follows:

§32.55 Oklahoma

* * * * *

Deep Fork National Wildlife Refuge

*A. Migratory Game Bird Hunting. * * **

1. You must possess and carry a free signed refuge permit (signed refuge brochure).

* * * * *

7. We prohibit horse and mule riding while hunting on the refuge.

8. We provide access for hunters with disabilities. Please contact the refuge office for additional information.

9. Persons possessing, transporting, or carrying firearms on the refuge must comply with all provisions of State and local law. Persons may only use (discharge) firearms in accordance with refuge regulations (50 CFR 27.42 and specific refuge regulations in part 32).

B. Upland Game Hunting. * * *

1. You must possess and carry a signed refuge permit (signed refuge brochure) for squirrel, rabbit, and raccoon. We require no fee.

2. We allow shotguns, .22 and .17 caliber rimfire rifles, and pistols for rabbit and squirrel hunting. We require the use of nontoxic shot when using a shotgun (see §32.2(k)).

* * * * *

10. Conditions A7, A8, and A9 apply.

C. Big Game Hunting. We allow hunting of white-tailed deer and feral hog on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. You must possess and carry a refuge Special Use Permit (FWS Form 3-1383) for the archery deer hunt only. Hunters must turn in a Big Game Harvest Report (FWS Form 3-2359) by December 31 annually. Failure to submit the report will render the hunter ineligible for the next year's limited season archery deer hunt.

2. We will offer a limited season archery deer hunt following the controlled deer hunt.

3. You may hunt feral hog during any established refuge hunting season. Refuge permits (either a signed refuge brochure, Special Use Permit, or a State-issued controlled hunt permit) and legal weapons apply for the current hunting season.

4. We prohibit scouting when we are conducting controlled deer hunts.

5. We offer refuge-controlled deer hunts (primitive weapon, disabled primitive, youth primitive). We require hunters to possess a permit (a State-issued controlled hunt permit) and pay a fee for these hunts. For information concerning the hunts, contact the refuge office or the State.

6. We prohibit off-road vehicle use (see §27.31 of this chapter).

7. Conditions A7, A8, and A9 apply.

8. Hunters may place no more than one stand on the refuge. Stands may not be in place until the day the hunt begins. Hunters must remove stands the day the hunt ends.

9. We allow take of feral hog only during daylight hours, and they must be dead prior to removal from the refuge.

D. Sport Fishing. * * *

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5. We allow bowfishing on the refuge from legal sunrise to legal sunset from March 1 to September 30 except during the Youth and Adult Controlled Turkey Hunts. Please contact the refuge for more information.

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10. We provide access for anglers with disabilities. Please contact the refuge office for additional information.

11. Conditions A7 and A9 apply.

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Sequoyah National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of duck, goose, dove, coot, snipe, and woodcock on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We require an annual refuge permit (Migratory Bird Hunt Application; FWS Form 3-2357) for all hunting. The hunter must possess and carry the signed permit while hunting. We require hunters to abide by all terms and conditions listed on the permit.

2. We open the refuge to hunting only on Saturdays, Sundays, Mondays, and Tuesdays. We prohibit hunters from entering the land portion of the Sandtown Bottom Unit or any portion of Sally Jones Lake before 5 a.m. Hunters must leave the area by 1 hour after legal sunset. We prohibit hunting or shooting within 50 feet (15 m) of designated roads or parking areas. All hunters must park in designated parking areas.

3. We designate the east portion of Sandtown Bottom Unit and the portion of Robert S. Kerr Reservoir, from Tuff boat ramp to the confluence of Vian Creek, as a Wildlife Use Area, and we close it to all entry, except for the designated hiking trail, from September 1 through March 31. We mark the closed area with signs and buoys.

4. Season lengths and bag limits will be in accordance with State regulations with the exception that all hunting, except for the conservation light goose season, will close on January 31 of each year. If a conservation light goose season is in effect, it will follow State regulations with the exception of special regulations and hunting days.

5. Hunters must use only legal shotguns and approved nontoxic shot for migratory bird hunting. Persons possessing, transporting, or carrying firearms on national wildlife refuges must comply with all provisions of State and local law. Persons may only use (discharge) firearms in accordance with refuge regulations (50 CFR 27.42 and specific refuge regulations in part 32).

6. We prohibit construction of pit blinds or permanent blinds. You must reduce blinds to a natural appearance or remove them (see §27.93 of this chapter) at the end of the day. You must remove all empty shells, litter, decoys, boats, or other personal property (see §§27.93 and 27.94 of this chapter) at the end of the day. We prohibit camping in boats or otherwise spending the night on any area of the refuge.

7. We allow boats, and you must operate them under applicable State laws and comply with all licensing and marking regulations from their State of origin.

8. We prohibit guiding or outfitting for commercial purposes.

9. We prohibit hunters from using refuge boat ramps to access hunting areas outside the refuge boundary on days when we close the refuge for hunting certain species or for any species not hunted on the refuge.

10. We restrict the use of airboats within the refuge boundary to the navigation channel and the designated hunting areas from September 1 to March 31.

11. We prohibit hunters entering the Sandtown Bottom Unit prior to 5 a.m. during hunting season. Until 9 a.m., the entrance is through the headquarters gate only, at which time hunters may enter the Sandtown Bottom Unit through any other access point of the refuge. Hunters must leave the Sandtown Bottom Unit by 1 hour after legal sunset.

12. We prohibit alcoholic beverages when hunting (see §32.2(j)).

B. Upland Game Hunting. We allow hunting of squirrel and rabbit on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A1, A3, and A8 through A12 apply.

* * * * *

26. Amend §32.57 Pennsylvania by revising paragraph A., the introductory text of paragraph C., and revising paragraph C.5. of Erie National Wildlife Refuge to read as follows:

§32.57 Pennsylvania.

* * * * *

Erie National Wildlife Refuge

*A. Migratory Game Bird Hunting.*We allow hunting of mourning dove, rail, common snipe, goose, duck, coot, and crow on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We allow hunting and scouting activities on the refuge from September 1 through the end of February.

2. We require all persons to possess and carry a signed refuge hunt permit (signed brochure) on their person while hunting.

3. We only allow nonmotorized boats for waterfowl hunting. We prohibit all other watercraft use.

4. We require that hunters remove all boats, blinds, and decoys from the

refuge within 1 hour after legal sunset (see §§27.93 and 27.94 of this chapter).

5. We allow dogs for hunting; however, they must be under the immediate control of the hunter at all times (see §26.21(b) of this chapter).

6. We prohibit field possession of migratory game birds in areas of the refuge closed to migratory game bird hunting.

* * * * *

C. Big Game Hunting. We allow hunting of deer and turkey on designated areas of the refuge in accordance with State regulations subject to the following conditions:

* * * * *

5. We require any person hunting bear off refuge to obtain a refuge Special Use Permit (FWS Form 3-1383) to track a wounded bear that may have entered the refuge.

* * * * *

27. Amend §32.60 South Carolina by:

a. Revising paragraphs C.1., C.3., C.5., C.6., C.8., and D. of Pinckney Island National Wildlife Refuge; and

b. Revising Savannah National Wildlife Refuge to read as follows:

§32.60 South Carolina.

* * * * *

Pinckney Island National Wildlife Refuge

* * * * *

C. Big Game Hunting. * * *

1. To participate in the refuge gun hunt, hunters must submit the Quota Deer Hunt Application (FWS Form 3-2354). If drawn, hunters must submit a permit fee in order to receive the hunt permit. You may obtain information about the quota hunt drawing at the Savannah Coastal Refuges Complex headquarters.

* * * * *

3. We will allow hunters to operate their personal vehicles on the main gravel trail only. Movement within all other areas of the refuge must be by foot or bicycle. We limit entry and exit points for authorized motor vehicles to designated check stations or other specified areas (see §27.31 of this chapter). We prohibit entry by boat, and we prohibit hunters to leave by boat to reach other parts of the island.

* * * * *

5. We prohibit the use of organized drives for taking or attempting to take game.

6. Each hunter may place one stand on the refuge during the week preceding the hunt. They must remove their stand at the end of the hunt (see §27.93 of this chapter).

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8. We allow only shotguns (20 gauge or larger; slugs only) for hunting.

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D. Sport Fishing. We allow fishing on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We allow saltwater fishing year-round in the estuarine waters adjacent to the refuge.

2. We allow fishing only from boats.

3. We prohibit freshwater fishing.

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Savannah National Wildlife Refuge

Refer to §32.29 Georgia for regulations.

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28. Amend §32.62 Tennessee by:

a. Revising Chickasaw National Wildlife Refuge;

b. Revising paragraphs A.5., A.6., B., and C.1., adding paragraphs C.3. and C.4., and revising paragraph D. of Cross Creeks National Wildlife Refuge;

c. Revising Hatchie National Wildlife Refuge;

d. Revising Lake Isom National Wildlife Refuge;

e. Revising Lower Hatchie National Wildlife Refuge;

f. Revising Reelfoot National Wildlife Refuge; and

g. Revising paragraphs A.2., A.5., A.6., B.5., B.7., and C.2., adding paragraphs C.3. and C.4., revising paragraphs D.3., D.5., and D.6., and adding paragraphs D.7. and D.8 of Tennessee National Wildlife Refuge.

The revisions and additions read as follows:

§32.62 Tennessee.

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Chickasaw National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of duck, goose, coot, merganser, mourning dove, woodcock, and snipe on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. The refuge is a day-use area only, with the exception of legal hunting/fishing activities.

2. We prohibit the use of motorized off-road vehicles (e.g., ATVs) on the refuge (see §27.31(f) of this chapter).

3. We seasonally close the refuge sanctuary area to the public from November 15 through March 15.

4. You must possess and carry a signed refuge permit (signed refuge brochure) and comply with all provisions specified within the permit.

5. We allow hunting for duck, goose, coot, and merganser from ½ hour before legal sunrise to 12 p.m. (noon).

6. Mourning dove, woodcock, and snipe seasons close during all firearms and muzzleloader deer seasons.

7. You may use only portable blinds, and you must remove all boats, blinds, and decoys (see §27.93 of this chapter) from the refuge by 1 p.m. daily.

8. We allow hunters to access the refuge no more than 2 hours before legal sunrise and no more than 2 hours after legal sunset.

9. Each youth hunter age 15 and younger must remain within sight and normal voice contact and under supervision of an adult age 21 or older, who possesses a license. One adult hunter may supervise no more than two youth hunters.

10. You may possess only approved nontoxic shot when hunting with a shotgun (see §32.2(k)).

B. Upland Game Hunting. We allow hunting of squirrel, rabbit, quail, raccoon, and opossum on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A1 through A4 and A9 through A10 apply.

2. We allow hunters to access the refuge no more than 2 hours before legal sunrise and no more than 2 hours after legal sunset with the exception of raccoon and opossum hunters who may access the refuge from legal sunset to legal sunrise.

3. We do not open for spring squirrel season on the refuge.

4. Squirrel, rabbit, and quail seasons close during all firearms and muzzleloader deer seasons.

5. Raccoon and opossum seasons close the Friday and Saturday nights during all firearms and muzzleloader deer hunts and seasons, including the Friday night prior to any hunt or season that opens on a Saturday morning.

6. We allow horses only on roads open to motorized traffic. We prohibit the use of horses and other animal conveyances from all other areas including fields, woods, and foot trails.

7. We prohibit use or possession of alcoholic beverages while hunting (see §32.2(j)).

8. You may take coyote and beaver incidental to legal hunting activities.

C. Big Game Hunting. We allow hunting of white-tailed deer and turkey on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A1 through A4, A8, A10, and B6 through B8 apply.

2. You may only participate in the refuge quota hunts with a special quota

permit issued through random drawing. Information for permit applications is available at the refuge headquarters.

3. You may possess only approved nontoxic shot while hunting turkey (see §32.2(k)).

4. We allow the use of lead shot while deer hunting on the refuge (see §32.2(k)).

5. We allow the use of only portable blinds and tree stands on the refuge. You must remove blinds, tree stands, and all other personal equipment (see §§27.93 and 27.94 of this chapter) from the refuge at the end of each day's hunt.

6. All youth hunters age 15 and younger must remain within sight and normal voice contact of an adult age 21 or older, who possesses a license. One adult hunter may supervise only one youth hunter.

D. Sport Fishing. We allow sport fishing on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A1 through A3 apply.

2. We allow fishing only with pole and line or rod and reel.

3. We prohibit possession of unauthorized fishing gear, including trotlines, limblines, juglines, yo-yos, nets, spears, and snag hooks, while fishing on the refuge.

4. We allow the use of bow and arrow or a gig to take nongame fish on refuge waters.

5. We prohibit taking frog or turtle on the refuge (see §27.21 of this chapter).

6. We allow fishing from legal sunrise to legal sunset.

Cross Creeks National Wildlife Refuge

A. Migratory Game Bird Hunting. * * *

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5. We allow access for goose hunting on the refuge from 2 hours before legal sunrise to 2 hours after legal sunset.

6. We prohibit the use of unlicensed motorized vehicles (e.g., ATVs, golf carts, etc.) on the refuge.

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B. Upland Game Hunting. We allow hunting of squirrel on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. The refuge is a day-use area only, with the exception of legal hunting/fishing activities.

2. You must possess and carry a valid refuge permit (name and address only) while hunting on the refuge.

3. We set and publish season dates and bag limits annually in the refuge Public Use Regulations available at the refuge office.

4. We prohibit hunting within 50 yards (45 m) of any building, public use road, or boat launching ramp.

5. We allow hunters to access the refuge from 2 hours before legal sunrise to 2 hours after legal sunset.

6. We prohibit the use of unlicensed motorized vehicles (e.g., ATVs & golf carts, etc.) on the refuge (see §27.31(f) of this chapter).

7. We prohibit the use of horses or other animal conveyances on the refuge hunts.

8. Each youth hunter under age 16 must remain within sight and normal voice contact of an adult age 21 or older. One adult hunter may supervise no more than two youth hunters.

9. We do not open for spring squirrel hunting.

C. Big Game Hunting. * * *

1. Conditions B1 through B7 apply.

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3. You may only participate in the refuge quota deer hunts with a special quota permit (name and address only) issued through random drawing. Information for permit applications is available at the refuge headquarters.

4. Each youth hunter younger than age 16 must remain within sight and normal voice contact of an adult age 21 or older. One adult hunter may supervise no more than one youth hunter.

D. Sport Fishing. We allow fishing on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We allow fishing on the refuge pools and reservoirs from March 16 through November 14 from legal sunrise to legal sunset.

2. We prohibit trotlines, limblines, jugs, and slat baskets in refuge pools and impoundments and on Elk Reservoir and South Cross Creeks Reservoir.

3. We prohibit taking frog, turtle, and crawfish on the refuge (see §27.21 of this chapter).

4. We prohibit leaving boats unattended on the refuge after daylight use hours.

5. We prohibit swimming in refuge impoundments and from boat ramps and boat docks.

6. We allow bow fishing in refuge impoundments and on Barkley Lake.

Hatchie National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of migratory game birds on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. The refuge is a day-use area only, with the exception of legal hunting/fishing activities.

2. We prohibit the use of motorized off-road vehicles (e.g., ATVs) on the refuge (see §27.31(f) of this chapter).

3. We seasonally close the sanctuary areas of the refuge to the public from November 15 through March 15.

4. You must possess and carry a signed refuge permit (signed refuge brochure) and comply with all provisions specified within the permit.

5. We allow waterfowl hunting only on Tuesdays, Thursdays, and Saturdays. We allow hunting for duck, goose, coot, and merganser from ½ hour before legal sunrise to 12 p.m. (noon).

6. Mourning dove, woodcock, and snipe seasons close during all deer archery and quota gun hunts.

7. We allow only portable blinds, and hunters must remove all boats, blinds, and decoys (see §§27.93 and 27.94 of this chapter) from the refuge by 1 p.m. daily.

8. We allow hunters to access the refuge no more than 2 hours before legal sunrise, and they must leave the refuge no more than 2 hours after legal sunset.

9. Each youth hunter age 15 and younger must remain within sight and normal voice contact and under supervision of an adult age 21 or older, who possesses a license. One adult hunter may supervise no more than two youth hunters.

10. You may possess only approved nontoxic shot while hunting (see §32.2(k)).

B. Upland Game Hunting. We allow hunting of squirrel, rabbit, quail, raccoon, and opossum on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A1 through A4 and A9 through A10 apply.

2. We allow hunters to access the refuge no more than 2 hours before legal sunrise and no more than 2 hours after legal sunset with the exception of raccoon and opossum hunters, who may access the refuge from legal sunset to legal sunrise.

3. We do not open to spring squirrel season on the refuge.

4. We close all small game hunts during the refuge deer archery and quota gun hunts.

5. We allow horses only on roads open to motorized traffic. We prohibit the use of horses and other animal conveyances from all other areas including fields, woods, and foot trails.

6. We prohibit use or possession of alcoholic beverages while hunting (see §32.2(j)).

7. You may take coyote and beaver incidental to legal hunting activities.

C. Big Game Hunting. We allow hunting of white-tailed deer and turkey on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A1 through A4, A8, A10, and B5 through B7 apply.

2. You may only participate in the refuge deer quota hunts with a special quota permit (name and address only) issued through random drawing. Information for permit applications is available at the refuge headquarters.

3. You may possess only approved nontoxic shot while hunting turkey (see §32.2(k)).

4. We allow the use of lead shot while deer hunting on the refuge (see §32.2(k)).

5. We allow the use of only portable blinds and tree stands on the refuge. You must remove blinds, tree stands, and all other personal equipment (see §§27.93 and 27.94 of this chapter) from the refuge at the end of each day's hunt.

6. We allow archery deer and turkey hunting on designated areas of the refuge as defined annually in the refuge Public Use Regulations available at the refuge office and in accordance with State regulations.

7. All youth hunters age 15 and younger must remain within sight and normal voice contact of an adult age 21 or older, who possesses a license. One adult hunter may supervise only one youth hunter.

D. Sport Fishing. We allow sport fishing on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A1 through A3 apply.

2. We allow fishing only with pole and line or rod and reel.

3. We prohibit possession of unauthorized fishing gear, including trotlines, limblines, juglines, yo-yos, nets, spears, and snag hooks while fishing on the refuge.

4. We allow use of a bow and arrow or gig to take nongame fish on refuge waters.

5. We prohibit taking frog or turtle on the refuge (see §27.21 of this chapter).

6. We open Oneal Lake for fishing during a restricted season and for authorized special events. Information on events and season dates is available at the refuge headquarters.

7. We only allow aluminum fishing boats and fiberglass boats of 16 feet (4.8 m) or less in length on refuge lakes.

8. We allow the use of nonmotorized boats and boats with electric motors only; we prohibit the use of gas and diesel motors on refuge lakes.

9. We allow fishing from legal sunrise to legal sunset.

Lake Isom National Wildlife Refuge

A. Migratory Game Bird Hunting. [Reserved]

B. Upland Game Hunting. We allow hunting of squirrel and raccoon on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. The refuge is a day-use area only, with the exception of legal hunting/fishing activities.

2. We prohibit the use of motorized off-road vehicles (e.g., ATVs) on the refuge (see §27.31(f) of this chapter).

3. We set season dates and bag limits annually and publish them in the refuge Public Use Regulations available at the refuge office.

4. You must possess and carry a valid refuge permit (signed brochure) and comply with all provisions specified within the permit.

5. We allow hunters to access the refuge no more than 2 hours before legal sunrise and no more than 2 hours after legal sunset with the exception of raccoon hunters. Those hunters can access the refuge from legal sunset to legal sunrise.

6. We seasonally close the refuge sanctuary area to the public from November 15 through March 15.

7. All youth hunters age 15 and younger must remain within sight and normal voice contact of an adult age 21 or older, who possesses a license. One adult hunter may supervise no more than two youth hunters.

8. We allow horses only on roads open to motorized traffic. We prohibit the use of horses and other animal conveyances from all other areas including fields, woods, and foot trails.

9. We prohibit use or possession of alcoholic beverages while hunting (see §32.2(j)).

10. You may possess only approved nontoxic shot while hunting (see §32.2(k)).

11. You may take coyote and beaver incidental to legal hunting activities.

12. We prohibit camping and fires on the refuge.

C. Big Game Hunting. We allow only archery hunting for white-tailed deer on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions B1 through B6 and B8 through B12 apply.

2. We allow the use of only portable blinds and tree stands on the refuge. You must remove blinds, tree stands, and all other personal equipment (see §27.93 of this chapter) from the refuge at the end of each day.

3. All youth hunters age 15 and younger must remain within sight and normal voice contact of an adult age 21 or older, who possesses a license. One adult hunter may supervise only one youth hunter.

D. Sport Fishing. We allow fishing on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We open all waters of Lake Isom to fishing only from March 16 through November 14 and from legal sunrise to legal sunset.

2. We allow boats with only electric or outboard motors of 10 hp or less.

3. We prohibit taking frog or turtle from refuge waters (see §27.21 of this chapter).

Lower Hatchie National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of duck, goose, coot, merganser, mourning dove, woodcock, and snipe on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. The refuge is a day-use area only, with the exception of legal hunting/fishing activities.

2. We prohibit the use of motorized off-road vehicles (e.g., ATVs) on the refuge (see §27.31(f) of this chapter).

3. We seasonally close the sanctuary area of the refuge and the southern unit of Sunk Lake Public Use Natural Area to the public from November 15 through March 15.

4. You must possess and carry a signed refuge permit (signed brochure) and comply with all provisions specified within the permit.

5. We allow hunting for duck, goose, coot, and merganser from ½ hour before legal sunrise to 12 p.m. (noon).

6. Mourning dove, woodcock, and snipe seasons close during all firearms and muzzleloader deer seasons.

7. You may use only portable blinds, and you must remove all boats, blinds, and decoys (see §27.93 of this chapter) from the refuge by 1 p.m. daily.

8. We allow hunters to access the refuge no more than 2 hours before legal sunrise to no more than 2 hours after legal sunset.

9. Each youth hunter age 15 and younger must remain within sight and normal voice contact and under supervision of an adult age 21 or older, who possesses a license. One adult hunter may supervise no more than two youth hunters.

10. You may possess only approved nontoxic shot while hunting (see §32.2(k)).

11. We close Sunk Lake Public Use Natural Area to all migratory game bird hunting, and we close the southern unit of Sunk Lake Public Use Natural Area to all hunting.

B. Upland Game Hunting. We allow hunting of squirrel, rabbit, quail, raccoon, and opossum on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A1 through A4 and A9 through A11 apply.

2. We allow hunters to access the refuge no more than 2 hours before legal sunrise to no more than 2 hours after legal sunset with the exception of raccoon and opossum hunters. We will allow access to those hunters from legal sunset to legal sunrise.

3. We do not open for spring squirrel season on the refuge.

4. Squirrel, rabbit, and quail seasons close during all firearms and muzzleloader deer seasons.

5. Raccoon and opossum seasons close Friday and Saturday nights during all firearms and muzzleloader deer hunts and seasons, including the Friday night prior to any hunt or season that opens on a Saturday morning.

6. We allow horses only on roads open to motorized traffic. We prohibit the use of horses and other animal conveyances from all other areas including fields, woods, and foot trails.

7. We prohibit use or possession of alcoholic beverages while hunting (see §32.2(j)).

8. You may take coyote and beaver incidental to legal hunting activities.

9. We prohibit camping and fires on the refuge.

C. Big Game Hunting. We allow hunting of white-tailed deer and turkey on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A1 through A4, A8, A10, A11, and B6 through B9 apply.

2. You may participate in the refuge quota hunts only with a special quota permit (name and address only) issued through random drawing. Information for permit applications is available at the refuge headquarters.

3. You may possess only approved nontoxic shot while hunting turkey (see §32.2(k)).

4. We allow the use of lead shot while deer hunting on the refuge (see §32.2(k)).

5. We allow the use of only portable blinds and tree stands on the refuge. You must remove blinds, tree stands, and all other personal equipment (see §§27.93 and 27.94 of this chapter) from the refuge at the end of each day's hunt.

6. All youth hunters age 15 and younger must remain within sight and normal voice contact of an adult age 21 or older, who possesses a license. One adult hunter may supervise only one youth hunter.

7. We allow archery deer hunting only on the northern unit of Sunk Lake Public Use Natural Area.

D. Sport Fishing. We allow sport fishing on designated areas of the refuge and the Sunk Lake Public Use Natural Area in accordance with State regulations subject to the following conditions:

1. We allow fishing only from legal sunrise to legal sunset.

2. We allow fishing only with pole and line or rod and reel.

3. We prohibit possession of unauthorized fishing gear, including trotlines, limblines, juglines, yo-yos, nets, spears, and snag hooks while fishing on the refuge.

4. We allow use of a bow and arrow or a gig to take nongame fish on refuge waters.

5. We prohibit taking frog or turtle on the refuge (see §27.21 of this chapter).

6. We seasonally close the sanctuary area of the refuge and the southern unit of Sunk Lake Public Use Natural Area to the public from November 15 through March 15.

7. We allow the use of only nonmotorized boats and boats with electric motors on Sunk Lake Public Use Natural Area.

Reelfoot National Wildlife Refuge

A. Migratory Game Bird Hunting. [Reserved]

B. Upland Game Hunting. We allow hunting of squirrel and raccoon on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. The refuge is a day-use area only, with the exception of legal hunting/fishing activities.

2. We prohibit the use of motorized off-road vehicles (e.g., ATVs) on the refuge (see §27.31(f) of this chapter).

3. We set season dates and bag limits annually and publish them in the Refuge Public Use Regulations available at the refuge office.

4. You must possess and carry a valid refuge permit (signed brochure) and comply with all provisions specified within the permit.

5. We allow hunters to access the refuge no more than 2 hours before legal sunrise to no more than 2 hours after legal sunset with the exception of raccoon hunters. We will allow those hunters access to the refuge from legal sunset to legal sunrise.

6. We seasonally close the sanctuary areas of the refuge to the public from November 15 through March 15.

7. All youth hunters age 15 and younger must remain within sight and normal voice contact of an adult age 21 or older, who possesses a license. One adult hunter may supervise no more than two youth hunters.

8. We allow horses only on roads open to motorized traffic. We prohibit the use of horses and other animal conveyances from all other areas including fields, woods, and foot trails.

9. We prohibit use or possession of alcoholic beverages while hunting (see §32.2(j)).

10. You may possess only approved nontoxic shot while using a shotgun (see §32.2(k)).

11. You may take coyote and beaver incidental to legal hunting activities.

12. We prohibit camping and fires on the refuge.

C. Big Game Hunting. We allow hunting for white-tailed deer and turkey on designated areas of the refuge accordance with State regulations subject to the following conditions:

1. Conditions B1 through B6 and B8 through B12 apply.

2. You may participate in the refuge firearms deer and turkey quota hunts only with a special quota permit (name and address only) issued through random drawing. Information for permit applications is available at the refuge headquarters.

3. You may possess only approved nontoxic shot while turkey hunting on the refuge (see §32.2(k)).

4. We allow the use of lead shot while deer hunting on the refuge (see §32.2(k)).

5. We allow the use of only portable blinds and tree stands on the refuge. You must remove blinds, tree stands, and all other personal equipment from the refuge at the end of each day (see §27.93 of this chapter).

6. All youth hunters age 15 and younger must remain within sight and normal voice contact of an adult age 21 or older, who possesses a license. One adult hunter may supervise only one youth hunter.

D. Sport Fishing. We allow fishing on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We allow access to the Long Point Unit (north of Upper Blue Basin) for fishing from March 16 through November 14, and the Grassy Island Unit (south of Upper Blue Basin) for fishing from February 1 through November 14.

2. We allow fishing on the refuge from legal sunrise to legal sunset.

3. We prohibit taking of frog or turtle on the refuge (see §27.21 of this chapter).

4. We prohibit airboats, hovercraft, or personal watercraft (e.g., Jet Skis) on any waters within the refuge boundary.

Tennessee National Wildlife Refuge

A. Migratory Game Bird Hunting. * * *

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2. We require a refuge hunt permit (signed brochure) for all hunters age 16

and older. We charge a fee for all hunt permits. You must possess and carry a valid refuge permit (name and address only) while hunting on the refuge.

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5. We allow access for goose hunting on the refuge from 2 hours before legal sunrise to 2 hours after legal sunset.

6. We prohibit the use of unlicensed motorized vehicles (e.g., ATVs and golf carts, etc.) on the refuge (see §27.31(f) of this chapter).

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B. Upland Game Hunting. * * *

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5. We allow hunters to access the refuge from 2 hours before legal sunrise to 2 hours after legal sunset.

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7. We prohibit the use of unlicensed motorized vehicles (e.g., ATVs and golf carts, etc.) on the refuge (see §27.31(f) of this chapter).

* * * * *

C. Big Game Hunting. * * *

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2. You may participate in the refuge quota deer hunts only with a special quota permit (name and address only) issued through random drawing. Information for permit applications is available at the refuge headquarters.

3. We allow the use of only portable blinds and tree stands on the refuge. You must remove blinds, tree stands, and all other personal equipment (see §27.93 of this chapter) from the refuge at the end of each day.

4. Each youth hunter younger than age 16 must remain within sight and normal voice contact and under supervision of an adult age 21 or older. One adult hunter may supervise no more than one youth hunter.

D. Sport Fishing. * * *

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3. We prohibit leaving boats unattended on the refuge after daylight use hours.

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5. We prohibit taking frog, turtle, and crawfish on the refuge (see §27.21 of this chapter).

6. We prohibit trotlines, limblines, jugs, and slat baskets in refuge pools and impoundments.

7. We prohibit swimming in refuge impoundments and from boat ramps and boat docks.

8. We allow bow fishing in refuge impoundments and on Kentucky Lake.

29. Amend §32.63 Texas by:

a. Revising paragraphs C., D.2., and D.3. of Aransas National Wildlife Refuge;

b. Revising Balcones Canyonlands National Wildlife Refuge;

c. Adding Caddo Lake National Wildlife Refuge in alphabetical order;

d. Revising paragraph A. of Hagerman National Wildlife Refuge;

e. Revising paragraphs C. and D.2. of Laguna Atascosa National Wildlife Refuge; and

f. Revising paragraphs A. and C. of Lower Rio Grande Valley National Wildlife Refuge to read as follows:

§32.63 Texas.

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Aransas National Wildlife Refuge

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C. Big Game Hunting. We allow hunting of white-tailed deer and feral hog on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We may immediately close the entire refuge or any portion thereof to hunting in the event of the appearance of whooping crane in the hunt area or in order to conduct habitat management practices as required during the available windows (i.e., prescribed burns, roller chopping, fire breaks).

2. For the archery and rifle season, hunters must obtain a refuge permit (name only required) and pay a fee. The hunter must tape the smaller vehicle tag on the driver's side windshield. The hunter must sign the larger permit and possess it at all times while on the refuge.

3. We define youth hunters as ages 9-16. A Texas-licensed, adult hunter, age 17 or older who has successfully completed a Hunter Education Training Course, must accompany youth hunters. We exempt those persons born prior to September 2, 1971 from the Hunter Education Training course requirement. We define accompanied as being within normal voice contact. Each adult hunter may supervise only one youth hunter.

4. We prohibit the use of dogs to trail game.

5. We prohibit possession of alcoholic beverages at any time while hunting (see §32.2(j)).

6. We will annually designate bag limits in the refuge hunt brochure.

7. We allow archery hunting within the deer season for the county on specified days listed in the refuge hunt brochure.

8. We allow firearm hunting within the deer season for the county on specified days listed in the refuge hunt brochure.

9. All hunters must check-in and out at the entrance gate at the beginning and end of each hunt and record their harvest if applicable.

10. Hunters must clean all harvested game in the field.

11. Firearm hunters must wear a total of 400 square inches (2,600 cm^2) hunter orange including 144 square inches (936 cm^2) visible in front and 144 square inches visible in rear. Some hunter orange must appear on head gear.

12. We prohibit target practice or any nonhunting discharge of firearms (see §27.42 of this chapter).

13. We prohibit hunting on or across any part of the refuge road system, or hunting from a vehicle on any refuge road or road right-of-way. Hunters must remain at a minimum of 100 yards (90 m) off any designated refuge road or structure.

14. We prohibit hunters using handguns during archery and rifle hunts. Hunters may use bows and arrows only in accordance with State law. We prohibit use of crossbows for hunting unless we issue a Special Use Permit (FWS Form 1383) due to "upper limb" disability. We allow the use of archery equipment and centerfire rifles for hunting in accordance with State law.

15. We prohibit cutting of holes or other manipulation of vegetation (e.g., cutting bushes, tree limbs, mowing, weed-eating, herbicide use, and other actions) or hunting from manipulated areas (see §27.51 of this chapter).

16. We allow use of portable hunting stands, stalking of game, and still hunting. There is a limit of two portable stands per permitted hunter. A hunter may set up the portable stands during the scouting week but must remove them when the hunter's permit expires (see §27.93 of this chapter). We prohibit hunters from driving nails, spikes, or other objects into trees or hunting from stands secured with objects driven into trees (see §27.61 of this chapter). We prohibit the building of pits and permanent blinds.

17. We prohibit hunting with the aid of bait, salt, or any ingestible attractant (see §32.2(h)). We allow sprays and other noningestible attractants.

18. We prohibit blocking of gates and roadways (see §27.31(h) of this chapter). We prohibit vehicles operating off-road for any reason. Hunters must park vehicles in such a manner as to not obstruct normal vehicle traffic.

19. We allow you to use only biodegradable flagging tape to mark trails and your hunt stand location during the archery and rifle hunts on the refuge. We color-code the flagging tape used each weekend during the rifle hunts. You must use the designated flagging tape color specified for particular hunt dates. We provide this information on the refuge hunt permit

and in refuge regulations sent to permittees. You must remove flagging (see §27.93 of this chapter) at the end of the hunt. The hunter must write his/her last name in black permanent marker on the first piece of flagging tape nearest the adjacent designated roadway.

20. We prohibit camping on the refuge at any time.

D. Sport Fishing. * * *

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2. Beginning April 15 through October 15, you may fish on the refuge only in areas designated in the refuge fishing brochure. From October 16 through April 14, the only area open to fishing is adjacent to the picnic area off of the fishing pier, and we also allow wade fishing in that immediate area. You may fish all year in marshes on Matagorda Island.

3. We prohibit consumption of alcohol or possession of open alcohol containers (see §32.5(e)).

Balcones Canyonlands National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of mourning, white-wing, rock, and Eurasian-collared dove on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. The hunting season will be consistent with the State season.

2. We allow hunting in designated areas from 12 p.m. (noon) to legal sunset.

3. You may possess only approved nontoxic shot for hunting while in the field (see §32.2(k)).

4. We require refuge permits (name, address, and signature only) and payment of a hunt fee by all hunters.

5. The bag limit will be consistent with State regulations

6. We allow dogs to retrieve game birds during the hunt, but the dogs must be under the control of the handler at all times and not allowed to roam free (see §26.21(b) of this chapter).

7. We define youth hunters as ages 9-16. A Texas-licensed, adult hunter, age 17 or older who has successfully completed a Hunter Education Training Course, must accompany youth hunters. We exempt those persons born prior to September 2, 1971 from the Hunter Education Training course requirement. We define accompanied as being within normal voice contact. Each adult hunter may supervise only one youth hunter.

8. We prohibit use or possession of alcohol while hunting (see §32.2(j)).

9. We may close the entire refuge or any portion thereof to hunting for the protection of resources, as determined by the refuge manager.

10. Persons possessing, transporting, or carrying firearms on national wildlife refuges must comply with all provisions of State and local law. Persons may only use (discharge) firearms in accordance with refuge regulations (50 CFR 27.42 and specific refuge regulations in part 32).

11. We allow nonhunters to accompany hunters needing special assistance. Contact the refuge manager for details.

B. Upland Game Hunting. [Reserved]

C. Big Game Hunting. We allow hunting of white-tailed deer, turkey, and feral hog at designated times on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A1, A4, A5, and A7 through A11 apply.

2. We require hunters to check-in and out daily at designated check station(s).

3. Weapons will be consistent with State regulations.

4. Hunters must visibly wear 400 square inches (2,600 cm^2) of hunter orange on the outermost layer of the head, chest, and back, which must include a hunter-orange hat or cap.

5. We prohibit dogs for hunting.

6. We prohibit camping.

7. You may use vehicles only on designated roads and parking areas.

8. We allow stand-by hunting permits only if openings are available on the day of each hunt on a first-come-first-served basis. Contact the refuge manager for details.

9. We prohibit the use or possession of bait during scouting or hunting (see §32.2(h)). We consider bait to be anything that may be eaten or ingested by wildlife. We allow scent attractants.

D. Sport Fishing. [Reserved]

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Caddo Lake National Wildlife Refuge

A. Migratory Game Bird Hunting. [Reserved]

B. Upland Game Hunting. [Reserved]

C. Big Game Hunting. We allow hunting of deer and feral hog on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We prohibit the use of motorized off-road vehicles (e.g., ATVs) on the refuge (see §27.31(f) of this chapter).

2. We set season dates and bag limits annually and publish them in the refuge public use regulations available at the refuge office.

3. Deer archery hunters must possess and carry a signed refuge permit (signed refuge brochure) while hunting.

4. You may hunt only big game during designated refuge seasons.

5. You may hunt feral hog during any established refuge hunting season. Refuge permits and legal weapons apply for the current hunting season.

6. We allow hunters to access the refuge no more than 2 hours before legal sunrise and no more than 2 hours after legal sunset.

7. We define youth hunters as ages 9-16. A Texas-licensed, adult hunter, age 17 or older who has successfully completed a Hunter Education Training Course, must accompany youth hunters. We exempt those persons born prior to September 2, 1971 from the Hunter Education Training course requirement. We define accompanied as being within normal voice contact. Each adult hunter may supervise only one youth hunter.

8. You may participate in the refuge firearms deer hunt only with a Quota Deer Hunt Application (FWS Form 3-2354) issued through random drawing. You may obtain information on permit applications at the refuge headquarters.

9. We allow the use of only portable blinds and tree stands on the refuge. You must remove blinds, tree stands, and all other personal equipment from the refuge at the end of each day (see §27.93 of this chapter).

10. We prohibit possession or distribution of bait or hunting with the aid of bait, including any grain, salt, minerals, or other feed or nonnaturally occurring attractant on the refuge (see §32.2(h)).

11. We prohibit the use of dogs, feeders, campsites, and all-terrain vehicles (we may allow all-terrain vehicles for medically documented disabled hunters by Special Use Permit (SUP) [FWS Form 3-1383] only). Contact the wildlife refuge manager for guidelines to obtain a SUP.

12. Hunters must conspicuously wear daylight-flurorescent orange as per State deer hunting regulations on public hunting lands.

13. Persons possessing, transporting, or carrying firearms on a national wildlife refuge must comply with all provisions of State and local law. Persons may only use (discharge) firearms in accordance with refuge regulations (see 50 CFR part 27.42 and specific refuge regulations in part 32).

D. Sport Fishing. [Reserved]

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Hagerman National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of mourning dove in the

month of September on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. You must possess and carry a signed refuge brochure (which serves as your Migratory Game Bird/Upland Game Hunting Permit). The permit/brochure is available free of charge at the refuge headquarters.

2. You may possess shot for hunting no larger than #4 in the hunting area.

3. We require the hunter to self check-in and check out.

4. We prohibit hunting within 150 feet (45 m) of any Day Use Area or walking trail.

5. We prohibit target practice or any nonhunting discharge of firearms.

6. We prohibit falconry.

7. We allow retriever dogs, but the dogs must be under the control of the handler at all times (see §26.21(b) of this chapter).

8. We prohibit airboats, hovercraft, and personal watercraft (jet skis, wave runner, jet boats, etc.) year-round on refuge waters.

9. We prohibit building or hunting from permanent blinds.

10. We prohibit blocking of gates and roads (see §27.31(h) of this chapter).

11. We prohibit ATVs.

12. We prohibit horses.

13. We prohibit glass containers.

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Laguna Atascosa National Wildlife Refuge

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C. Big Game Hunting. We allow hunting of white-tailed deer, feral pig, and nilgai antelope on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We require hunters to pay a fee and obtain a refuge hunt permit (name, address, and signature only). We issue replacement permits for an additional nominal fee. All hunt fees are nonrefundable. We require the hunter to possess and carry a signed and dated refuge hunt permit.

2. We allow archery and firearm hunting on designated units of the refuge. Units 1, 2, 3, 5, 6, and 8 are open to archery hunting during designated dates. Units 2, 3, 5, and 8 are open to firearm hunting during designated dates. We close the following areas to hunting: Adolph Thomae, Jr. County Park in Unit 3, posted "No Hunting Zones" within all hunt units, La Selva Verde Tract (Armstrong), Waller Tract, Tocayo (COHYCO, Inc.) Tract, Freze Tract, Escondido Tract, Sendero del Gato, Bahia Grande Unit, and South Padre Island Unit.

3. We offer hunting during specific portions of the State hunting season. We determine specific deer hunt dates annually, and they usually fall within November, December, and January. We may provide special feral pig and nilgai antelope hunts to reduce populations at any time during the year.

4. We annually establish a specific bag limit for deer hunted on the refuge in the refuge hunt brochure and permit. We have an unlimited bag limit on feral pig and nilgai antelope.

5. We require hunters to visibly wear 400 square inches (2,600 cm^2) of hunter orange, which includes wearing a minimum of 144 square inches (936 cm^2) visible on the chest, a minimum of 144 square inches visible on the back, and a hunter-orange hat or cap visible on the head when in the field. We allow hunter-orange camouflage patterns. We allow archery hunters during the archery-only hunts to remove their hunter orange in the field only when hunting at a stationary location.

6. We define youth hunters as ages 9-16. A Texas-licensed, adult hunter, age 17 or older who has successfully completed a Hunter Education Training Course, must accompany youth hunters. We exempt those persons born prior to September 2, 1971 from the Hunter Education Training course requirement. We define accompanied as being within normal voice contact. Each adult hunter may supervise only one youth hunter.

7. We allow the use of only longbows, compound bows, recurved bows, shoulder-fired muzzleloaders, and rifles. We prohibit use of a pistol or shotgun for hunting. When hunting, muzzleloader firearms must be .40 caliber or larger, and modern rifles must be center fired and .22 caliber or larger. We prohibit loaded authorized hunting firearms (see §27.42 of this chapter) in the passenger compartment of a motor vehicle unless allowed by State regulations. We define "loaded" as having rounds in the chamber of magazine or a fire cap on a muzzleloading firearm. We prohibit target practice or "sighting-in" on the refuge.

8. We allow a 9–day scouting period, ending one week prior to the commencement of the refuge deer hunting season. A permitted hunter and a limit of two nonpermitted individuals may enter the hunt units during the scouting period. We allow access to the units during the scouting period from legal sunrise to legal sunset. You must clearly display the refuge-issued Hunt Vehicle Validation Tags/Scouting Permits (name/signature required; available from the refuge office) face up on the vehicle dashboard when hunting and scouting.

9. We allow hunters to enter the refuge only 1 hour before legal shooting hours during the permitted hunt season. We may require hunters to check out daily at the refuge check station at the end of their hunt or no later than 1 hour after legal shooting hours.

10. We allow vehicle parking at Unit 1 and Unit 6 designated parking areas and along the roadside of General Brandt Road (FM 106), Buena Vista Road, Lakeside Road, and County Road.

11. We restrict vehicle access to service roads not closed by gates or signs. We prohibit the use of motorized vehicles (see §27.31 of this chapter). You may access hunt units only by foot or by bicycle.

12. We allow hunting from portable stands or by stalking and still hunting. There is a limit of one blind or stand per permitted hunter. You must attach hunter identification (name and phone number) to the blind or stand. We prohibit attaching blinds and stands to trees or making blinds and stands from natural vegetation (see §§27.51 of this chapter and 32.2(i)). You must remove all blinds and stands (see §27.93 of this chapter) at the end of the permitted hunt season.

13. We prohibit the possession or use of dogs while scouting or hunting.

14. Hunters must field-dress all harvested big game in the field and check the game at the refuge check station before removal from the refuge. You may quarter deer, feral pig, and nilgai antelope in the field as defined by State regulations. You may use a nonmotorized cart to assist with the transportation of harvested game animals.

15. We prohibit use of or hunting from any type of watercraft or floating device.

16. You must receive authorization from a refuge employee to enter closed refuge areas to retrieve harvested game.

17. You may not kill or wound an animal covered in this section and intentionally or knowingly fail to make a reasonable effort to retrieve and include it in your bag limit.

18. We reserve the right to revoke or deny any permit for up to 5 years due to unsafe conduct or violation of one or more refuge regulations; this includes a demonstrated lack of public or hunter safety to a degree that may endanger oneself or other persons or property; multiple refuge regulation violations; aggressive, abusive, or intimidating behavior towards any employee of the United States or any local or State government employee engaged in official business, or towards any private

person engaged in official business, or towards any private person engaged in the pursuit of a permitted activity on the refuge.

D. Sport Fishing. * * *

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2. We require payment of an entry fee and boat launch at Adolph Thomae, Jr. County Park. We allow access to Adolph Thomae, Jr. County Park in accordance with the Cameron County Parks Department.

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Lower Rio Grande Valley National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of mourning, white-winged, and white-tipped dove on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. The hunting season will be concurrent with the State season. We publish this information in the refuge hunting sheet.

2. Designated areas include the La Grulla and Monte Cristo tracts of the refuge.

3. We require hunters to pay a fee to obtain a refuge hunt permit (name only required) and to possess and carry such permit at all times during your designated hunt period. Hunters must also display the refuge-issued vehicle placard (part of the hunt permit) while participating in the designated hunt period. Hunters, including youth hunters, must also have a valid hunting license, proof of hunter's education certification, and picture identification in order to obtain a refuge hunt permit and must possess the above items while on the refuge hunt.

4. You should park in designated refuge parking areas if they are available. You may park along County roads; however, you must not block the path of traffic and access to the refuge or private property (see §27.31(h) of this chapter). We will tow inappropriately parked vehicles at the owner's expense.

5. We define youth hunters as ages 9-16. A Texas-licensed, adult hunter, age 17 or older who has successfully completed a Hunter Education Training Course, must accompany youth hunters. We exempt those persons born prior to September 2, 1971 from the Hunter Education Training course requirement. We define accompanied as being within normal voice contact. Each adult hunter may supervise only one youth hunter.

6. You may access the refuge during your permitted hunt period from 1 hour before legal hunt time to 1 hour after legal hunt time; however, you may not hunt outside of the legal hunt hours.

7. Your licenses, permits, hunting equipment, effects, and vehicles or other conveyances are subject to inspection by Federal, State, and local law enforcement officers.

8. We restrict hunt participants to those listed on the refuge hunt permit (hunter, nonhunting chaperone, and nonhunting assistant). We require all participants to wear hunter orange according to Texas State regulations (400 square inches [2,600 cm^2] that is visible on the chest, back and head).

9. We allow only the hunter to hunt and carry or discharge the applicable hunting shotgun, muzzleloader, rifle, or bow.

10. We allow hunters to use bicycles on designated routes of travel.

11. You may use properly trained retriever dogs to retrieve dove during the hunt, but the dog must be under the control of the handler at all times (hunters must not allow dogs to roam free) (see §26.21(b) of this chapter).

12. We prohibit hunters discharging firearms for any purpose other than to take or attempt to take a game bird listed in the introductory text of this paragraph A. during your established hunt.

13. We prohibit use of flagging or any other type of marker.

14. We prohibit hunters cutting or trimming any vegetation or brush (see §27.51 of this chapter).

15. We prohibit overnight camping.

16. We prohibit the use of motorized vehicles.

17. We reserve the right to revoke or deny any permit for up to 5 years for the following reasons: Lack of public safety to a degree that may endanger oneself or other persons or property; multiple regulation violations; aggressive, abusive, or intimidating behavior towards any employee of the United States or any local or State government employee engaged in official business, or towards any private person engaged in the pursuit of a permitted activity on the refuge.

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C. Big Game Hunting. We allow hunting of white-tailed deer, feral hog, and nilgai antelope on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. Conditions A3 through A10 and A13 through A17 apply.

2. We offer hunting during specific portions of the State hunting season. We determine specific hunt dates annually. We publish this information in the refuge hunting sheet.

3. We allow archery and firearm hunting on designated tracts of the refuge. We open Teniente Tract to archery and firearm hunting during designated dates. We open East Lake Tract to firearm hunting during designated dates.

4. We allow the use of longbows, compound bows, recurved bows, shotgun, muzzleloader, and any legal center-fire firearm except hand-held pistols (handguns) when hunting. Muzzleloader firearms must be .40 caliber or larger and slugs are the only permitted shot for shotguns when hunting. We publish this information in the refuge hunting sheet.

5. We allow the use of rattling horns.

6. We allow free-standing blinds or tripods. Hunters may set them up during the scouting days preceding each permitted hunt date and must take them down by the end of such hunt date. Hunters must mark and tag all stands with their name, contact number, and hunt date during the period of use.

7. Hunters must field-dress all harvested big game in the field.

8. Hunters may use nonmotorized dollies or carts off improved roads or trails to haul carcasses to a parking area.

9. We prohibit use of big game decoys.

10. We prohibit use or possession of dogs, horses, or mules on the refuge during big game refuge hunt.

11. We prohibit the killing, wounding, taking, or possession of an animal listed in the introductory text of this paragraph C while intentionally or knowingly failing to make a reasonable effort to retrieve or keep the edible portions of the animal and include it in your bag limit.

12. We prohibit discharge of firearms or bows and arrows for any purpose other than to take or attempt to take an animal listed in the introductory text of this paragraph C during your established hunt.

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30. Amend §32.64 Utah by removing paragraph B.3. and redesignating paragraph B.4. as paragraph B.3. of Ouray National Wildlife Refuge.

31. Amend §32.66 Virginia by:

a. Revising paragraphs C.1., C.5., C.9., C.12., C.14., D.6., and D.7.iv. of Back Bay National Wildlife Refuge;

b. Revising paragraphs A.1., A.5., A.7., C.1.i., C.1.viii., and C.2.iii., removing paragraph C.2.v., redesignating paragraph C.2.vi. as C.2.v., revising paragraphs C.3.iii. through C.3.vi., and adding paragraph D.4. of Chincoteague National Wildlife Refuge;

c. Revising paragraph C. of James River National Wildlife Refuge;

d. Revising paragraphs C.2. and C.4. of Mason Neck National Wildlife Refuge;

e. Revising paragraphs C.2. and C.4. of Occoquan Bay National Wildlife Refuge;

f. Revising paragraph A. of Plum Tree Island National Wildlife Refuge;

g. Revising paragraph C. of Presquile National Wildlife Refuge; and

h. Revising paragraphs C. and D. of Rappahannock River Valley National Wildlife Refuge.

The revisions and additions read as follows:

§32.66 Virginia.

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Back Bay National Wildlife Refuge

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C. Big Game Hunting. * * *

1. Hunting brochures containing hunting application procedures, seasons, bag limits, methods of hunting, maps depicting areas open to hunting, and the terms and conditions under which we issue hunting permits (with hunter signature and date) are available at the refuge administration office and on the refuge's website.

* * * * *

5. All selected and standby applicants must enter the refuge between 4 a.m. and 4:30 a.m. on each hunt day. We may issue standby hunters permits to fill vacant slots by lottery. All hunters must cease hunting no later than 6 p.m.

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9. You must be at least age 16 to hunt without an accompanying, qualified adult. Youths between ages 12 and 15 may hunt only when accompanied by a licensed hunter who is age 18 or older. We prohibit persons under age 12 from hunting on the refuge.

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12. We allow scouting 1 week prior to the start of each refuge hunt period. Hunters may enter the hunt zones on foot or bicycle only. Scouts must wear 400 square inches (2,600 cm^2) of visible blaze orange. We require hunters to sign in and out on each day of scouting.

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14. We prohibit hunting or discharging of firearms within designated Safety Zones. We prohibit retrieval of wounded game from a "No Hunting Area" or "Safety Zone" without the consent of the refuge employee on duty at the check station.

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D. Sport Fishing. * * *

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6. You may surf fish, crab, and clam south of the refuge's beach access ramp. We allow night surf fishing by Special Use Permit (FWS Form 3-1383) in this area in accordance with dates and times designated on the permit.

7. * * *

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iv. You must catch and release all freshwater game fish. The daily creel limit for D Pool for other species is a maximum combination of any 10 nongame fish.

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Chincoteague National Wildlife Refuge

A. Migratory Game Bird Hunting. * * *

1. You must possess and carry a Migratory Bird Hunting Application (FWS Form 3-2357). Hunting brochures containing hunting application procedures, seasons, bag limits, methods of hunting, maps depicting areas open to hunting, and the terms and conditions under which we issue hunting permits are available at the refuge administration office and on the refuge's website.

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5. You may erect portable blinds and deploy decoys; however, during the regular duck season, you must remove the blinds and decoys daily (see §27.93 of this chapter).

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7. You must complete and return a Migratory Bird Hunt Report (FWS Form 3-2361), available at the refuge administration office or on the refuge's website, within 15 days of the close of the season.

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C. Big Game Hunting. * * *

1. * * *

i. You must possess and carry a Big/Upland Game Hunt Application (FWS Form 3-2356). Hunting brochures containing hunting application procedures, seasons, bag limits, methods of hunting, maps depicting areas open to hunting, and the terms and conditions under which we issue hunting permits are available at the refuge administration office and on the refuge's website.

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viii. We prohibit the use of a boat, all-terrain vehicle (see §27.31(f) of this chapter), bicycle, or saddled animal within your hunt zone.

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2. * * *

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iii. During the sika archery season, you may take up to five sika daily, of which two may be antlered. In addition, you may take white-tailed deer in accordance with State regulations.

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3. * * *

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iii. When hunting, you may use any firearm allowed by State law in designated areas of the refuge.

iv. We prohibit the discharge of a firearm within 50 feet (15m) of the centerline of any road.

v. During the sika firearm season, you may take up to five sika daily, two of which may be antlered. In addition, during designated white-tailed deer hunt periods, you may take white-tailed deer in accordance with State regulations.

vi. You must have a 4-wheel drive vehicle to hunt on Tom's Cove Hook. All over-sand vehicles must carry a shovel, jack, tow rope or chain, board or similar support for the jack, and a low-pressure tire gauge.

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D. Sport Fishing. * * *

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4. You must possess and carry a refuge permit (name, address, phone number supplied to refuge manager) to surf fish on Assawoman Island between March 15 and September 1.

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James River National Wildlife Refuge

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C. Big Game Hunting. We allow hunting of white-tailed deer on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We require hunters to possess a refuge hunting permit (signed refuge brochure), along with their State hunting license and stamps, while on refuge property.

2. We require firearm hunters to purchase a refuge hunting permit (signed refuge brochure) at the Refuge Hunter Check Station on the morning of each hunt on a first-come-first-served basis. We also require hunters to complete and sign a Quota Deer Hunt Application (FWS Form 3-2354) and provide the application to the hunt administrator prior to receiving a refuge hunting permit.

3. We require persons who wish to hunt during the State archery season to obtain a refuge hunting permit by way of a Quota Deer Hunt Application and subsequent lottery administered through the Virginia Department of Game and Inland Fisheries. We notify successful applicants by mail or e-mail, and if we receive the hunting fee by the date identified in the mailing, we mail refuge hunting permits to successful applicants.

4. We allow the use of shotguns (20-gauge or larger, loaded with buckshot only), muzzleloaders, and bows and

arrows as designated on refuge hunting permits.

5. We allow the take of two deer of either sex per day.

6. We prohibit dogs.

7. We allow only portable tree stands that hunters must remove at the end of each hunt day (see §27.93 of this chapter). We prohibit damage to trees (see §32.2(i)).

8. We require hunters during firearms and muzzleloader seasons to wear in a conspicuous manner on head, chest, and back a minimum of 400 square inches (2,600 cm^2) of solid-colored, hunter-orange clothing or material.

9. We require hunters during archery only seasons to wear in a visible manner on head, chest, and back a minimum of 100 square inches (645 cm^2) of solid-colored, hunter-orange clothing or material while moving to and from their stand/hunting location.

10. We require that hunters using shotguns remain within 100 feet (30 m) of their assigned stand while hunting.

11. We require that hunters using a muzzleloader must hunt from a stand elevated 10 feet (3 m) or more above the ground.

12. Persons possessing, transporting, or carrying firearms on national wildlife refuges must comply with all provisions of State and local law. Persons may only use (discharge) firearms in accordance with refuge regulation (see §27.42 of this chapter and specific refuge regulations in part 32).

13. We prohibit the discharge of firearms or archery equipment across or within State-maintained or refuge roads, including roads closed to vehicles, as shown on refuge hunt maps.

14. We prohibit the use of flagging to mark trails or for any other purpose.

15. An adult age 21 or older, who must also possess and carry a valid hunting license and refuge hunting permit, must accompany and directly control youth hunters ages 12 to 17. We prohibit persons under age 12 to hunt on the refuge.

16. We prohibit the use or possession of alcohol while hunting on the refuge (see §32.2(j)).

17. We require hunters to report accidents or injuries to the refuge office or sheriff's office within 24 hours after the incident. Hunters must report accidents resulting in serious injury to the sheriff's office immediately.

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Mason Neck National Wildlife Refuge

C. Big Game Hunting. * * *

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2. We select hunters by lottery using the Quota Deer Hunt Application (FWS Form 3-2354). Contact the refuge office for information on application dates.

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4. Hunters must certify/qualify weapons and ammunition and attend an orientation session or take the orientation session online prior to issuance of a permit (see application form referenced above). Please contact the refuge for the online orientation web address.

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Occoquan Bay National Wildlife Refuge

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C. Big Game Hunting. * * *

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2. We select hunters by lottery using the Quota Deer Hunt Application (FWS Form 3-2354). Contact the refuge office for information on application dates.

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4. Hunters must certify/qualify weapons and ammunition and attend an orientation session or take the orientation session online prior to issuance of a permit (see application form referenced above). Please contact the refuge for the online orientation web address.

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Plum Tree Island National Wildlife Refuge

A. Migratory Game Bird Hunting. We allow hunting of waterfowl, gallinule, and coot on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We require hunters to possess and carry a signed refuge hunting permit (see condition A2 below) while hunting migratory game birds on the refuge. We open the Cow Island unit of the refuge only to migratory game bird hunting. We close all other areas of the refuge to all public entry.

2. We require migratory game bird hunters to obtain a permit by way of quota hunt application and subsequent lottery administered through the Virginia Department of Game and Inland Fisheries. We mail permits to successful applicants.

3. We prohibit jump-shooting by foot or boat. All hunting must take place from a blind as determined by the hunting permit.

4. We allow only one boat or hunting party at each of the hunting locations.

5. An adult age 21 or older, possessing and carrying a valid hunting license and refuge hunting permit, must accompany and directly control youth hunters ages 12 to 17. We prohibit persons younger than age 12 to hunt on the refuge.

6. Persons possessing, transporting, or carrying firearms on national wildlife refuges must comply with all provisions of State and local law. Persons may only use (discharge) firearms in accordance with refuge regulations (see §27.42 of this chapter).

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Presquile National Wildlife Refuge

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C. Big Game Hunting. We allow hunting of white-tailed deer on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We require big game hunters to obtain a permit by way of quota hunt application and subsequent lottery administered through the Virginia Department of Game and Inland Fisheries. We require a fee to obtain a refuge hunting permit. We notify successful applicants by mail or e-mail, and if we receive the hunting fee by the date identified in the mailing, we mail refuge hunting permits to successful applicants.

2. We require hunters to possess a refuge hunting permit, along with their State hunting license and stamps, while on refuge property.

3. We require still hunting only. We prohibit the use of "man drives," defined as individual or group efforts intended to "push" or "jump" deer for the purposes of hunting.

4. We allow the use of shotguns (20-gauge or larger, loaded with buckshot and or rifled slugs). We require hunters using slugs to be in a stand elevated 10 feet (30) or more above the ground.

5. We allow the take of two deer of either sex per day.

6. We prohibit dogs.

7. We prohibit the discharge of a weapon within 300 feet (90 m) of any building.

8. We allow only portable tree stands that hunters must remove at the end of each hunt day (see §27.93 of this chapter). We prohibit damage to trees (see §32.2(i)).

9. We require hunters to wear in a conspicuous manner on head, chest, and back a minimum of 400 square inches (2,600 cm^2) of solid-colored, hunter-orange clothing or material.

10. We prohibit the use of flagging to mark trails or for any other purpose (see §27.93 of this chapter).

11. Persons possessing, transporting, or carrying firearms on national wildlife refuges must comply with all provisions of State and local law. Persons may only use (discharge) firearms in accordance with refuge regulations (see §27.42 of this chapter).

12. An adult, age 21 or older, who must also possess and carry a valid hunting license and refuge hunting permit, must accompany and directly control youth hunters ages 12 to 17. We prohibit persons younger than age 12 to hunt on the refuge.

13. We prohibit the use or possession of alcohol while hunting on the refuge (see §32.2(j)).

14. We require hunters to dock their boats at designated locations on the refuge.

15. We require hunters to report accidents or injuries to the refuge office or sheriff's office within 24 hours after the incident. Hunters must report hunting accidents resulting in serious injury to the sheriff's office immediately.

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Rappahannock River Valley National Wildlife Refuge

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C. Big Game Hunting. We allow hunting of white-tailed deer on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We require big game hunters to obtain a permit by way of quota hunt application and subsequent lottery administered through the Virginia Department of Game and Inland Fisheries. We require a fee to obtain a refuge hunting permit (signed and dated sheet). We notify successful applicants by mail or e-mail, and if we receive the hunting fee by the date identified in the mailing, we mail refuge hunting permits to successful applicants. We offer walk-in registration to fill hunting slots not filled during the lottery process.

2. We require hunters to possess a refuge hunting permit (signed and dated sheet), along with their State hunting license and stamps, while on refuge property. We require hunters to display a vehicle permit (contains date selected to hunt and permit number) provided by the refuge on the dashboard of their vehicle while on the refuge so that the permit is visible through the windshield.

3. We require still hunting only. We prohibit the use of "man drives," defined as individual or group efforts intended to "push" or "jump" deer for the purposes of hunting.

4. We allow archery, muzzleloader, and shotgun hunting on designated refuge tracts and days.

5. We permit the take of two deer of either sex per day.

6. We prohibit dogs.

7. We allow only portable tree stands that hunters must remove at the end of each hunt day (see §27.93 of this chapter). We prohibit damaging trees (see §32.2(i)).

8. We require hunters during archery-only season to wear in a conspicuous manner a minimum of 100 square inches (650 cm^2) of solid-colored, hunter-orange material or clothing while moving to and from their stand or hunting location.

9. We require hunters during muzzleloader and firearms seasons to wear in a conspicuous manner on head, chest, and back a minimum of 400 square inches (2,600 cm^2) of solid-colored, hunter-orange material or clothing.

10. We prohibit the use of flagging to mark trails or for any other purpose (see §27.93 of this chapter).

11. We prohibit the use of vehicles except on designated refuge roads.

12. Hunters possessing, transporting, or carrying firearms on the refuge must comply with all provisions of State and local law. We prohibit the discharge of firearms or archery equipment within 100 feet (30 m) of refuge roads as marked on the refuge hunt maps.

13. An adult age 21 or older, possessing and carrying a valid hunting license and refuge hunting permit, must accompany and directly control youth hunters ages 12 to 17. We prohibit persons younger than age 12 to hunt on the refuge.

14. We require hunters to report accidents or injuries to the refuge office or sheriff's office within 24 hours after the incident. Hunters must report accidents resulting in serious injury to the sheriff's office immediately.

15. We prohibit the use or possession of alcohol while hunting on the refuge (see §32.2(j)).

16. We prohibit the discharge of a weapon within 300 feet (90 m) of any building.

D. Sport Fishing. We allow fishing on designated areas of the refuge in accordance with State regulations subject to the following conditions:

1. We allow fishing access daily from legal sunrise to legal sunset.

2. During the period when the refuge is open for hunting, we will close hunting areas to all other uses, including sport fishing.

3. We prohibit fishing by any means other than by use of one or more attended poles with hook and line attached.

4. We prohibit the use of lead sinkers in freshwater ponds, including Wilna Pond and Laurel Grove Pond.

5. We require catch-and-release fishing for largemouth bass in freshwater ponds, including Wilna Pond and Laurel Grove Pond. Anglers may take other finfish species in accordance with State regulations.

6. We prohibit the take of any reptile, amphibian, or invertebrate species for use as bait or for any other purpose.

7. We prohibit the use of minnows as bait.

8. We prohibit use of boats propelled by gasoline motors, sail, or mechanically operated paddle wheel.

9. Prescheduled environmental education field trips will have priority over other uses, including sport fishing, on the Wilna Pond and Hutchinson piers at all times.

* * * * *

32. Amend §32.68 West Virginia by revising paragraphs A.1., A.6., B.1., and C.1. of Canaan Valley National Wildlife Refuge to read as follows:

§32.68 West Virginia.

* * * * *

Canaan Valley National Wildlife Refuge

A. Migratory Game Bird Hunting. * * *

1. We require each hunter to possess and carry a signed refuge hunting permit (name, address, phone number), State hunting license, and driver's license (or other photo identification card) at all times while hunting on the refuge. The refuge hunting permit is free, and you may obtain it at the refuge headquarters. We require each hunter to submit a Migratory Bird Hunt Report (FWS Form 3-2361) at the end of the hunting season. Hunters must submit this form to the refuge headquarters if they wish to receive a hunting permit the following year.

* * * * *

6. We prohibit scouting and dog training except during legal hunting seasons.

* * * * *

B. Upland Game Hunting. * * *

1. Conditions A1 (Upland/Small Game Furbearer Report; FWS Form 3-2362), A2, A6, and A7 apply.

* * * * *

C. Big Game Hunting. * * *

1. Conditions A1 (Big Game Harvest Report; FWS Form 3-2359), A2, A6, A7, and B4 apply.

* * * * *

33. Amend §32.69 Wisconsin by:

a. Revising paragraph B. of Leopold Wetland Management District; and

b. Revising paragraphs A. and B. of St. Croix Wetland Management District to read as follows:

§32.69 Wisconsin.

* * * * *

Leopold Wetland Management District

* * * * *

B. Upland Game Hunting. We allow hunting of upland game throughout the district (except that we prohibit hunting on the Blue-wing Waterfowl Production Area (WPA) in Ozaukee County or the Wilcox WPA in Waushara County) in accordance with State regulations subject to the following conditions:

1. Condition A1 applies.

2. You may possess approved nontoxic shot shells while hunting in the field, including shot shells used for hunting wild turkey (see §32.2(k)).

* * * * *

St. Croix Wetland Management District

A. Migratory Game Bird Hunting. We allow hunting of migratory game birds throughout the district in accordance with State regulations subject to the following conditions:

1. We prohibit hunting on designated portions posted as closed of the St. Croix Prairie Waterfowl Production Area (WPA) in St. Croix County.

2. We close the Oak Ridge Waterfowl Production Area in St. Croix County to hunting from the opening day of waterfowl season until the first Saturday in December except deer hunting during regular archery, gun, and muzzleloader seasons.

B. Upland Game Hunting. We allow hunting of upland game throughout the district in accordance with State regulations subject to the following conditions:

1. Conditions A1 and A2 apply.

2. You may possess only approved nontoxic shot shells while hunting in the field, including shot shells used for hunting wild turkey (see §32.2(k)).

* * * * *

34. Amend §32.70 Wyoming by revising paragraph C.1. and removing paragraph C.4. of National Elk Refuge to read as follows:

§32.70 Wyoming.

* * * * *

National Elk Refuge

* * * * *

C. Big Game Hunting. * * *

1. We require refuge permits (issued by State of Wyoming).

* * * * *

Dated: August 25, 2010

Will Shafroth,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2010–22131 Filed 9–14–10; 8:45 am]

BILLING CODE S

Federal Register

Wednesday,
September 15, 2010

Part IV

Environmental Protection Agency

40 CFR Part 52

Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Nonattainment NSR (NNSR) for the 1-Hour and the 1997 8-Hour Ozone Standard, NSR Reform, and a Standard Permit; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2006–0133 and EPA–R06–OAR–2005–TX–0025; FRL—9199–6]

Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Nonattainment NSR (NNSR) for the 1-Hour and the 1997 8-Hour Ozone Standard, NSR Reform, and a Standard Permit

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: EPA is taking final action to disapprove submittals from the State of Texas, through the Texas Commission on Environmental Quality (TCEQ), to revise the Texas Major and Minor NSR SIP. We are disapproving the submittals because they do not meet the 2002 revised Major NSR SIP requirements. We are also disapproving the submittals as not meeting the Major Nonattainment NSR SIP requirements for implementation of the 1997 8-hour ozone national ambient air quality standard (NAAQS) and the 1-hour ozone NAAQS. EPA is disapproving the submitted Standard Permit (SP) for Pollution Control Projects (PCP) because it does not meet the requirements of the CAA for a minor NSR Standard Permit program. Finally, EPA is also disapproving a submitted severable definition of best available control technology (BACT) that is used by TCEQ in its Minor NSR SIP permitting program.

EPA is not addressing the submitted revisions concerning the Texas Major PSD NSR SIP, which will be addressed in a separate action. EPA is taking no action on severable provisions that implement section 112(g) of the Act and is restoring a clarification to an earlier action that removed an explanation that a particular provision is not in the SIP because it implements section 112(g) of the Act. EPA is not addressing severable revisions to definitions submitted June 10, 2005, submittal, which will be addressed in a separate action. We are taking no action on a severable provision relating to Emergency and Temporary Orders, which we will address in a separate action.

EPA is taking these actions under section 110, part C, and part D, of the Federal Clean Air Act (the Act or CAA).

DATES: This rule is effective on October 15, 2010.

ADDRESSES: EPA has established a docket for this action on New Source Review (NSR) Nonattainment NSR (NNSR) Program for the 1-Hour Ozone Standard and the 1997 8-Hour Ozone Standard, NSR Reform, and a specific Standard Permit under Docket ID No. EPA–R06–OAR–2006–0133. The docket for the action on the definition of BACT is in Docket ID No. EPA–R06–OAR–2005–TX–0025. All documents in these dockets are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Air Permits Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittal, which is part of the EPA record, is also available for public inspection at the State Air Agency listed below during official business hours by appointment:

Texas Commission on Environmental Quality, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Mr. Stanley M. Spruiell, Air Permits Section (6PD–R), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–7212; fax number 214–665–7263; e-mail address *spruiell.stanley@epa.gov*.

SUPPLEMENTARY INFORMATION:

Throughout this document, the following terms have the meanings described below:

- "We," "us," and "our" refer to EPA.
- "Act" and "CAA" means Clean Air Act.
- "40 CFR" means Title 40 of the Code of Federal Regulations–Protection of the Environment.
- "SIP" means State Implementation Plan as established under section 110 of the Act.
- "NSR" means new source review, a phrase intended to encompass the statutory and regulatory programs that regulate the construction and modification of stationary sources as provided under CAA section 110(a)(2)(C), CAA Title I, parts C and D, and 40 CFR 51.160 through 51.166.
- "Minor NSR" means NSR established under section 110 of the Act and 40 CFR 51.160.
- "NNSR" means nonattainment NSR established under Title I, section 110 and part D of the Act and 40 CFR 51.165.
- "PSD" means prevention of significant deterioration of air quality established under Title I, section 110 and part C of the Act and 40 CFR 51.166.
- "Major NSR" means any new or modified source that is subject to NNSR and/or PSD.
- "TSD" means the Technical Support Document for this action.
- "NAAQS" means national ambient air quality standards promulgated under section 109 of that Act and 40 CFR part 50.
- "PAL" means "plantwide applicability limitation."
- "PCP" means "pollution control project."
- "TCEQ" means "Texas Commission on Environmental Quality."

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I. What action is EPA taking?

A. What regulations is EPA disapproving?

We are disapproving the SIP revisions submitted by Texas on June 10, 2005, and February 1, 2006, as not meeting the Act and the 1997 8-hour ozone Major Nonattainment NSR SIP requirements, and as not meeting the Act and Major Nonattainment NSR SIP requirements for the 1-hour ozone NAAQS. We are disapproving the SIP revision submitted by Texas on February 1, 2006, as not meeting the Major NSR Reform SIP requirements for PAL provisions and the Major NSR Reform SIP requirements without the PAL provisions. We are disapproving the Standard Permit for PCP submitted February 1, 2006, as not meeting the Act and Minor NSR SIP requirements. We proposed to disapprove the above SIP revision submittals on September 23, 2009 (74 FR 48467). We are disapproving the State's regulatory definition for its Texas Clean Air Act's statutory definition for "BACT" that was submitted in 30 TAC 116.10(3) on March 13, 1996, and July 22, 1998, because it is not clearly limited to minor sources and minor modifications. We proposed to disapprove this severable definition of BACT under our action on Qualified Facilities. *See* 74 FR 48450, at 48463 (September 23, 2009). It is EPA's position that each of these six identified portions in the SIP revision submittals, 8-hour ozone, 1-hour ozone, PALs, non-PALs, PCP Standard Permit, and Minor NSR definition of BACT, is severable from each other and from the remaining portions of the SIP revision submittals.

We have evaluated the SIP submissions to determine whether they meet the Act and 40 CFR Part 51, and are consistent with EPA's interpretation of the relevant provisions. Based upon our evaluation, EPA has concluded that each of the six portions of the SIP revision submittals, identified below, does not meet the requirements of the Act and 40 CFR part 51. Therefore, each portion of the State submittals is not approvable. As authorized in sections 110(k)(3) and 301(a) of the Act, where portions of the State submittal are severable, EPA may approve the portions of the submittal that meet the requirements of the Act, take no action on certain portions of the submittal,[1] and disapprove the portions of the submittal that do not meet the requirements of the Act. When the deficient provisions are not severable from the all of the submitted provisions, EPA must disapprove the submittals, consistent with section 301(a) and 110(k)(3) of the Act. Each of the six portions of the State submittals is severable from each other. Therefore, EPA is disapproving each of the following severable provisions of the submittals:

- The submitted 1997 8-hour ozone NAAQS Major Nonattainment NSR SIP revision,
- The submitted 1-hour ozone NAAQS Major NNSR SIP revision,
- The submitted Major NSR reform SIP revision with PAL provisions,
- The submitted Major NSR reform SIP revision with no PAL provisions,
- The submitted Minor NSR Standard Permit for PCP SIP revision, and
- The submitted definition of "BACT" under 30 TAC 116.10(3) for Minor NSR.

The provisions in these submittals for each of the six portions of the SIP revision submittals were not submitted to meet a mandatory requirement of the Act. Therefore, this final action to disapprove the submitted six portions of the State submittals does not trigger a sanctions or Federal Implementation Plan clock. *See* CAA section 179(a).

B. What other actions is EPA taking?

EPA is taking action in a separate rulemaking action published in today's **Federal Register** on the severable revisions that relate to Prevention of Significant Deterioration. The affected provision that is being acted upon separately in today's **Federal Register** is 30 TAC 116.160.

We are taking no action on 30 TAC 116.400, 116.402, 116.404, and 116.406, submitted February 1, 2006. These provisions implement section 112(g) of the Act, which is outside the scope of the SIP. We are also making an administrative correction relating to 30 TAC 116.115(c)(2)(B)(ii)(I). In our 2002 approval of 30 TAC 116.115 we included an explanation in 40 CFR 52.2270(c) that 30 TAC 116.115(c)(2)(B)(ii)(I) is not in the SIP because it implements section 112(g) of the Act, which is outside the scope of the SIP. In a separate action published April 2, 2010 (75 FR 16671), we inadvertently removed the explanation that states that this provision is not part of the SIP.

We are taking no action on severable portions of the June 10, 2005, submittal concerning 30 TAC 101.1 Definitions. We will take action on these portions of the submittal in a later rulemaking.

Finally, we are taking no action on severable portions of the February 1, 2006, submittal which relate to

[1] In this action, we are taking no action on certain provisions that are either outside the scope of the SIP or which revise an earlier submittal of a base regulation that is currently undergoing review for appropriate action.

Emergency and Temporary Orders. We will take action on these portions of the submittal in a later rulemaking.

II. What is the background?

A. Summary of Our Proposed Action

On September 23, 2009, under Docket No. EPA–R06–OAR–0133, EPA proposed to disapprove revisions to the SIP submitted by the State of Texas that relate to revisions to the New Source Review (NSR) State Implementation Plan (SIP); (1) Prevention of Significant Deterioration (PSD), (2) Nonattainment NSR (NNSR) for the 1997 8-Hour Ozone Standard, (3) NNSR for the 1-Hour Ozone Standard, (4) Major NSR Reform for PAL provisions, (5) The Major NSR Reform SIP requirements without the PAL provisions and (6) The Standard Permit for PCP. *See* 74 FR 48467. These affected provisions that we proposed to disapprove were 30 TAC 116.12, 116.121, 116.150, 116.151, 116.160, 116.180, 116.182, 116.184, 116.186, 116.188, 116.190, 116.192, 116.194, 116.196, 116.198, 116.610(a), and 116.617 under Chapter 116, Control of Air Pollution by Permits for New Construction or Modification. EPA also proposed on September 23, 2009, under Docket No. EPA–R06–OAR–2005–TX–0025 (*see* 74 FR 48450, at 48463–48464), to disapprove a revision to the SIP submitted by the State that relates to the State's Minor NSR definition of BACT. The affected definition that we proposed to disapprove was 30 TAC 116.10(3). *See* 74 FR 48450, at 48463–48464. EPA finds that each of these six submitted provisions is severable from each other. EPA also finds that the submitted definition is severable from the other submittals.

EPA is taking action in a separate rulemaking action published in today's **Federal Register** on the severable revisions that relate to Prevention of Significant Deterioration. The affected provision that is being acted upon separately in today's **Federal Register** is 30 TAC 116.160.

EPA proposed on September 23, 2009, under Docket No. EPA–R06–OAR–0133, no action on the following regulations:

- 30 TAC 116.400, 116.402, 116.404, 116.406, 116.610(d). These regulations implement section 112(g) of the CAA and are outside the scope of the SIP;
- 30 TAC 116.1200. This regulation relates to Emergency and Temporary Orders and will be addressed in a separate action under the Settlement Agreement in BCCA Appeal Group v. EPA, Case No. 3:08–cv–01491–N (N.D. Tex).

B. Summary of the Submittals Addressed in This Final Action

Tables 1 and 2 below summarize the changes that are in the SIP revision submittals. A summary of EPA's evaluation of each section and the basis for this final action is discussed in sections III through V of this preamble. The TSD (which is in the docket) includes a detailed evaluation of the submittals.

TABLE 1—SUMMARY OF EACH SIP SUBMITTAL THAT IS AFFECTED BY THIS ACTION

Title of SIP submittal	Date submitted to EPA	Date of state adoption	Regulations affected in this action
Qualified Facilities and Modification to Existing Facilities	3/13/1996	2/14/1996	30 TAC 116.10—definition of "BACT".
NSR Rule Revisions; section 112(g) Rule Review for Chapter 116.	7/22/1998	6/17/1998	30 TAC 116.10(3)—definition of "BACT".
New Source Review for Eight-Hour Ozone Standard	6/10/2005	5/25/2005	30 TAC 116.12 and 115.150.
Federal New Source Review Permit Rules Reform	2/1/2006	1/11/2006	30 TAC 116.12, 116.121, 116.150, 116.151, 116.180, 116.182, 116.184, 116.186, 116.188, 116.190, 116.192, 116.194, 116.196, 116.198, 116.400, 116.402, 116.404, 116.406, 116.610, 116.617, and 116.1200.

TABLE 2—SUMMARY OF EACH REGULATION THAT IS AFFECTED BY THIS ACTION

Section	Title	Submittal dates	Description of change	Final action
Chapter 116—Control of Air Pollution by Permits for New Construction or Modification				
Subchapter A—Definitions				
30 TAC 116.10(3)	Definition of "BACT"	3/13/1996	Added new definition	Disapproval.
		7/22/1998	Repealed and a new definition submitted as paragraph (3).	
30 TAC 116.12	Nonattainment Review Definitions	6/10/2005	Changed several definitions to implement Federal phase I rule implementing 8-hour ozone standard.	Disapproval.
	Nonattainment Review and Prevention of Significant Deterioration Definitions.	2/1/2006	Renamed section and added and revised definitions to implement Federal NSR Reform regulations.	Disapproval.
Subchapter B—New Source Review Permits				
Division 1—Permit Application				
30 TAC 116.121	Actual to Projected Actual Test for Emissions Increase.	2/1/2006	New Section	Disapproval.

TABLE 2—SUMMARY OF EACH REGULATION THAT IS AFFECTED BY THIS ACTION—Continued

Section	Title	Submittal dates	Description of change	Final action
Division 5—Nonattainment Review				
30 TAC 116.150	New Major Source or Major Modification in Ozone Nonattainment Area.	6/10/2005	Revised section to implement Federal phase I rule implementing 8-hour ozone standard.	Disapproval.
		2/1/2006	Revised section to implement Federal NSR Reform regulations.	Disapproval.
30 TAC 116.151	New Major Source or Major Modification in Nonattainment Areas Other Than Ozone.	2/1/2006	Revised section to implement Federal NSR Reform regulations.	Disapproval.
Subchapter C—Plant-Wide Applicability Limits				
Division 1—Plant-Wide Applicability Limits				
30 TAC 116.180	Applicability	2/1/2006	New Section	Disapproval.
30 TAC 116.182	Plant-Wide Applicability Limit Permit Application.	2/1/2006	New Section	Disapproval.
30 TAC 116.184	Application Review Schedule	2/1/2006	New Section	Disapproval.
30 TAC 116.186	General and Special Conditions	2/1/2006	New Section	Disapproval.
30 TAC 116.188	Plant-Wide Applicability Limit	2/1/2006	New Section	Disapproval.
30 TAC 116.190	Federal Nonattainment and Prevention of Significant Deterioration Review.	2/1/2006	New Section	Disapproval.
30 TAC 116.192	Amendments and Alterations	2/1/2006	New Section	Disapproval.
30 TAC 116.194	Public Notice and Comment	2/1/2006	New Section	Disapproval.
30 TAC 116.196	Renewal of a Plant-Wide Applicability Limit Permit.	2/1/2006	New Section	Disapproval.
30 TAC 116.198	Expiration and Voidance	2/1/2006	New Section	Disapproval.
Subchapter E—Hazardous Air Pollutants: Regulations Governing Constructed and Reconstructed Sources (FCAA, § 112(g), 40 CFR Part 63) [a]				
30 TAC 116.400	Applicability	2/1/2006	Recodification from section 116.180.	No action.
30 TAC 116.402	Exclusions	2/1/2006	Recodification from section 116.181.	No action.
30 TAC 116.404	Application	2/1/2006	Recodification from section 116.182.	No action.
30 TAC 116.406	Public Notice Requirements	2/1/2006	Recodification from section 116.183.	No action.
Subchapter F—Standard Permits				
30 TAC 116.610	Applicability	2/1/2006	Revised paragraphs (a), (a)(1) through (a)(5), (b), and (d) [b].	- Disapproval of paragraph (a) - No action on paragraph (d)
30 TAC 116.617	State Pollution Control Project Standard Permit.	2/1/2006	Replaced former 30 TAC 116.617—Standard Permit for Pollution Control Projects [c].	Disapproval.
Subchapter K—Emergency Orders [d]				
30 TAC 116.1200	Applicability	2/1/2006	Recodification from 30 TAC 116.410.	No action.

[a] Recodification of former Subchapter C. These provisions are not SIP-approved.
[b] 30 TAC 116.610(d) is not SIP-approved.
[c] 30 TAC 116.617 is not SIP-approved.
[d] Recodification of former Subchapter E. These provisions are not SIP-approved.

C. Other Relevant Actions on the Texas Permitting SIP Revision Submittals

Final action on the submitted Major NSR SIP elements and the Standard Permit is required by August 31, 2010, as provided in the Consent Decree entered on January 21, 2010 in *BCCA Appeal Group* v. *EPA,* Case No. 3:08–cv–01491–N (N.D. Tex). As required by the Consent Decree, EPA published its final actions for the following SIP revisions: (1) Texas Qualified Facilities

Program and its associated General Definitions on April 14, 2010 (*See* 75 FR 19467); and (2) Texas Flexible Permits Program on July 15, 2010 (*See* 75 FR 41311).

TCEQ submitted on July 16, 2010, a proposed SIP revision addressing the PSD SIP requirements. We are acting upon the previous PSD SIP revision submittal of February 1, 2006, and the newly submitted PSD SIP revision in a separate rulemaking. Additionally, EPA acknowledges that TCEQ is developing a proposed rulemaking package to address EPA's concerns with revisions to the New Source Review (NSR) State Implementation Plan (SIP); Nonattainment NSR (NNSR) for the 1997 8-Hour Ozone Standard and the 1-Hour Ozone Standard, NSR Reform, and the PCP Standard Permit. We will, of course, consider any rule changes if and when they are submitted to EPA for review. However, the rules before us today are those of Texas's current 1997 8-Hour Ozone Standard NNSR Program, 1-Hour Ozone Standard NNSR Program, NSR Reform Program, PCP Standard Permit, and we have concluded that these current Programs are not approvable for the reasons set out in this notice.

III. Did we receive public comments on the proposed rulemaking?

In response to our September 23, 2009, proposal, we received comments from the following: Association of Electric Companies of Texas (AECT); Austin Physicians for Social Responsibility (PSR); Baker Botts, L.L.P., on behalf of BCCA Appeal Group (BCCA); Baker Botts, L.L.P., on behalf of Texas Industrial Project (TIP); Bracewell & Guiliani, L.L.P., on behalf of the Electric Reliability Coordinating Council (ERCC); Citizens of Grayson County; Gulf Coast Lignite Coalition (GCLC); Office of the Mayor—City of Houston, Texas (City of Houston); Harris County Public Health and Environmental Services (HCPHES); Sierra Club—Houston Regional Group (Sierra Club); Sierra Club Membership Services (including 2,062 individual comment letters) (SCMS); Texas Chemical Council (TCC); Texas Commission on Environmental Quality (TCEQ); Texas Association Business; Members of the Texas House of Representatives; Texas Association of Business (TAB); Texas Oil and Gas Association (TxOGA); and University of Texas at Austin School of Law—Environmental Clinic (the Clinic) on behalf of Environmental Integrity Project, Environmental Defense Fund, Galveston-Houston Association for Smog Prevention, Public Citizen, Citizens for Environmental Justice, Sierra Club Lone Star Chapter, Community-In-Power and Development Association, KIDS for Clean Air, Clean Air Institute of Texas, Sustainable Energy and Economic Development Coalition, Robertson County: Our Land, Our Lives, Texas Protecting Our Land, Water and Environment, Citizens for a Clean Environment, Multi-County Coalition, and Citizens Opposing Power Plants for Clean Air.

We respond to these comments in our evaluation and review under this final action in section IV below.

IV. What are the grounds for these actions?

This section includes EPA's evaluation of each part of the submitted rules. The evaluation is organized as follows: (1) A discussion of the background of the submitted rules; (2) a summary and response to each comment received on the submitted rule; and (3) the grounds for final action on each rule.

A. The Submitted Minor NSR State BACT Definition SIP Revision

EPA proposed to disapprove this severable definition of BACT in 30 TAC 116.10(3), submitted March 13, 1996, and July 22, 1998, when EPA proposed to disapprove the Texas Qualified Facilities Program (under Docket No. EPA–R06–OAR–2005–TX–0025). *See* 74 FR 48450, at 48463–48464. The submittals on March 13, 1996, and July 22, 1998, include a new regulatory definition for the Texas Clean Air Act's definition of "BACT," defining it as BACT with consideration given to the technical practicability and economical reasonableness of reducing or eliminating emissions.

1. What is the background for the submitted definition of BACT under 30 TAC 116.10(3) as proposed under Docket No. EPA–R06–OAR–2005–TX–0025?

On July 27, 1972, the State of Texas revised its January 1972 permitting rules, then Regulation VI at rule 603.16, to add the Texas Clean Air Act statutory requirement that a proposed new facility and proposed modification utilize BACT, with consideration to the technical practicability and economical reasonableness of reducing or eliminating the emissions from the facility. EPA approved the revised 603.16 into the Texas SIP [2] and that provision is presently codified in the Texas SIP at 30 TAC 116.111(a)(2)(C).

The Texas NSR SIP includes not only the PSD BACT definition [3] but also a requirement for a source to perform a BACT analysis. *See* 30 TAC 116.111(a)(2)(C). EPA relied upon this SIP provision in its 1992 original approval of the Texas PSD SIP as meeting the PSD requirement of 40 CFR 52.21(j). *See* 54 FR 52823, at 52824–52825, and 57 FR 28093, at 28096–28096. Both Texas and EPA interpreted this SIP provision to require either a Minor NSR BACT determination or a Major PSD BACT determination. Since EPA's approval of the Texas PSD SIP in 1992, there has been some confusion about the distinction between a State Minor NSR BACT definition and a PSD Major NSR BACT definition and the requirement that a source must perform the relevant BACT analysis.

TCEQ in 1996 submitted a regulatory definition of the TCAA BACT statutory provision but failed to distinguish the submitted regulatory BACT definition as the Minor NSR BACT definition. *See* the proposed disapproval of the BACT definition in 30 TAC 116.10(3) at 74 FR 48450, at 40453 (footnote 2), 48463–48464, TCEQ's proposed revisions to its Qualified Facilities Program rulemaking, and EPA's June 7, 2010, comment letter on TCEQ's Qualified Facilities Program, for further information.

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[2] The January 1972 Texas NSR rules, as revised in July 1972, require a proposed new facility or modification to utilize "best available control technology, with consideration to the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility." This definition of BACT is from the Texas Clean Air Act. EPA approved this into the Texas NSR SIP possibly in the 1970's and definitely on August 13, 1982 (47 FR 35193). When EPA approved the Texas PSD program SIP revision submittals, including the State's incorporation by reference of the Federal definition of PSD BACT, in 1992, both EPA and Texas interpreted the use of the TCAA BACT definition to be for Minor NSR SIP permitting purposes only. EPA specifically found that the State's TCAA BACT definition did not meet the Federal PSD BACT definition. We required the use of the Federal PSD BACT definition for PSD SIP permitting purposes. *See* the proposal and final approval of the Texas PSD SIP at 54 FR 52823 (December 22, 1989) and 57 FR 28093 (June 24, 1992).

[3] Texas's current PSD SIP incorporates by reference the Federal PSD definition of BACT in 40 CFR 52.21(b)(12). *See* current SIP at 30 TAC 116.160(a). On February 1, 2006, TCEQ submitted a revision that reorganized 30 TAC 116.160 and removed the reference to the BACT definition. On September 23, 2009, EPA proposed to disapprove the 2006 revision to section 116, because of the removal of the reference to the Federal PSD BACT definition. On July 16, 2010, Texas submitted a revision to section 116.160 that reinstated the reference to the PSD BACT definition in 40 CFR 52.21(b)(12). *See* 30 TAC 116.160(c)(1)(A), submitted July 16, 2010. EPA is addressing the 2006 and 2010 revisions to 30 TAC 116.160 in a separate action published in today's **Federal Register.**

2. What is EPA's response to comments on the submitted Minor NSR definition of BACT SIP revision?

Comment 1: TCEQ commented (under Docket No. EPA–R06–OAR–2005–TX–0025) on the proposed disapproval of BACT in the Qualified Facilities proposal that it will consider EPA's comments in connection with its disapproval of the definition of BACT and plans to revise its definition of BACT to correct the deficiencies identified in the proposal.

Response: EPA acknowledges TCEQ's consideration of our comments regarding our disapproval of the definition of BACT as well as TCEQ's plans to revise its definition of BACT to correct the deficiencies identified in our proposal. TCEQ proposed to revise this definition on March 30, 2010. On June 7, 2010, we forwarded comments to TCEQ on this proposed rule. In our comments, we stated that the definition of the TCAA BACT must be revised to indicate more clearly that the definition is for any air contaminant or facility that is not subject to the Federal permitting requirements for PSD. The proposed substantive revisions to the regulatory definition are acceptable. Nonetheless, as we explained in our comment letter, we believe that the TCAA BACT regulatory definition should be given a distinguishable name, *e.g.,* State, Texas, Minor NSR Best Available Control Technology. We recognize that the State must continue to use the term BACT since it is in the TCAA; we believe that TCEQ could add before "BACT" however, Texas, State, or Minor NSR, to clearly distinguish this BACT definition from the Federal PSD BACT definition.

Comment 2: The Clinic commented (under Docket No. EPA–R06–OAR–2005–TX–0025) on the proposed disapproval and agrees that this definition cannot be substituted for the Federal definition of BACT for purposes of PSD. The Clinic further comments that rather than limiting the applicability of the definition of "Texas BACT" to minor sources and modifications, Texas should use a different acronym for its minor NSR technology requirement. The use of dual definitions of BACT within the same program is too confusing, as evidenced by the ongoing application of Texas BACT in the Texas PSD permitting proceedings.

Response: EPA agrees with the Clinic that the TCAA BACT regulatory definition cannot be substituted for the Federal definition of PSD BACT. EPA takes note of the Clinic's comment regarding the dual use of the definition of "Texas BACT" within the same program and ensuing confusion. *See* Response to Comment 1 above for further information.

3. What are the grounds for disapproval of the submitted Minor NSR definition of BACT SIP revision?

EPA is disapproving the submitted definition of BACT under 30 TAC 116.10(3) as proposed under Docket No. EPA–R06–OAR–2005–TX–0025. EPA proposed to disapprove this severable definition of BACT in 30 TAC 116.10(3), submitted March 13, 1996, and July 22, 1998, when EPA proposed to disapprove the submitted Texas SIP revisions for Modification of Existing Qualified Facilities Program and General Definitions (under Docket No. EPA–R06–OAR–2005–TX–0025). *See* 74 FR 48450, at 48463–48464.

EPA received comments from TCEQ and the Clinic regarding the proposed disapproval of this submitted definition as a revision to the Texas NSR SIP. *See* our response to these comments in section IV.A.2 above. The submitted regulatory BACT definition of the TCAA provision at 30 TAC 116.10(3) fails to apply clearly only for minor sources and minor modifications at major stationary sources. *See* the proposed disapproval of the BACT definition in 30 TAC 116.10(3) at 74 FR 48450, at 40453 (footnote 2), 48463–48464, TCEQ Qualified Facilities proposal, and EPA's Qualified Facilities comment letter, for further information. Moreover, we strongly recommend, as suggested in comments from the Clinic, that Texas adopt a prefatory term before its TCAA BACT definition, *e.g.,* State, Texas, or Minor NSR, to avoid any confusion with the term BACT as used by the CAA and the major source PSD program.

B. The Submitted Anti-Backsliding Major NSR SIP Requirements for the 1-Hour Ozone NAAQS

1. What is the background for the submitted anti-backsliding Major NSR SIP requirements for the 1-hour ozone NAAQS?

On July 18, 1997, EPA promulgated a new NAAQS for ozone based upon 8-hour average concentrations. The 8-hour averaging period replaced the previous 1-hour averaging period, and the level of NAAQS was changed from 0.12 parts per million (ppm) to 0.08 ppm (62 FR 38865).[4] On April 30, 2004 (69 FR 23951), we published a final rule that addressed key elements related to implementation of the 1997 8-hour ozone NAAQS including, but not limited to: revocation of the 1-hour NAAQS and how anti-backsliding principles will ensure continued progress toward attainment of the 1997 8-hour ozone NAAQS. We codified the anti-backsliding provisions governing the transition from the revoked 1-hour ozone NAAQS to the 1997 8-hour ozone NAAQS in 40 CFR 51.905(a). The 1-hour ozone major nonattainment NSR SIP requirements indicated that certain 1-hour ozone standard requirements were not part of the list of anti-backsliding requirements provided in 40 CFR 51.905(f).

On December 22, 2006, the DC Circuit vacated the Phase 1 Implementation Rule in its entirety. *South Coast Air Quality Management District, et al.,* v. *EPA,* 472 F.3d 882 (DC Cir. 2006), reh'g denied 489 F.3d 1245 (2007) (clarifying that the vacatur was limited to the issues on which the court granted the petitions for review). EPA requested rehearing and clarification of the ruling and on June 8, 2007, the Court clarified that it was vacating the rule only to the extent that it had upheld petitioners' challenges. Thus, the Court vacated the provisions in 40 CFR 51.905(e) that waived obligations under the revoked 1-hour standard for NSR. The court's ruling, therefore, maintains major nonattainment NSR applicability thresholds and emission offsets pursuant to classifications previously in effect for areas designated nonattainment for the 1-hour ozone NAAQS.

On June 10, 2005 and February 1, 2006, Texas submitted SIP revisions to 30 TAC 116.12 and 30 TAC 116.150 which relate to the transition from the major nonattainment NSR requirements applicable for the 1-hour ozone NAAQS to implementation of the major nonattainment NSR requirements applicable to the 1997 8-hour ozone NAAQS. Texas's revisions at 30 TAC 116.12(18) (Footnote 6 under Table I under the definition of "major modification") and 30 TAC 116.150(d) introductory paragraph, effective as State law on June 15, 2005, provide that for "the Houston-Galveston-Brazoria, Dallas-Fort Worth, and Beaumont-Port Arthur eight hour ozone nonattainment areas, if the United States Environmental Protection Agency promulgates rules requiring new source review permit applications in these areas to be evaluated for nonattainment new source review according to the area's one-hour standard classification," then "each application will be evaluated

[4] On March 12, 2008, EPA significantly strengthened the 1997 8-hour ozone standard, to a level of 0.075 ppm. EPA is developing rules needed for implementing the 2008 revised 8-hour ozone standard and has received the States' submittals identifying areas with their boundaries they identify to be designated nonattainment. EPA is reviewing the States' submitted data.

according to that area's one-hour standard classification" and "* * * the de minimis threshold test (netting) is required for all modifications to existing major sources of VOC or NO_X in that area * * *." The footnote 6 and the introductory paragraph add a new requirement for an affirmative regulatory action by EPA on the reinstatement of the 1-hour ozone NAAQS major nonattainment NSR requirements before the legally applicable major nonattainment NSR requirements under the 1-hour ozone standard will be implemented in the Texas 1-hour ozone nonattainment areas.

The currently approved Texas major nonattainment NSR SIP does not require such an affirmative regulatory action by EPA before the 1-hour ozone major nonattainment NSR requirements come into effect in the Texas 1-hour ozone nonattainment areas. The current SIP states at 30 TAC 116.12(18) (Footnote 1 under Table I) that "Texas nonattainment area designations are specified in 40 Code of Federal Regulations § 81.344." That section includes designations for the one-hour standard as well as the eight-hour standard. Moreover, the submitted revisions to 30 TAC 116.12(18) and 116.150(d) do not comport with the *South Coast* decision as discussed above.

The court opinion maintains the lower applicability thresholds and more stringent offset ratios for a 1-hour ozone nonattainment area whose classification under that standard was higher than its nonattainment classification under the 8-hour standard. In the submitted rule revision, the lower applicability thresholds and more stringent offset ratios for a classified 1-hour ozone nonattainment area would not be required in a Texas 1-hour ozone nonattainment area unless and until EPA promulgated a rulemaking implementing the South Coast decision. Although EPA proposed that the Texas revision relaxes the requirements of the approved SIP and we stated that EPA lacks sufficient information to determine whether this relaxation would not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the Act (*see* 74 FR 48467, at 48473) we have now determined that it is unnecessary to reach this issue because the revision nonetheless fails to comply with the CAA, whereas, the existing approved SIP meets CAA requirements.

2. What is EPA's response to comments on the submitted anti-backsliding Major NSR SIP requirements for the 1-Hour Ozone NAAQS?

Comment 1: TCEQ commented that the anti-backsliding issue associated with the status of the requirements for compliance with the 1-hour ozone NAAQS with the implementation of the 8-hour ozone NAAQS was delayed by litigation that took several years to become final. TCEQ adopted changes to 30 TAC 116.12(18) in June, 2005, prior to the resolution of the litigation. After the *South Coast* decision, EPA subsequently stated it would conduct rulemaking to address the 1-hour ozone NAAQS requirements.[5] TCEQ commits to work with EPA to ensure that the rule is revised to comply with current law.

Response: EPA acknowledges TCEQ's commitment to revise its State rules to implement the Major NSR anti-backsliding requirement. However, the 2007 Meyers Memorandum cited in the comment did not indicate that States should await EPA rulemaking before taking any necessary steps to comply with the *South Coast* decision. Rather, the memorandum encouraged the Regions to "have States comply with the court decision as quickly as possible." The memorandum's reference to "rulemaking to conform our NSR regulations to the court's decision" was not intended to suggest that States could simply ignore the court's decision until EPA had updated its regulations to reflect the vacatur.

Comment 2: The Clinic commented that Texas rules limit enforcement of the 1-hour ozone NAAQS in violation of *South Coast Air Quality Management District* v. *EPA.* As a result of this decision, States must immediately comply with the formerly revoked 1-hour ozone requirements, including NNSR applicability thresholds and emission offset requirements. Texas rules include two provisions that require EPA to conduct rulemaking before TCEQ can begin enforcing the one-hour standard classification requirements for NAAQS. *See* 30 TAC 116.12(18), Table I, and 116.150(d).

Response: See response to Comment 1.

[5] *See* New Source Review (NSR) Aspects of the Decision of the U.S. Court of Appeals for the District of Columbia Circuit on the Phase I Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standards (NAAQS), from Robert J. Meyers, Principal Deputy Assistant Administrator, to EPA Regional Administrators, dated October 3, 2007. This memorandum is in the docket for this action numbered EPA–R06–OAR–2006–0133–0007 and is available at: *http://www.regulations.gov/search/Regs/home.html#documentDetail?R=09000064801987ff.*

Comment 3: BCCA, TIP, TCC, commented that the Texas rules regarding the 1-hour/8-hour transition are neither inconsistent with the CAA, nor the court's decision in *South Coast.* With its remand to EPA following vacatur of parts of the Phase 1 transition rule, the *South Coast* court did not offer specific direction concerning implementation of the backsliding requirements as they apply to NSR. However, the court in its Opinion on Petitions for Rehearing "urged" EPA "to act promptly in promulgating a revised rule that effectuates the statutory mandate by implementing the eight-hour standard * * *." *South Coast Air Quality Mgmt. Dist.* v. *EPA,* 489 F.3d 1245, 1248–49 (DC Cir. 2007).

The commenters note that consistent with the court's direction in *South Coast,* the language of CAA § 172(e) suggests that EPA must take definite action to implement anti-backsliding requirements:

> If the Administrator relaxes a national primary ambient air quality standard * * * the Administrator *shall, within 12 months after the relaxation, promulgate requirements* applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.

42 U.S.C. 7502(e) (emphasis added). Commenters claim that an October 2007 memorandum from EPA Deputy Administrator Robert Meyers stated that EPA intends to undertake rulemaking to conform the Agency's NSR regulations to the *South Coast* decision and yet EPA has not yet proposed such a rule. The footnote 6 and introductory paragraph cited in EPA's proposed disapproval are consistent with CAA § 172(e) and not a basis for disapproval of the proposed SIP revision. TCC stated that it is reasonable for TCEQ to understand that some EPA action is necessary before it proceeds with appropriate rule changes to reinstate the major NNSR applicability thresholds and emission offset requirements, and this is not a rational basis to justify disapproving the State's rules.

Response: EPA disagrees with the claim that States are under no obligation to take steps to comply with the *South Coast* decision until EPA updates its regulations. Neither the court's vacatur of the provision that waived States' obligation to include in their SIPs NSR provisions meeting the requirements for the 1-hour standard nor section 172(e) mandate that EPA promulgate a rule before such a requirement applies.

As EPA provided in the preamble to the Phase 1 Implementation Rule and as

recognized by the Court in *South Coast,* CAA § 172(e) does not apply because the 1997 8-hour NAAQS was a strengthening, rather than a relaxation, of the 1-hour NAAQS. *See* 69 FR 23951, at 23972 (April 30, 2004); 489 F.3d at 1248. However, in the preamble to the Phase I Implementation Rule, we cited to section 172(e) of the CAA and stated that "if Congress intended areas to remain subject to the same level of control where a NAAQS was relaxed, they also intended that such controls not be weakened where the NAAQS is made more stringent." *See* 69 FR 23951, at 23972 (April 30, 2004). Thus, even if, as suggested upon revocation of a standard in the absence of an EPA rule retaining them pursuant to section 172(e), that would hold true only where section 172(e) directly applied, *i.e.,* where EPA had promulgated a less stringent NAAQS. Regardless, EPA disagrees with that interpretation of section 172(e). Rather, EPA interprets the CAA as retaining requirements applicable to any area, but allowing EPA through rulemaking to develop alternatives approaches or processes that would apply, so long as such alternatives ensure that the requirements are no less stringent than what applies under the Act. Thus, in the case, once the Court vacated EPA determination under the principles of section 172(e) that NSR as it applied for the 1-hour NAAQS should no longer apply, that requirement, as established under the CAA, once again applied. We do not believe that the interpretation suggested by the commenters is a reasonable interpretation as it would allow areas to discontinue implementing measures mandated by Congress with respect to a revoked standard in the absence of EPA rulemaking specifically retaining such obligations. Such a result would be counter to the health-protective goals of the CAA and inconsistent with the *South Coast* decision, which upheld EPA's authority to revoke standards but only where adequate anti-backsliding requirements were in place.

Nor do we believe that the language cited by the commenter from the *South Coast* decision supports their claim that rulemaking is necessary before the statutory 1-hour NSR requirement applies. The quoted language from the court's opinion immediately follows a sentence that pertains to the classification issue that was decided by the Court. Specifically, the Court notes that some parties objected to a partial vacatur of the rule because it would "inequitably exempt Subpart 1 areas from regulation while the remand is pending." *See* 489 F.3d at 1248. In other words, certain States with areas subject to subpart 2 claimed it would be inequitable for such areas to remain subject to planning obligations while subpart 1 areas would be "exempt." The Court responded by saying that a complete vacatur "would only serve to stall progress where it is most needed" and then urges EPA "to act promptly in promulgating a revised rule." *See* 489 F.3d at 1248. Thus, this portion of the opinion expressly addressed the need for EPA to promulgate a rule quickly so that areas that had been classified as subpart 1 would no longer be "exempt" from planning requirements for the 1997 ozone NAAQS, which requirements are linked to whether an area is subject only to subpart 1 or also subpart 2 and to an area's classification under subpart 2.

For these reasons, the effect of the portion of the court's ruling that vacated the waiver of the 1-hour NSR obligation is to restore the statutory obligation for areas that were nonattainment for the 1-hour standard at the time of designation for the 1997 8-hour standard to include in their SIPs major nonattainment NSR applicability thresholds and emission offsets pursuant to the area's classifications for the 1-hour ozone NAAQS at the time of designation for the 1997 ozone NAAQS.

In addition, the Court specifically concluded that withdrawing 1-hour NSR from a SIP "would constitute impermissible backsliding." *See* 472 F.3d at 900. Thus, it would be inconsistent with the *South Coast* decision for Texas to withdraw the 1-hour NSR applicability thresholds and emission offsets from its SIP. Texas's proposed addition of SIP language conditioning implementation of the 1-hour NSR thresholds and offsets on an affirmative regulatory action by EPA would be equivalent, in terms of human health impact, to a temporary withdrawal of those requirements from the SIP, and therefore would be inconsistent with the Court's decision.

Finally, we note that the 2007 Meyers Memorandum cited in the comment did not indicate that States should await EPA rulemaking before taking any necessary steps to comply with the *South Coast* decision. Rather, the memorandum encouraged the Regions to "have States comply with the court decision as quickly as possible." The memorandum's reference to "rulemaking to conform our NSR regulations to the court's decision" was not intended to suggest that States could simply ignore the court's decision until EPA had updated its regulations to reflect the vacatur. EPA proposed to remove the vacated provisions from its regulations on January 16, 2009 (74 FR 2936).

3. What are the grounds for disapproval of the submitted anti-backsliding Major NSR SIP requirements for the 1–hour ozone NAAQS?

EPA is disapproving the submitted Anti-Backsliding Major NSR SIP revisions for the 1-hour ozone NAAQS. This includes the SIP revisions submitted June 10, 2005, and February 1, 2006, with changes to 30 TAC 116.12 and 30 TAC 116.150 which relate to the transition from the major nonattainment NSR requirements applicable for the 1-hour ozone NAAQS to implementation of the major nonattainment NSR requirements applicable to the 1997 8-hour ozone NAAQS. *See* section B.1, first three paragraphs, for the information regarding EPA's promulgation of the new 1997 8-hour ozone NAAQS, EPA's Phase 1 Implementation Rule, the court history, and the description of the submitted SIP revisions.

The currently approved Texas major nonattainment NSR SIP does not require such an affirmative regulatory action by EPA before the 1-hour ozone major nonattainment NSR requirements can be implemented in the Texas 1-hour ozone nonattainment areas. However, the submitted revisions to 30 TAC 116.12(18) and 116.150(d) do not comply with the CAA as interpreted by the Court in the *South Coast* decision because the opinion does not require further action by EPA with respect to NSR, as discussed above.

EPA received comments from TCEQ, the Clinic, and industry regarding the proposed disapproval of these submitted SIP revisions. *See* our response to these comments in section IV.B.2 above. We are disapproving the revisions as not meeting part D of the Act as interpreted by the Court in *South Coast* for the Major NNSR SIP requirements for the 1-hour ozone NAAQS. *See* the proposal at 74 FR 48467, at 48472–48473, our background for these submitted SIP revisions in section IV.B.1 above, and our response to comments on these submitted SIP revisions in section IV.B.2 above for additional information.

C. The Submitted Major Nonattainment NSR SIP Requirements for the 1997 8–Hour Ozone NAAQS

1. What is the background for the submitted Major Nonattainment NSR SIP requirements for the 1997 8-hour ozone NAAQS?

EPA interprets its Major NSR SIP rules to require that an applicability

determination regarding whether Major NSR applies for a pollutant should be based upon the designation of the area in which the source is located on the *date of issuance* of the Major NSR permit. EPA also interprets the Act and its rules that if an area is designated nonattainment on the date of issuance of a Major NSR permit, then the Major NSR permit must be a NNSR permit, not a PSD permit. If the area is designated attainment/unclassifiable, then under EPA's interpretation of the Act and its rules, the Major NSR permit must be a PSD permit on the date of issuance. *See* the following: sections 160, 165, 172(c)(5) and 173 of the Act; 40 CFR 51.165(a)(2)(i) and 51.166(a)(7)(i). EPA's interpretation of these statutory and regulatory requirements is guided by the memorandum issued March 11, 1991, and titled "New Source Review (NSR) Program Transitional Guidance," issued March 11, 1991, by John S. Seitz, Director, Office of Air Quality Planning and Standard.[6]

Revised 30 TAC 116.150(a), as submitted June 10, 2005 and February 1, 2006, now reads as follows under State law:

(a) This section applies to all new source review authorizations for new construction or modification of facilities as follows:

(1) For all applications for facilities that will be located in any area designated as nonattainment for ozone under 42 United States Code (U.S.C.), 7407 *et seq.* on the effective date of this section, the issuance date of the authorization; and

(2) For all applications for facilities that will be located in counties for which nonattainment designation for ozone under 42 U.S.C. 7407 *et seq.* becomes effective after the effective date of this section, the date the application is administratively complete.[7]

The submitted rule raises two concerns. First, the revised language in the submitted 30 TAC 116.150(a) is not clear as to when and where the applicability date will be set by the date the application is administratively complete and when and where the applicability date will be set by the issuance date of the authorization. The rule, adopted and submitted in 2005, applies the date of administrative completeness of a permit application, not the date of permit issuance, where setting the date for determination of NSR applicability after June 15, 2004 (the effective date of ozone nonattainment designations). The submitted 2006 rule adds the date of permit issuance. Unfortunately, the submitted 2006 rule by introducing a bifurcated structure creates vagueness rather than clarity. The effective date of this new bifurcated structure is February 1, 2006. It is unclear whether this means under subsection (1) that the permit issuance date is used in existing nonattainment areas designated nonattainment for ozone before and up through February 1, 2006. Thus, the proposed revision lacks clarity on its face and is therefore not enforceable.

Second, to the extent that the date of application completeness is used in certain instances to establish the applicability date for Nonattainment NSR requirements, such use is contrary to EPA's interpretation of the governing EPA regulations, as discussed above.

Thus, based upon the above and in the absence of any explanation by the State, EPA proposed to disapprove the SIP revision submittals for not meeting the Major NNSR SIP requirements for the 1997 8-hour ozone standard. *See* the proposal at 74 FR 48467, at 48473–48474, for additional information.

2. What is EPA's response to comments on the submitted Major Nonattainment NSR SIP requirements for the 1997 8-hour ozone NAAQS?

Comment 1: TCEQ commented that in 2006 it had revised the rule to clarify and implement EPA interpretation that the applicability date is the date of permit issuance, as well as provide for the possibility of new nonattainment areas. The 2006 submittal also added a new bifurcated structure to the rule for when applicability is based upon date of submittal of a complete application and when applicability is based upon the date of permit issuance. TCEQ further agrees that this new bifurcated structure is unclear. TCEQ commits to work with EPA to comply with current rule and practice.

Response: EPA acknowledges TCEQ's commitment to revise the rule to clarify and implement EPA's interpretation of the Act that the applicability date is the date of permit issuance for all nonattainment areas, including applicability in newly designated nonattainment areas.

Comment 2: TCEQ, the Clinic, BCC, TIP, and TCC commented on the definition of "facility" as used in its submitted Major Nonattainment NSR SIP Requirements for the 1997 8-hour ozone NAAQS. They also commented on this definition under the evaluation of the Submitted Non-PAL Aspects of the Major NSR SIP Requirements in section IV.

Response: See section IV.E.2, Comments 1 through 3, for the comments and EPA's response on the definition of facility.

Comment 3: The Clinic commented that TCEQ's rules fail to require all NSR applicability determinations to be based on the applicable attainment status of an area on the date of permit issuance, as required under the CAA. Texas rule authorize certain sources to construct or modify in a nonattainment area to comply with PSD requirements rather than NNSR requirements if the facility's permit application is administratively complete prior to the area's designation to nonattainment. *See* 30 TAC 116.150(a). While the rules are vague as to what constitutes the "effective date of this section," 30 TAC 116.150(a)(2) clearly is not approvable because it authorizes facilities to base applicability determination on the area's attainment status as of the date their applications are administratively complete.

Response: EPA agrees with this comment.

Comment 4: BCCA, TIP, TCC, commented that the applicability cutoff established in TCEQ rules is not inconsistent with the CAA or EPA rules. While it may be inconsistent with EPA's interpretation of that rule language, the use of application completeness as an applicability date is not inconsistent with Part 51 itself. As a result, the applicability cutoff dates, established in 30 TAC 116.150(a), are not appropriate grounds for disapproval of the proposed SIP revision. EPA concerns regarding applicability dates are properly addressed through comments on individual permits, and not through a disapproval of the SIP revision. TCC further commented that TCEQ rules state that for facilities located in areas that are designated nonattainment areas after the effective date of TCEQ rules, the NNSR requirements apply the day the application is administratively complete. The day the application is determined to be administratively complete occurs prior to the issuance date of the permit; therefore, the State's rules are more stringent than the Federal rules in this regard.

Response: EPA disagrees with this comment. The applicability cutoff established in the submitted revision is inconsistent with the CAA and EPA rules. EPA interprets EPA's NSR SIP

[6] You can access this document at: *http://www.epa.gov/ttn/nsr/gen/nstrans.pdf.*

[7] It is our understanding of State law, that a "facility" can be an "emissions unit," *i.e.,* any part of a stationary source that emits or may have the potential to emit any air contaminant. A "facility" also can be a piece of equipment, which is smaller than an "emissions unit." A "facility" can be a "major stationary source" as defined by Federal law. A "facility" under State law can be more than one "major stationary source." It can include every emissions point on a company site, without limiting these emissions points to only those belonging to the same industrial grouping (SIC code).

rules to require that an applicability determination regarding whether Major NSR applies for a pollutant should be based upon the attainment or nonattainment designation of the area in which the source is located on the *date of issuance* of the Major NSR permit. EPA also interprets its rules that if an area is designated nonattainment on the date of issuance of a Major NSR permit, then the Major NSR permit must be a NNSR permit, not a PSD permit. If the area is designated attainment/unclassifiable, then under EPA's interpretation of the Act and its rules, the Major NSR permit must be a PSD permit on the date of issuance. *See* the following: sections 160, 165, 172(c)(5) and 173 of the Act; 40 CFR 51.165(a)(2)(i) and 51.166(a)(7)(i). EPA's interpretation of these statutory and regulatory requirements is guided by the memorandum issued March 11, 1991, and titled "New Source Review (NSR) Program Transitional Guidance," issued March 11, 1991, by John S. Seitz, Director, Office of Air Quality Planning and Standard. *See* section IV.C.1 above for further information. The submitted revision provides the regulatory framework for administering individual permits, thus it is necessary to ensure it is consistent with the equivalent Federal requirements. The submitted revision applies the date of administrative completeness of a permit application, not the date of permit issuance, where setting the date for determination of NSR applicability after June 15, 2004 (the effective date of ozone nonattainment designations). The submitted revision also appears to apply the date of permit issuance in existing nonattainment areas designated nonattainment for ozone before and up through February 1, 2006. This regulatory structure creates ambiguity and lacks clarity. Thus, the proposed revision lacks clarity on its face and is therefore not enforceable.

3. What are the grounds for disapproval of the submitted Major Nonattainment NSR SIP requirements for the 1997 8-hour ozone NAAQS?

EPA is disapproving the submitted Major Nonattainment NSR SIP requirements for the 1997 8-hour ozone NAAQS. An applicability determination for a Major Nonattainment NSR (NNSR) permit based upon the date of administrative completeness, rather than date of issuance, would allow more sources to avoid the Major NSR requirements where there is a nonattainment designation between the date of administrative completeness and the date of issuance, and thus this submitted revision will reduce the number of sources subject to Major NNSR requirements. The submitted revised rule does not apply the date of permit issuance in all cases and therefore violates the Act, as discussed previously.

The submitted revised 2006 rule by introducing a bifurcated structure creates vagueness rather than clarity. The effective date of this new bifurcated structure is February 1, 2006. Thus, the proposed revision lacks clarity on its face and is therefore not enforceable.

EPA received comments from TCEQ, the Clinic, and industry regarding the proposed disapproval of these submitted SIP revisions. *See* our response to these comments in section IV.C.2 above. *See* the proposal at 74 FR 48467, at 48473–48474, our background for these submitted SIP revisions in section IV.C.1 above, and our response to comments on these submitted SIP revisions in section IV.C.2 above for additional information.

D. The Submitted Major NSR Reform SIP Revision for Major NSR With PAL Provisions

1. What is the background for the submitted Major NSR reform SIP revision for Major NSR with PAL provisions?

We proposed to disapprove the following non-severable revisions that address the revised Major NSR SIP requirements with Plant-Wide Applicability Limitation (PAL) provisions: 30 TAC Chapter 116 submitted February 1, 2006: 30 TAC 116.12—Definitions; 30 TAC 116.180—Applicability; 30 TAC 116.182—Plant-Wide Applicability Limit Permit Application; 30 TAC 116.184—Application Review Schedule; 30 TAC 116.186—General and Special Conditions; 30 TAC 116.188—Plant-Wide Applicability Limit; 30 TAC 116.190—Federal Nonattainment and Prevention of Significant Deterioration Review; 30 TAC 116.192—Amendments and Alterations; 30 TAC 116.194—Public Notice and Comment; 30 TAC 116.196—Renewal of a Plant-Wide Applicability Limit Permit; 30 TAC 116.198—Expiration or Voidance.

We proposed disapproval of the PAL Provisions because of the following:

- The submittal lacks a provision which limits applicability of a PAL only to an *existing* major stationary source, and which precludes applicability of a PAL to a new major stationary source, as required under 40 CFR 51.165(f)(1)(i) and 40 CFR 51.166(w)(1)(i), which limits applicability of a PAL to an existing major stationary source. In the absence of such limitation, this submission would allow a PAL to be authorized for the construction of a new major stationary source. In EPA's November 2002 TSD for the revised Major NSR Regulations, we respond on pages I–7–27 and 28 that actuals PALs are available only for existing major stationary sources, because actuals PALs are based on a source's actual emissions.[8] Without at least 2 years of operating history, a source has not established actual emissions upon which to base an actuals PAL. However, for individual emissions units with less than two years of operation, allowable emissions would be considered as actual emissions. Therefore, an actuals PAL can be obtained only for an existing major stationary source even if not all emissions units have at least 2 years of emissions data. Moreover, the development of an alternative to provide new major stationary sources with the option of obtaining a PAL based on allowable emissions was foreclosed by the Court in *New York* v. *EPA,* 413 F.3d 3 at 38–40 (DC Cir. 2005) ("New York I") (holding that the Act since 1977 requires a comparison of existing actual emissions before the change and projected actual (or potential emissions) after the change in question is required).
- The submittal has no provisions that relate to PAL re-openings, as required by 40 CFR 51.165(f)(8)(ii), (ii)(A) through (C), and 51.166(w)(8)(ii) and (ii)(a).
- There is no mandate that failure to use a monitoring system that meets the requirements of this section renders the PAL invalid, as required by 40 CFR 51.165(f)(12)(i)(D) and 51.166(w)(12)(i)(d).
- The Texas submittal at 30 TAC 116.186 provides for an emissions cap that may not account for all of the emissions of a pollutant at the major stationary source. Texas requires the owner or operator to submit a list of all facilities to be included in the PAL, such that not all of the facilities at the entire major stationary source may be specifically required to be included in the PAL. *See* 30 TAC 116.182(1). However, the Federal rules require the owner or operator to submit a list of all emissions units at the source. *See* 40 CFR 51.166(f)(3)(i) and 40 CFR 51.166(w)(3)(i). The Texas submittal is unclear as to whether the PAL would apply to all of the emission units at the *entire* major stationary source and

[8] The TSD for the 2002 NSR rule making is in the docket for this action as document no. EPA–R06–OAR–2006–0133–0010. You can access this document at: *http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a2b968.*

therefore appears to be less stringent than the Federal rules. In the absence of any demonstration from the State, EPA proposed to disapprove 30 TAC 116.186 and 30 TAC 116.182(1) as not meeting the revised Major NSR SIP requirements.

• Submitted 30 TAC 116.194 requires that an applicant for a PAL permit must provide for public notice on the draft PAL permit in accordance with 30 TAC Chapter 39—Public Notice—for all initial applications, amendments, and renewals or a PAL Permit.[9] Although this submitted rule relates to the public participation requirements of the PAL program, it is is not severable from the PAL program. Because we proposed to disapprove the PAL program, we likewise proposed to disapprove 30 TAC 116.194.

• The Federal definition of the "baseline actual emissions" provides that these emissions must be calculated in terms of "the *average* rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period." *See* 40 CFR 51.165(a)(1)(xxxv)(A), (B), (D) and (E) and 51.166(b)(47)(i), (ii), (iv), and (v). Emphasis added. Texas's submitted definition of the term "baseline actual emissions" found at 30 TAC 116.12(3)(A), (B), (D), and (E) differs from the Federal definition by providing that the baseline shall be calculated as "the rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period." The submitted definition omits reference to the "average rate." The definition differs from the Federal SIP definition but the State failed to provide a demonstration showing how the different definition is at least as stringent as the Federal definition. Therefore, EPA proposed to disapprove the different definition of "baseline actual emissions" found at 30 TAC 116.12(3) as not meeting the revised Major NSR SIP requirements. On the same grounds for lacking a demonstration, EPA proposed to disapprove 30 TAC 116.182(2) that refers to calculations of the baseline actual emissions for a PAL, as not meeting the revised Major NSR SIP requirements.

• The State also failed to include the following specific monitoring definitions: "Continuous emissions monitoring system (CEMS)" as defined in 40 CFR 51.165(a)(1)(xxxi) and 51.166(b)(43); "Continuous emissions rate monitoring system (CERMS)" as defined in 40 CFR 51.165(a)(1)(xxxiv) and 51.166(b)(46); "Continuous parameter monitoring system (CPMS)" as defined in 40 CFR 51.165(a)(1)(xxxiii) and 51.166(b)(45); and "Predictive emissions monitoring system (PEMS)" as defined in 40 CFR 51.165(a)(1)(xxxii) and 51.166(b)(44). All of these definitions concerning the monitoring systems in the revised Major NSR SIP requirements are essential for the enforceability of and providing the means for determining compliance with a PALs program. Therefore, we proposed to disapprove the State's lack of these four monitoring definitions as not meeting the revised Major NSR SIP requirements. Additionally, where, as here, a State has made a SIP revision that does not contain definitions that are required in the revised Major NSR SIP program, EPA may approve such a revision only if the State specifically demonstrates that, despite the absence of the required definitions, the submitted revision is more stringent, or at least as stringent, in all respects as the Federal program. *See* 40 CFR 51.165(a)(1) (non-attainment SIP approval criteria); 51.166(b) (PSD SIP definition approval criteria). Texas did not provide such a demonstration. Therefore, EPA proposed to disapprove the lack of these definitions as not meeting the revised Major NSR SIP requirements.

None of the provisions and definitions in the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR SIP requirements for PALs is severable from each other. Therefore, we proposed to disapprove the portion of the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR PALs SIP requirements as not meeting the Act and the revised Major NSR SIP regulations. *See* the proposal at 74 FR 48467, at 48474–48475, for additional information.

2. What is EPA's response to comments on the submitted Major NSR Reform SIP Revision for Major NSR With PAL provisions?

Comment 1: TCEQ commented that it does not use a rate that differs from the Federal NSR requirement relating to baseline actual emissions. TCEQ definition of "actual emissions" includes the modifier "average," and "actual emissions" are included in the definition of "baseline actual emissions" rate. In practice, TCEQ contends that a reading of the entire definition, including parts (a)–(d), results in an average emission rate being used to establish a baseline actual emission rate. This is because to determine an actual emission rate in tons per year from a consecutive 24-month period requires averaging the emissions over 24 months to obtain an annual emission rate (an average annual emission rate).

TCEQ is willing to work with EPA to address any changes necessary to clarify the definition, and specifically reference that a baseline actual emission rate is an average emission rate, in tons per year, of a Federally regulated new source review pollutant.

Response: We appreciate the State's willingness to work with EPA to address any changes necessary to clarify the definition, and specifically reference that a baseline actual emission rate is an average emission rate, in tons per year, of a NSR regulated pollutant, but disagree with TCEQ's comment. We acknowledge that the SIP-approved definition of "actual emissions" at 30 TAC 116.12(1) is based upon average emissions but the lack of a specific provision in the definition of "baseline actual emissions" to require such emissions to be calculated as average emissions can be interpreted to be less stringent than the Federal minimum requirements because readers can interpret "the" emissions rate to be the highest rate instead of an average rate. It does not necessarily follow that the reading of the entire definition and the requirement to determine an actual emission rate in tons per year from a consecutive 24-month period to obtain an annual emission rate would result in an average emission rate.

Comment 2: BCCA and TIP commented that the substance of EPA's concern appears to be that the Texas rules are missing the word "average." The missing term is not grounds for disapproval of the Texas definition of "baseline actual emissions." The omission of the term "average" from this phrase in the 30 TAC 116.12(3) definition does not render the definition invalid or inconsistent with the

[9] "The submittals do not meet the following public participation provisions for PALs: 1) For PALs for existing major stationary sources, there is no provision that PALs be established, renewed, or increased through a procedure that is consistent with 40 CFR 51.160 and 51.161, including the requirement that the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment, consistent with the Federal PAL rules at 40 CFR 51.165(f)(5) and (11) and 51.166(w)(5) and (11). 2) For PALs for existing major stationary sources, there is no requirement that the State address all material comments before taking final action on the permit, consistent with 40 CFR 51.165(f)(5) and 51.166(w)(5). 3) The applicability provision in section 39.403 does not include PALs, despite the cross-reference to Chapter 39 in Section 116.194." *See* 73 FR 72001 (November 26, 2008) for more information on Texas's public participation rules and their relationship to PALs. The November 2008 proposal addressed the public participation provisions in 30 TAC Chapter 39, but did not specifically propose action on 30 TAC 116.194.

equivalent provision in 40 CFR Part 51. EPA cites a distinction without a substantive difference, as application of the two definitions will reach the same conclusion with regard to the tons per year ("tpy") emission rate over the 24-month baseline period. The Texas definition of "baseline actual emissions" in the proposed SIP revision is equivalent to the Federal definition in this regard and should be approved.

Response: EPA disagrees with this comment. *See* the response to comment 1 above.

Comment 3: TCEQ commented on EPA's statements that TCEQ's rules do not include the following PAL requirements:

- Provisions for PAL re-openings;
- Requirements concerning the use of monitoring systems (and associated definitions);
- A provision which limits applicability of a PAL only to an existing major stationary source;
- A provision that requires all facilities at a major source, emitting a PAL pollutant be included in the PAL;
- A provision that a PAL include every emissions point at a site, without limiting these emissions points to only those belonging to the same industrial grouping (SIC) code; and
- Notwithstanding the "lack of explicit limitation," *i.e.,* defining facility to equal emissions unit; that is how TCEQ applies the rule.

TCEQ will address these items in a future rulemaking.

Response: We appreciate the State's willingness to work with EPA to address any changes necessary to clarify these concerns relating to PAL re-openings; requirements concerning the use of monitoring systems (and associated definitions); a provision which limits applicability of a PAL only to an existing major stationary source; the lack of regulatory provisions relating to emissions to be included in a proposed PAL, the lack of provisions to require that all facilities at a major source, emitting a pollutant for which a PAL is being requested, be included in the PAL; and the concern that PAL can include every emissions point at a site, without limiting these emissions points to only those belonging to the same industrial grouping (SIC) code. However, our evaluation is based on the submitted rule currently before us.

Comment 4: The Clinic comments that Texas illegally allows PALs for new sources based upon allowable emissions. Federal regulations allow an agency to approve a PAL for "any existing major stationary source." *See* 40 CFR 51.166(f)(1)(i). PALs are intended to serve as thresholds for determining when emission increases trigger NNSR and PSD permitting review. As the DC Circuit found in *New York* v. *EPA,* "Congress clearly intended to apply NSR to changes that increase actual emissions. *New York* v. *EPA,* 413 F.3d 3, 38–40 (DC Cir. 2005.) Because new sources do not have past actual emissions, they cannot be subject to a PAL. 67 FR 80186, 80285 (December 31, 2002). The submitted Texas PAL rules do not limit their applicability to existing major sources.

Response: EPA agrees with this comment. The Federal PAL regulations provide that "[t]he reviewing authority may approve the use of an actuals PAL *for any existing major stationary source* * * *." *See* 40 CFR 51.165(f)(1) and 51.166(w)(1). Emphasis added. *See* the discussion in the proposal at 74 FR 48467, at 48474, and section IV.D.1 above, for further information.

Comment 5: Regarding limiting issuance of PAL permits only to existing major stationary sources, BCCA, TIP, and TCC comment that the absence of a reference to "existing" facilities is not grounds for disapproval of the Texas PAL rules. Even absent a reference to existing facilities, the Texas PAL rules are substantively similar to and closely track the Federal PAL regulations, as TCEQ explained in adopting the Texas PAL program.[10] The Texas PAL rules' applicability provisions are consistent with the Federal PAL program in 40 CFR Part 51, and should be approved as part of the Texas SIP on that basis. Moreover, the Federal scheme contemplates that "new" units may be included when calculating the baseline actual emissions for a PAL.[11] The preamble goes on to provide, "For any emission unit * * * that is constructed after the 24-month period, emissions equal to its PTE must be added to the PAL level."[12] Additionally, EPA issued PALs before NSR reform and these PALs showed a degree of flexibility tailored to the specific sites. For example, in its flexible permit pilot study, EPA examined a hybrid PAL issued to the Saturn plant in Spring Hill, Tennessee. This permit consisted of PSD permit for a major expansion with permitted emissions based on projected future actual emissions in combination with a PSD permit for existing emissions units with allowable emissions based on current actual emissions at the existing emissions units. According to EPA, that plant's hybrid PAL permit enabled Saturn to add and modify new lines "in a timely manner, while ensuring that best available pollution control technologies are installed and that air emissions remain under approved limits." Texas's PAL provisions are consistent with the Federal PAL provisions, and so should be approved. EPA concerns regarding TCEQ's implementation of the Texas rules are properly addressed through comments on individual permits, and not through a disapproval of the SIP revision.

Response: EPA disagrees that Texas's rules are consistent with the Federal PAL provisions, and we find the absence to a reference to "existing" major stationary sources to be grounds for disapproval. The Federal regulations generally adhere to the basic tenet that the PAL level is based on actual, historical operations. Such information is absent for new major stationary sources, and thus, EPA chose not to allow PALs for new major stationary sources. The commenters' reference to a hybrid PAL issued to the Saturn plant in Spring Hill, Tennessee, is not relevant to the approvability of the Texas's rules. This facility was permitted under a flexible permit pilot study, not under the provisions under 40 CFR 51.165(f) and 51.166(w), which specify the minimum requirements for an approvable State PAL SIP Program. Moreover, TCEQ provided no demonstration that its submitted program is at least as stringent as the Federal minimum PAL SIP Program requirements despite its broader applicability. EPA's concerns with the submitted PAL Program revisions are a result of its evaluation of these revisions. EPA disapproval is due to programmatic deficiencies, not problems associated with individual permits. Moreover, implementation by the State of its State PAL program is outside the scope of this rulemaking action.

Comment 6: The Clinic comments that Texas's rules fail to include adequate reopening provisions. Federal rules allow a permitting authority to re-open a PAL permit to correct errors in calculating a PAL or to reduce the PAL based on new Federal or State requirements or changing NAAQS levels or a change in attainment status. *See* 40 CFR 51.165(f)(8). The Texas rules do not provide for such reopening and are less stringent than Federal regulations.

Response: EPA agrees with this comment. The Federal rules require PAL re-openings as provided under 40 CFR 51.165(f)(8)(ii)) and 51.166(w)(8)(ii). The State did not provide any demonstration, as required for a customized Major NSR SIP revision submittal, showing how its submitted program is at least as

[10] *See* 31 Tex. Reg. 516, 527 & 528 (Jan. 27, 2006).

[11] 67 FR 80,186, at 80,208 (Dec. 31, 2002).

[12] *Id.*

stringent as the Federal PAL SIP Program requirements.

Comment 7: Regarding PAL re-openings, BCCA, TIP, TCC, and TxOGA comment that the current provisions of 30 TAC 116.192 regarding amendments and alterations of PALs provide adequate safeguards to ensure that appropriate procedural requirements are followed, both to increase a PAL through an amendment and to decrease a PAL through a permit alteration. *See, e.g.,* 30 TAC 116.190(b), requiring the decrease of a PAL for any emissions reductions used as offsets. The absence of rule language using the specific term "reopening" does not prevent TCEQ from implementing and enforcing the program in a manner consistent with Part 51 and is not an appropriate basis for disapproval of the SIP revision. The Texas PAL rules should be approved as a revision to the Texas SIP.

Response: EPA disagrees with this comment. The provisions in 30 TAC 116.192 relate to amendments and alterations. The Federal rules provide for PAL re-openings for other causes which include the following: correction of typographical/calculation errors in setting the PAL; reduction of the PAL to create creditable emission reductions for use as offsets; reductions to reflect newly applicable Federal requirements (for example, NSPS) with compliance dates after the PAL; PAL reduction consistent with any other requirement, that is enforceable as a practical matter, and that the State may impose on the major stationary source under the SIP; and PAL reduction if the reviewing authority determines that a reduction is necessary to avoid causing or contributing to a NAAQS or PSD increment violation, or an adverse impact on an air quality related value that has been identified for a Federal Class I area by a Federal Land Manager for which information is available to the general public. *See* 40 CFR 51.165(f)(4)(i)(A) and (f)(6)(i), and 51.166(w)(4)(i)(*a*) and (w)(6)(i). Texas has submitted no demonstration, as required for a customized Major NSR SIP revision submittal, that the lack of provisions for PAL re-openings is at least as stringent as the Federal PAL Program SIP requirements.

Comment 8: The Clinic comments that Texas illegally allows for "partial PALs." Federal rules require that all units at a source be subject to the PAL cap. *See* 40 CFR 52.21(aa)(6)(i)–(ii). Texas rules do not require PALs to include all units at the source that emit the PAL pollutant. *See* 30 TAC 116.182(1). EPA stated in its proposal that inclusion of all units at the source that emit the PAL pollutant is an "essential feature of the Federal PAL." Texas failure to require such provision justifies disapproval of the Texas PAL rules.

Response: The 2002 final rules require States to include PALs as a minimum program element in the SIP-approved major NSR program. The minimum Federal requirement for an approvable PAL regulations must include all emissions units at a major stationary source that emit the PAL pollutant as provided under 40 CFR 51.165(f)(6)(i) and 51.166(w)(6)(i). We reviewed the approvability of the Texas submitted program against these criteria, and determined, *inter alia,* that the submitted program does not meet these minimum program elements.

EPA has not taken a position on whether a State could include a "partial PAL" program, separate and apart from a PAL program that meets the Federal minimum program requirements, as an element in its major or minor NSR program. Nonetheless, the State did not submit its PAL Program with a request to have it reviewed by EPA on a case-by-case basis for approvability as a program, separate and apart from the Federal source-wide PAL program. Nor did it submit it for approval as a Minor NSR SIP revision. TCEQ did not provide any demonstration, as required for a customized Major NSR SIP revision submittal, showing how the allowing of an emission cap that does not include all emissions units at the major stationary source that emit the PAL pollutant is at least as stringent as the Federal PAL Program SIP requirements, nor does the record show whether Texas's submission will interfere with any applicable requirement concerning attainment and reasonable further progress or any other CAA requirement.

Comment 9: Concerning the lack of provision that a PAL include all emissions units at the major stationary source that emit the PAL pollutant, BCCA, TIP, TCC, and TxOGA commented that EPA's interpretation of the Texas PAL rules, which are consistent with the Federal PAL, is not grounds for disapproval of the SIP revision. The Texas PAL rules are substantively similar to and closely track the Federal PAL regulations, as TCEQ explained in adopting the Texas PAL program. EPA concerns regarding TCEQ's implementation of the Texas rules are properly addressed through comments on individual permits and not through a disapproval of the SIP revision. The Texas rules require that applicants for a PAL specify the facilities and pollutants to be covered by the PAL. Specifically, an applicant must detail "[A] list of all facilities, including their registration or permit number to be included in the PAL * * *." *See* 30 TAC 116.182. This requirement closely tracks the Federal provisions. Moreover, logic dictates, and the Federal rules recognize, that not every facility emits every regulated pollutant. Under the Federal rules "[e]ach PAL shall regulate emissions of only one pollutant." *See* 40 CFR 52.21(aa)(4)(e). Additionally, EPA has recognized that States may implement PAL programs in a more limited manner. In its 1996 proposal for the PAL concept, EPA noted "States may choose * * * to adopt the PAL approach on a limited basis. For example, States may choose to adopt the PAL approach only in attainment/unclassifiable areas, or only in nonattainment areas, for *specified source categories,* or only for certain pollutants in these areas." *See* 61 FR 38250, at 38265 (July 23, 1996) (emphasis added). The Texas PAL provisions track the Federal regulations, and so should be approved.

Response: EPA disagrees with this comment. The Federal rules at 40 CFR 51.165(f)(4)(i)(A) and (f)(6)(i), and 51.166(w)(4)(i)(a) and (w)(6)(i) require a PAL to include each emissions unit at a major stationary source that emits the PAL pollutant. The Federal rules do not require a PAL to include an emissions unit that does not emit, or has the potential to emit, the relevant PAL pollutant. In 1996, EPA proposed to allow States to pick and choose from the menu of reform options. In 2002, we rejected this proposed approach in favor of making all the reform options minimum program elements. *See* 67 FR 80185, at 80241, December 31, 2002. Accordingly, our final rule requires States to adopt the Federal PAL provisions as a minimum program element, or to demonstrate that an alternative program is equivalent or more stringent in effect. Texas has submitted no demonstration, as required for a customized Major NSR SIP revision submittal, that the difference in its program is at least as stringent as the Federal PAL Program SIP requirements.

Comment 10: The Clinic comments that Texas fails to prohibit the use of PALs in ozone extreme areas. Federal rules prohibit the use of PALs in extreme ozone nonattainment areas. *See* 40 CFR 51.165(f)(1)(ii). The Texas rules contain no such prohibition, and are less stringent than the Federal rules and not protective of air quality.

Response: EPA agrees that 40 CFR 51.165(f)(1)(ii) requires the prohibition and the submittal lacks such a prohibition. Texas currently has no extreme ozone nonattainment areas so it is not clear how that requirement

applies. We do not need to reach the issue, however, because the scope of our disapproval, *i.e.,* the entire Texas PALs Program, is not changed even if we added this as a basis for disapproval.

Comment 11: TCEQ commented that it will address EPA's concerns regarding public participation for PALs in a separate rulemaking regarding public participation for the NSR permitting program.

Response: TCEQ adopted revised rules for public participation on June 2, 2010; these rules became effective on June 24, 2010. TCEQ submitted these revised rules to EPA on July 2, 2010. EPA is reviewing these submitted regulations and will address the submittal in a separate action. Because this 30 TAC 116.740 relates to the public participation requirements of the PAL program, this section is not severable from the PAL program. Because we are disapproving the PAL program, we are also disapproving the submitted 30 TAC 116.194.

Comment 12: The Clinic commented that the PAL rules lack adequate public participation. Texas's rules do not require PALs to be established, renewed, or increased through a procedure that is consistent with 40 CFR 51.160 and 51.161. In particular, the PAL rules are missing the requirements that the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least 30 day period for submittal of public comment on the draft permit as required under 40 CFR 51.165(f)(5) and (11) and 51.166(w)(5) and (11). Further the rules lack provisions for public participation for PAL renewals or emission increases. There is no requirement that TCEQ address all material comments before taking final action on the permit. Accordingly, these rules are less stringent than the Federal rules.

Response: EPA agrees with these comments. The submitted rule does not meet the public participation requirements for PAL as required in 40 CFR 51.165(f)(5) and (11) and 51.166(w)(5) and (11). These rules require that PALs be established, renewed, or increased through a procedure that is consistent with 40 CFR 51.160 and 51.161; and which require the program to include provisions for public participation for PAL renewals or emission increases. The Federal rules further require that TCEQ address all material comments before taking final action on the permit. Because the submitted rule lacks these requirements it is not consistent with the Federal rules.

Comment 13: Concerning the lack of provisions in the Texas PAL that meet the public participation requirements in 40 CFR 51.160 and 51.161, BCCA and TIP commented that EPA appears to be concerned that there is not an explicit reference to PALs in the public participation provisions. The Texas rules make clear that PALs are subject to public notice and participation. The absence of a reference to PALs in the applicability section of 30 TAC 39.403 is not significant. Section 116.194 of the PAL rules provides the clear cross-references to the applicable provisions of Chapter 39. A reference back from Chapter 39 to the PAL rules is redundant and unnecessary, and not grounds for disapproval of the Texas PAL rules.

Response: EPA disagrees with this comment. Submitted 30 TAC 116.194 requires that an applicant for a PAL permit must provide for public notice on the draft PAL permit in accordance with 30 TAC Chapter 39—Public Notice—for all initial applications, amendments, and renewals of a PAL Permit.[13] *See* 73 FR 72001 (November 26, 2008) for more information on Texas's public participation rules and their relationship to PALs. The November 2008 proposal addressed the public participation provisions in 30 TAC Chapter 39, but did not specifically propose action on 30 TAC 116.194. In the September 23, 2009, proposal, we proposed to address 30 TAC 116.194. Because this section relates to the public participation requirements of the PAL program, this section is not severable from the PAL program. Because we are disapproving the PAL program, we are also disapproving the submitted 30 TAC 116.194.

Comment 14: The Clinic commented that Texas fails to include required monitoring definitions for PALs. While the Federal regulations define "continuous emission monitoring system (CEMS)," "continuous emission rate monitoring system (CERMS)," "continuous parameter monitoring system (CPMS)," and "predictive emissions monitoring system (PEMS)" (*see* 40 CFR 51.165(a)(1)(xxxi), (xxxiv), (xxxiii), and (xxxii)), the Texas rules omit definitions. Because these definitions are crucial to enforcing and monitoring PALs, the lack of these definitions in Texas's PAL rules make the PAL rules less stringent that the Federal rules.

Response: EPA agrees with this comment. *See* 74 FR 48467, at 48475, and section IV.D.I of this action.

Comment 15: BCCA and TIP commented that EPA appears to be concerned that the monitoring provisions are not separately and discretely defined. They comment that Texas PAL rules in 30 TAC 116.192(c) contain monitoring requirements that are equivalent to the Federal PAL rules. They also comment that the absence of definitions of CEMS, CERMS, CPMS and PEMS does not render the rules unenforceable. They maintain that the rules themselves identify and define each type of monitoring system, and identify Federal-equivalent requirements that each monitoring system must satisfy. They cite, as an example, 30 TAC 116.192(c)(2)(B) as providing that an owner or operator using a CEMS to monitor PAL pollutant emissions shall comply with applicable performance specifications found in 40 CFR Part 60, Appendix B and sample, analyze, and record data at least every 15 minutes while the emissions unit is operating. Similar requirements are included for mass balance calculations, CPMS, PEMS and emissions factors used to monitor PAL pollutant emissions. They claim that the absence of separate definitions does not impact the enforceability of Texas PALs. The Texas provisions adequately address monitoring requirements for PALs, and should therefore be approved.

Response: EPA disagrees with this comment. In the proposal we stated that "[a]ll definitions concerning the monitoring systems in the revised Major SIP requirements are essential for the enforceability of and providing the means for determining compliance with a PALs program." We acknowledge that 40 CFR 51.165(f)(12)(i)(C) and 51.166(w)(12)(i)(*c*) allow a State program to include alternative monitoring, but the alternative monitoring must be approved by EPA as meeting the requirements of 40 CFR 51.165(f)(12)(A) and 51.166(w)(12)(a). The State did not provide any request for approval for alternative monitoring. Furthermore, the State did not provide any demonstration, as required for a customized Major NSR SIP revision

[13] "The submittals do not meet the following public participation provisions for PALs: (1) For PALs for existing major stationary sources, there is no provision that PALs be established, renewed, or increased through a procedure that is consistent with 40 CFR 51.160 and 51.161, including the requirement that the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment, consistent with the Federal PAL rules at 40 CFR 51.165(f)(5) and (11) and 51.166(w)(5) and (11). (2) For PALs for existing major stationary sources, there is no requirement that the State address all material comments before taking final action on the permit, consistent with 40 CFR 51.165(f)(5) and 51.166(w)(5). (3) The applicability provision in section 39.403 does not include PALs, despite the cross-reference to Chapter 39 in Section 116.194."

submittal, showing how the absence of these PAL monitoring definitions, is at least as stringent as the Federal PAL Program SIP requirements.

Comment 16: BCCA, TIP, TCC, and TxOGA commented that the Texas PAL rules make clear that monitoring is mandatory for a PAL. They comment that the rules establish monitoring requirements in 30 TAC 116.186(c) that are consistent with the Federal PAL monitoring requirements. They also comment the monitoring requirements are, most importantly, cast in terms of requirements that "*shall*" *or* "*must*" be met. Examples include:

- 30 TAC 116.186(c)(1): "The PAL monitoring system *must* accurately determine all emissions of the PAL pollutant in terms of mass per unit of time."
- 30 TAC 116.186(c)(2) further specifies requirements that *shall* be met for any permit holder using mass balance equations, continuous emissions monitoring system ("CEMS"), continuous parameter monitoring system ("CPMS") predictive emissions monitoring system ("PEMS"), or emission factors.

The commenters claim that these provisions adequately address the monitoring requirements required under the Federal PAL provisions. They assert that any additional statement that the PAL is rendered invalid unless the permit holder complies with these requirements is unnecessary in light of the clearly mandatory monitoring requirements that are equivalent to Federal requirements.

Response: EPA disagrees with this comment. The rules referred to by the commenters only provide that the required monitoring be met, but has no provision that the PAL becomes invalid whenever a major stationary source with a PAL Permit or any emissions unit under such PAL is operated without complying with the required monitoring, as required under 40 CFR 51.165(f)(12)(i)(D) and 51.166(w)(i)(*d*). TCEQ did not provide any demonstration, as required for a customized Major NSR SIP revision submittal, showing how the lack of a requirement invalidating the PAL if there is no compliance with the required monitoring, is at least as stringent as the Federal PAL Program SIP requirements.

3. What are the grounds for disapproval of the submitted Major NSR Reform SIP revision for Major NSR with PAL provisions?

EPA is disapproving the submitted Major NSR Reform SIP Revision for Major NSR with PAL provisions. We are disapproving the following non-severable revisions that address the revised Major NSR SIP requirements with a PALs provision: 30 TAC Chapter 116 submitted February 1, 2006: 30 TAC 116.12—Definitions; 30 TAC 116.180—Applicability; 30 TAC 116.182—Plant-Wide Applicability Limit Permit Application; 30 TAC 116.184—Application Review Schedule; 30 TAC 116.186—General and Special Conditions; 30 TAC 116.188—Plant-Wide Applicability Limit; 30 TAC 116.190—Federal Nonattainment and Prevention of Significant Deterioration Review; 30 TAC 116.192—Amendments and Alterations; 30 TAC 116.194—Public Notice and Comment; 30 TAC 116.196—Renewal of a Plant-Wide Applicability Limit Permit; 30 TAC 116.198—Expiration or Voidance.

We are disapproving the submitted PAL revisions for the following reasons: (1) The submittal lacks a provision which limits applicability of a PAL only to an *existing* major stationary source; (2) the submittal has no provisions that relate to PAL re-openings; (3) there is no mandate that failure to use a monitoring system that meets the requirements of this section renders the PAL invalid; (4) the Texas submittal at 30 TAC 116.186 provides for an emissions cap that may not account for all of the emissions of a pollutant at the major stationary source; (5) the submitted 30 TAC 116.194 does not require that: (a) PALs be established, renewed, or increased through a procedure that is consistent with 40 CFR 51.160 and 51.161, including the requirement the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment; (b) that the State address all material comments before taking final action on the permit; and (c) include a cross-reference to 30 TAC Chapter 39—Public Notice; (6) the Federal definition of the "baseline actual emissions" provides that these emissions must be calculated in terms of the average rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period; [14] and (7) the State also failed to include the following specific monitoring definitions for CEMS, CERMS, CPMS, PEMS.

EPA received comments from TCEQ, the Clinic, and industry regarding the proposed disapproval of these submitted SIP revisions. *See* our response to these comments in section IV.D.2 above. None of the provisions and definitions in the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR SIP requirements for PALs is severable from each other. Therefore, we are disapproving the portion of the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR PALs SIP requirements as not meeting the Act and the revised Major NSR SIP regulations. *See* the proposal at 74 FR 48467, at 48474–48475, our background for these submitted SIP revisions in section IV.D.1 above, and our response to comments on these submitted SIP revisions in section IV.D.2 above for additional information.

E. The Submitted Non-PAL Aspects of the Major NSR SIP Requirements

1. What is the background for the submitted non-PAL aspects of the Major NSR SIP requirements?

The submitted NNSR non-PAL rules do not explicitly limit the definition of "facility" [15] to an "emissions unit" as do the submitted PSD non-PAL rules. It is our understanding of State law that a "facility" can be an "emissions unit," *i.e.,* any part of a stationary source that emits or may have the potential to emit any air contaminant, as the State explicitly provides in the revised PSD rule at 30 TAC 116.160(c)(3). A "facility" also can be a piece of equipment, which is smaller than an "emissions unit." A "facility" can include more than one "major stationary source." It can include every emissions point on a company site, without limiting these emissions points to only those belonging to the same industrial grouping (SIP code). In our proposed action on the Texas Qualified Facilities State Program, EPA specifically solicited comment on the definition for "facility" under State law. Regardless, the State clearly thought the prudent legal course was to limit "facility" explicitly to "emissions unit" in its PSD SIP non-PALs revision. TCEQ did not submit a demonstration showing how the lack of this explicit limitation in the NNSR SIP non-PALs revision is at least as stringent as the revised Major NSR SIP requirements. Therefore, EPA is disapproving the submitted definition and its use as not meeting the revised Major NNSR non-PALs SIP requirements.

Under the Major NSR SIP requirements, for any physical or

[14] *See* section IV.E.3 of this preamble for further information on the basis for disapproval of the submitted definitions "baseline actual emission" for not determining baseline emissions as average emissions.

[15] "Facility" is defined in the SIP approved 30 TAC 116.10(6) as "a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment."

operational change at a major stationary source, a source must include emissions resulting from startups, shutdowns, and malfunctions in its determination of the baseline actual emissions (*see* 40 CFR 51.165(a)(1)(xxxv)(A)(1) and (B)(1) and 40 CFR 51.166(b)(47)(i)(*a*) and (ii)(a)) and the projected actual emissions (*see* 40 CFR 51.165(a)(1)(xxviii)(B) and 40 CFR 51.166(b)(40)(ii)(*b*)). The definition of the term "baseline actual emissions," as submitted in 30 TAC 116.12(3)(E), does not require the inclusion of emissions resulting from startups, shutdowns, and malfunctions.[16] Our understanding of State law is that the use of the term "may" "creates discretionary authority or grants permission or a power. *See* Section 311.016 of the Texas Code Construction Act. Similarly, the submitted definition of "projected actual emissions" at 30 TAC 116.12(29) does not require that emissions resulting from startups, shutdowns, and malfunctions be included. The submitted definitions differ from the Federal SIP definitions and the State has not provided information demonstrating that these definitions are at least as stringent as the Federal SIP definitions. Therefore, based upon the lack of a demonstration from the State, EPA is disapproving the definitions of "baseline actual emissions" at 30 TAC 116.12(3) and "projected actual emissions" at 30 TAC 116.12(29) as not meeting the revised Major NSR SIP requirements.

The Federal definition of the "baseline actual emissions" provides that these emissions must be calculated in terms of "the average rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period." The submitted definition of the term "baseline actual emissions" found at 30 TAC 116.12 (3)(A), (B), (D), and (E) differs from the Federal definition by leaving out the word "average" and instead providing that the baseline shall be calculated as "the rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period."

None of the provisions and definitions in the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR SIP requirements for non-PALs is severable from each other. Therefore, we proposed to disapprove the portion of the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR non-PALs SIP requirements as not meeting the Act and the revised Major NSR SIP regulations.

See the proposal at 74 FR 48467, at 48475, for additional information.

2. What is EPA's response to comments on the submitted non-PAL aspects of the Major NSR SIP requirements?

Comment 1: TCEQ responded to EPA's request concerning its interpretation of Texas law and the Texas SIP with respect to the term "facility." The definition of "facility" is the cornerstone of the Texas Permitting Program under the Texas Clean Air Act. In addition, to provide clarity and consistency, TCEQ also provides similar comments in regard to Docket ID No. EPA–R06–OAR–2005–TX–0025 and EPA–R06–OAR–2005–TX–0032. EPA believes that the State uses a "dual definition" for the term facility. Under the TCAA and TCEQ rule, "facility" is defined as "a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. Tex. Health & Safety Code 382.003(6); 30 TAC 116.10(6). A mine, quarry, well test, or road is not considered to be a facility." A facility may contain a stationary source—point of origin of a contaminant. Tex. Health & Safety Code 382.003(12). As a discrete point, TCEQ contends that, under Federal law, a facility can constitute but cannot contain a major stationary source as defined by Federal law. A facility is subject to Major and Minor NSR requirements, depending on the facts of the specific application. Under Major NSR, EPA uses the term "emissions unit" (generally) when referring to a part of a "stationary source," TCEQ translates "emissions unit" to mean "facility,"[17] which TCEQ contends is at least as stringent as Federal rule. TCEQ and its predecessor agencies have consistently interpreted facility to preclude inclusion of more than one stationary source, in contrast to EPA's stated understanding. Likewise, TCEQ does not interpret facility to include "every emissions point on a company site, even if limiting these emission points to only those belonging to the same industrial grouping (SIC Code)." The Federal definition of "major stationary source" is not equivalent to the state definition of "source." 40 CFR 51.166(b)(1)(a). A "major stationary source"[18] can include more than one "facility" as defined under Texas law—which is consistent with EPA's interpretation of a "major stationary source" including more than one emissions unit. The above interpretation of "facility" has been consistently applied by TCEQ and its predecessor agencies for more than 30 years. TCEQ's interpretation of Texas statutes enacted by the Texas Legislature is addressed by the Texas Code Construction Act. More specifically, words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly. Tex. Gov't Code 311.011(b). While Texas law does not directly refer to the two steps allowing deference enunciated in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* Texas law and judicial interpretation recognize *Chevron*[19] and follow similar analysis as discussed below. The Texas Legislature intends an agency created to centralize expertise in a certain regulatory area "be given a large degree of latitude in the methods it uses to accomplish its regulatory function." *Phillips Petroleum Co.* v. *Comm'n on Envtl. Quality,* 121 S.W.3d 502, 508 (Tex.App.—Austin 2003, no pet.), which cites Chevron to support the following: "Our task is to determine whether an agency's decision is based upon a permissible interpretation of its statutory scheme." Further, Texas courts construe the test of an administrative rule under the same principles as if it were a statute. *Texas Gen. Indem. Co.* v. *Finance Comm'n,* 36 S.W.3d 635,641 (Tex.App.—Austin 2000, no pet.). Texas Administrative agencies have the power to interpret their own rules, and their interpretation is entitled to great weight and deference. *Id.* The agency's construction of its rule is controlling unless it is plainly erroneous or inconsistent. *Id.* "When the construction

[16] The submitted definition of "baseline actual emissions," is as follows: Until March 1, 2016, emissions previously demonstrated as emissions events or historically exempted under Chapter 101 of this title * * * *may* be included to the extent they have been authorized, or are being authorized, in a permit action under Chapter 116. 30 TAC 116.12(3)(E) (emphasis added).

[17] The term "facility" shall replace the words "emissions unit" in the referenced sections of the CFR. 30 TAC 116.160(c)(3).

[18] Tex. Health & Safety Code § 382.003(12).

[19] *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 387, 842–43 (1984). "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously express intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

of an administrative regulation rather than a statute is at issue, deference is even more clearly in order." *Udall* v. *Tallman,* 380 U.S. 1, 17 (1965). This is particularly true when the rule involves complex subject matter. *See Equitable Trust Co.* v. *Finance Comm'n,* 99 S.W.3d 384, 387 (Tex.App.—Austin 2003, no pet.). Texas courts recognize that the legislature intends an agency created to centralize expertise in a certain regulatory area "be given a large degree of latitude in the methods it uses to accomplish its regulatory function." *Reliant Energy, Inc.* v. *Public Util. Comm'n,* 62 S.W.3d 833,838 (Tex.App.—Austin 2001, no pet.)(citing *State* v. *Public Util. Comm'n,* 883 S.W.2d 190, 197 (Tex. 1994). In summary, TCEQ translates "emissions unit" to mean "facility." Just as an "emissions unit" under Federal law is construed by EPA as part of a major stationary source, a "facility" under Texas law can be a part of a major stationary source. However, a facility cannot include more than one stationary source as defined under Texas law.

Response: EPA welcomes the clarification concerning TCEQ's interpretation of Texas law and the Texas SIP with respect to the term "facility." However, we have determined that Texas's use of the term "facility," as it applies to the NNSR non-PALs rules, is overly vague, and therefore, unenforceable. TCEQ comments that it translates "emissions unit" to mean "facility." Although Texas's PSD non-PAL rules explicitly limit the definition of "facility" to "emissions unit," the NNSR non-PALs rules fail to make such a limitation. *See* 74 FR 48467, at 48473, footnote 6, and 48475; *compare* 30 TAC 116.10(6) *to* 30 TAC 116.160(c)(3). The State clearly thought the prudent legal course was to limit "facility" explicitly to "emissions unit" in its PSD SIP non-PALs revision. Furthermore, TCEQ did not submit information sufficient to demonstrate that the lack of this explicit limitation in the submitted NNSR non-PALs is at least as stringent as the revised definition in the PSD non-PALs definition.

We recognize that TCEQ should be accorded a level of deference to interpret the State's statutes and regulations; however, such interpretations must meet the applicable requirements of the Act and implementing regulations under 40 CFR part 51 to be approvable into the SIP as Federally enforceable requirements. The State has failed to provide any case law or SIP citation that confirms TCEQ's interpretation for "facility" under the NNSR non-PALs that would ensure Federal program scope.

Comment 2: The Clinic comments that Texas's use of the term "facility" makes its rules unacceptably vague. Texas's use of this term is problematic because of its dual definitions and broad meanings. The commenter compares Texas's definition of "facility" in 30 TAC 116.10 with the definition of "stationary source" in 30 TAC 116.12 and the definition of "building, structure, facility, or installation" in 30 TAC 116.12 and concludes that these definitions are quite similar. The commenter acknowledges that this argument assumes that one can rely on the Nonattainment NSR rules to interpret the general definitions. If one cannot use the Nonattainment NSR definitions to interpret the general definition of "facility," then one must resort to the definition of "source" in 30 TAC 116.10(17), which is defined as "a point of origin of air contaminants, whether privately or publicly owned or operated." Pursuant to this reading, a facility is more like a Federal "emissions unit." 40 CFR 51.165(a)(1)(vii). " 'Emissions unit' means any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant * * *" At least in the Qualified Facility rules, it appears that TCEQ use of the definition of "facility" is more like a Federal "emissions unit." The circular nature of these definitions, and the existence of two different definitions of "facility" without clear description of their applicability, makes Texas's rules, including the Qualified Facility rules, vague. The commenter urges EPA to require Texas to clarify its definition of "facility" and to ensure that its use of the term throughout the rules is consistent with that definition.

Response: EPA agrees with this comment. *See* our response to comment 1 above for further information.

Comment 3: Concerning the definition of "facility," BCCA, TIP, and TCC commented that the term "facility" is defined in Chapter 116 and in the Texas Clean Air Act, and is used in a consistent manner throughout. The term has identical meaning in the NNSR non-PAL rules and the PSD non-PAL rules. Any failure to "explicitly limit the definition" in one part of Chapter 116 is not grounds for disapproval, given the well-established definition of "facility" in the context of Texas air permitting and that it is comparable to the Federal definition of "emissions unit." TCEQ regulations in 30 TAC 116.10(6) defines a facility as: "A discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not a facility." *See* 30 TAC 116.10(6). Section 116.10 states that the definitions contained in the section apply to *all* uses throughout Chapter 116. 30 TAC 116.10 ("[T]he following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.") This definition is similar to the definition of "emission unit" in Texas's Title V rules. There, "emissions unit" is defined as: "A discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. *See* 30 TAC 122.10(8). Under the express terms of 30 TAC 116.10, the definition of "facility" is clear, and is equivalent to the Federal definition of "emission unit" in the nonattainment NSR non-PAL rules, as it is throughout Chapter 116.

Response: EPA disagrees with these comments. *See* our response to comment 1 above for further information.

Comment 4: TCEQ comments that TCEQ rules includes maintenance, startup and shutdown emissions in the development of "baseline actual emissions" to the extent that the permit reviewer can verify that these emissions occurred, were properly quantified and reported as part of the baseline, and were creditable. Otherwise, startup and shutdown, as well as maintenance emissions, are treated as unauthorized and, as such, have a baseline actual emission rate of zero. Further, TCEQ rules do not authorize malfunction emissions. TCEQ has concerns about crediting a major source with an emission associated with malfunctioning of equipment when the source determines baseline actual emissions. TCEQ is concerned that including malfunction emissions would inflate the baseline and narrow the gap between baseline actual emissions and the planned emission rate. Therefore, the number of "major" sources or modifications would be reduced. It is unclear how emissions that are not authorized would be considered creditable within the concept of NSR applicability.

EPA has approved the exclusion of malfunction emissions from the baseline calculation in other States' rules. TCEQ considers the exclusion of malfunction emissions from baseline actual emissions to be at least as stringent as the Federal rule. TCEQ is willing to work with EPA to clarify the inclusion of startup and shutdown emissions when determining baseline actual emissions.

Response: EPA disagrees with this comment. We note two fundamental concerns with the Texas definitions, as discussed in this response. First, the Texas definition of "baseline actual emissions" provides discretion to include emissions from malfunctions, startups, and shutdowns, but does not contain specific, objective, and replicable criteria for determining whether TCEQ's choice of emissions events to be included in the baseline actual emissions will be effective in terms of enforceability, compliance assurance, and ambient impacts. Second, the Texas definition of "projected actual emissions" does not include emissions from startups, shutdowns and malfunctions in contrast to the Federal definition which includes such emissions.

The Federal definition of "baseline actual emissions" requires such emissions to include emissions associated with startups, shutdowns, and malfunctions. *See* 40 CFR 51.165(a)(1)(xxxv)(A)(*1*) and (B)(*1*) and 51.166(b)(47)(i)(*a*) and (ii)(*a*). In contrast, Texas's submitted definition of "baseline actual emissions" at 30 TAC 116.12(3)(E) differs from the Federal definition by providing that "[u]ntil March 1, 2016, emissions previously demonstrated as emissions events or historically exempted under [30 TAC] Chapter 101 of this title * * * *may* be included the extent they have been authorized, or are being authorized, in a permit action under Chapter 116." Emphasis added. EPA's understanding of State law is that the use of the term "may" creates discretionary authority or grants permission or power. *See* section 311.016 of the Texas Code Construction Act.

TCEQ considers emission events as unauthorized emissions associated with the startup, shutdown, and malfunction related activities. *See* 30 TAC 101.1(28). Texas has adopted an affirmative defense approach to handle such emissions. *See* 30 TAC 101.222. For emissions associated with the planned maintenance, startup or shutdown activities, the State rule has adopted a phased-in approach to allow a source to file an application to permit its planned maintenance, startup or shutdown related emissions in a source's NSR permit. This approach is based on the source's SIC code. *See* 101.222(h) and (i). For EPA's proposed rulemaking action on the State's Emission Events rule, *see* May 13, 2010 (75 FR 26892). The State's submitted definition provides director discretion whether to include these types of emissions. Such director discretion provisions are not acceptable for inclusion in SIPs, unless each director decision is required under the plan to be submitted to EPA for approval as a single-source SIP revision. This Program does not contain specific, objective, and replicable criteria for determining whether the Executive Director's choice of emissions events to be included in the baseline actual emissions will be effective in terms of enforceability, compliance assurance, and ambient impacts. This would include a replicable procedure for use of any discretionary decision to determine which maintenance, startup, and shutdown emissions are properly quantified and reported as part of the baseline, and are creditable; and for determining that maintenance, startup, and shutdown emissions then do not meet such criteria and can be excluded because they are unauthorized.

The State did not provide any demonstration, as required for a customized Major NSR SIP revision submittal, that the submitted provision that may exclude any emissions from maintenance, startup, and shutdown from the definition of baseline actual emissions, is at least as stringent as the definition in the Federal non-PAL Program SIP requirements. Texas also includes authorized maintenance emissions in its baseline actual emissions. Because maintenance emissions are not specifically required in the Federal definition, the State must provide a demonstration, as required for a customized Major NSR SIP revision submittal, that including these emissions in the baseline actual emissions is at least as stringent as the definition in the Federal non-PAL Program SIP requirements.

With respect to "projected actual emission," the Federal definition of "projected actual emissions" requires the projected emissions to include emissions associated with startups, shutdowns, and malfunctions. *See* 40 CFR 51.165(a)(1)(xxviii)(B)(*2*) and 51.166(b)(40)(ii)(*b*). Texas's submitted definition of "projected actual emissions" at 30 TAC 116.12(29) differs from the Federal definitions by not including emissions associated with startups, shutdowns, and malfunctions. The exclusion of these emissions in the projected actual emissions while providing for the possible inclusion of these emissions from baseline actual emissions does not provide a comparable estimation of emissions increases associated with the project and could narrow the gap between baseline actual emissions and the projected actual emissions in a way that allows facilities to avoid NSR requirements. The State did not provide a demonstration, as required for a customized Major NSR SIP revision, that excluding these emissions from projected actual emissions, is at least as stringent as the Federal non-PALs SIP requirements. (EPA also wishes to note that the submitted definition of baseline actual emissions is unclear how TCEQ will include authorized emissions events as baseline actual emissions and projected actual emissions on and after March 1, 2016.)

With respect to one aspect specifically related to emissions associated with malfunctions, EPA appreciates Texas's concern that including malfunction emissions in the baseline and projected actual emissions would inflate the baseline and narrow the gap between baseline and planned emissions. EPA acknowledges that it has approved the exclusion of malfunction emissions from the baseline calculation in other States' rules. This includes the approval of such exclusions in Florida (proposed April 4, 2008 at 73 FR 18466 and final approval on June 27, 2008 at 73 FR 36435) and South Carolina (proposed September 12, 2007 at 72 FR 52031 and final approval on June 2, 2008 at 73 FR 31368) and the proposed exclusion in Georgia (proposed September 4, 2008 at 73 FR 51606). EPA's review of these actions indicates that in each State, malfunctions were excluded from *both* baseline actual emissions and projected actual emissions. This exclusion was based upon the difficulty of quantifying past malfunction emissions and estimating future malfunction emissions as part of the projected actual emissions. Georgia's rules specify that if malfunction emissions are omitted from projected actual emissions, they must also be omitted from baseline emissions, and vice versa, so as to provide a comparable estimation of emissions increases associated with the project. Florida is also concerned about the possibility that including malfunction emissions may result in the unintended rewarding of the source's poor operation and maintenance, by allowing malfunction to be included in the baseline emissions that will be used to calculate emissions changes and emissions credits.

After reviewing Texas's comments on exclusion of malfunctions from its baseline actual emissions and projected actual emissions, we note that TCEQ voices concerns similar to Florida, Georgia, and South Carolina. Accordingly, we agree with TCEQ's concern that including malfunction emissions would inflate the baseline and narrow the gap between baseline actual emissions and the planned emission rate. Therefore, the number of "major" sources or modifications would

be reduced. It is unclear how emissions that are not authorized would be considered creditable within the concept of NSR applicability. Nevertheless, we must review the submitted definitions pending before EPA for action. Both definitions do not exclude malfunctions emissions. Furthermore, the baseline actual emissions definition allows the discretionary inclusion of malfunction emissions. To be approvable, both definitions must mandate the exclusion of malfunction emissions.

Comment 5: BCCA, TIP, TCC, and TxOGA commented that the Texas rules' treatment of startups, shutdowns, and malfunctions is not a proper basis for disapproval of the proposed SIP revision. The Federal and Texas definitions both require that non-compliant emissions be excluded from the determination of baseline actual emissions.[20] Based on the Texas rules' integration of pending Chapter 101 revisions on startup, shutdown, and malfunction emissions (as requested by EPA), the proposed SIP revision's treatment of these types of emissions is a reasonable approach.

EPA has approved rules for baseline calculations that exclude some of the elements they assert should be included in Texas's definition. For example, Georgia's PSD regulations give applicants the option of excluding malfunction emissions from the calculation of baseline emissions.[21] In approving this approach, EPA noted "The intent behind this optional calculation methodology is that it may result in a more accurate estimate of emission increases. The Federal rules allow for some flexibility, and EPA supports EPD's analysis that the Georgia rule is at least as stringent as the Federal rule." [22] Similarly, Texas's approach to the baseline calculation attempts for a more accurate estimate of emissions.

Moreover, TCEQ is underway in permitting maintenance, startup and shutdown emissions through Chapter 116 preconstruction permits, and a SIP revision reflecting the maintenance, startup, and shutdown permitting initiative has been submitted to EPA for approval. TCEQ is distinguishing between planned and unplanned maintenance, startup, and shutdown emissions, and working to authorize those planned maintenance, startup, and shutdown emissions in Texas air permits. It is reasonable and appropriate that the maintenance, startup, and shutdown permitting initiative be properly integrated with the definition of "baseline actual emissions." The proposed SIP revision recognizes that such emissions may be added to the baseline in the future, based on TCEQ's ongoing process of authorizing maintenance, startup, and shutdown emissions. The proposed SIP revision and TCEQ's current approach is sound and reasonable based on historical treatment of maintenance, startup, and shutdown emissions in Texas air permits, and is not grounds for disapproval of the proposed SIP revision.

Response: EPA disagrees with this comment. *See* the response to Comment 4 above for more information.

Comment 6: The Clinic comments that Texas's definition of "baseline actual emissions" is less stringent than the Federal definition. The Federal regulations define "baseline actual emissions" as "the average rate, in tons per year, at which the unit actually emitted the pollutant during any consecutive 24-month period." *See* 40 CFR 51.165(a)(1)(xxxv)(A) and (B). This definition further provided that the average rate "shall include emissions associated with startups, shutdowns, and malfunctions." *See* 40 CFR 51.165(a)(1)(xxxv)(A)(1).

Texas rules define "baseline actual emissions" as "the rate, in tons per year, at which the unit actually emitted the pollutant during any consecutive 24-month period." *See* 30 TAC 116.12(3)(A). The Texas rules do not require baseline actual emissions to include emissions associated with maintenance, startups, and shutdowns. Instead, the rules state that maintenance, startup, and shutdown events "may be included to the extent they have been authorized, or are being authorized." *See* 30 TAC 116.12(3)(E). Texas's failure to incorporate the Federal definition and the express failure to require incorporation of maintenance, startup, and shutdown emissions in the average rate renders the definition as inconsistent with Federal regulations.

The commenter further notes that Texas's failure to include maintenance, startup, and shutdown emissions is related to a larger problem with Texas's program. Texas is allowing sources to authorize their maintenance, startup, and shutdown emissions separately from their routine emissions. For example, Texas allows sources that have individual major NSR or PSD permits to authorize their maintenance, startup, and shutdown emissions through a stand-alone permit-by-rule. *See* 30 TAC 106.263. This allows sources to avoid considering their maintenance, startup, and shutdown emissions in determining potential to emit, as well as in determining the magnitude of any emission increases. EPA has repeatedly informed Texas that its approach for permitting maintenance, startup, and shutdown emissions violates the Act.[23] EPA should take action to ensure that Texas follows the Act when permitting maintenance, startup, and shutdown emissions.

Response: EPA agrees with the comment relating to not calculating baseline actual emissions as average emission rates. *See* section IV.D.2, responses to comments 1 and 2 for further information.

EPA agrees with this comment related to the inclusion of emissions associated with authorized maintenance, startup, and shutdown in the baseline actual emissions. *See* the response to comment 4 above. The comments relating to authorizing maintenance, startup, and shutdown emissions separately from routine emissions are outside the scope of this action.

Comment 7: The Clinic comments that Texas's definition of "projected actual emissions" is less stringent than the Federal definition. The Federal regulations define "projected actual emissions" to include maintenance, startup, and shutdown emissions. *See* 40 CFR 51.165(a)(1)(xxviii)(b) and 51.166(b)(40)(ii)(b). Texas's definition of "projected actual emissions" fails to include maintenance, startup, and shutdown emissions. *See* 30 TAC 116.12(29). Even where such emissions are included in a source's baseline actual emissions, there is no provision to require such emission in the projected actual emissions. The commenter states that facilities in Texas often have extremely large maintenance, startup, and shutdown emissions. *See* Attachment 8 of the comments (Facility emission event information). Under Texas's definitions, a source which would trigger a major modification under Federal rules could avoid a major modification by failing to include maintenance, startup, and shutdown in their projected actual emissions. The commenter states that any company that includes maintenance, startup, and shutdown in its baseline actual emissions should be required to include a realistic estimate of maintenance,

[20] 30 TAC 116.12(3)(D) ("The actual rate shall be adjusted downward to exclude any non-compliant emissions that occurred during the consecutive 24-month period.")

[21] GA. COMP. R. & REGS. 391–3– 1–.02(7)(a)2.(ii)(II)II (2009).

[22] 73 FR 51,606, at 51,609 (Sept. 4, 2008).

[23] *See* "Letter to Richard Hyde, TCEQ, Director, Air Permits Division" from Jeff Robinson, EPA, Region 6, Chief, Air Permits Section (May 21, 2008) (Attachment 7 in the Clinic's comments).

startup, and shutdown emissions in its projected actual emissions.

Response: EPA agrees with this comment. *See* our response to Comment 4 above for further information.

3. What are the grounds for disapproval of the submitted non-PAL aspects of the major NSR SIP requirements?

EPA is disapproving the submitted NNSR non-PAL rules because they do not explicitly limit the definition of "facility" to an "emissions unit." It is our understanding of State law that a "facility" can be an "emissions unit," *i.e.,* any part of a stationary source that emits or may have the potential to emit any air contaminant, as the State explicitly provides in the revised PSD rule at 30 TAC 116.160(c)(3). A "facility" also can be a piece of equipment, which is smaller than an "emissions unit." A "facility" can include more than one "major stationary source." It can include every emissions point on a company site, without limiting these emissions points to only those belonging to the same industrial grouping (SIP code). Regardless, the State clearly thought the prudent legal course was to limit "facility" explicitly to "emissions unit" in its PSD SIP non-PALs revision. TCEQ did not submit a demonstration showing how the lack of this explicit limitation in the NNSR SIP non-PALs revision is at least as stringent as the revised Major NSR SIP requirements. Therefore, EPA is disapproving the use of the submitted definition as not meeting the revised Major NNSR non-PALs SIP requirements.

Under the Major NSR SIP requirements, for any physical or operational change at a major stationary source, a source must include emissions resulting from startups, shutdowns, and malfunctions in its determination of the baseline actual emissions. The definition of the term "baseline actual emissions," as submitted in 30 TAC 116.12(3)(E), does not require the inclusion of emissions resulting from startups, shutdowns, and malfunctions as required under Federal regulations. The submitted definition of baseline actual emissions provides that until March 1, 2016, emissions previously demonstrated as emissions events or historically exempted under [30 TAC] Chapter 101 of this title may be included the extent they have been authorized, or are being authorized, in a permit action under Chapter 116. The submitted definition of "projected actual emissions" at 30 TAC 116.12(29) differs from the Federal definitions by not including emissions associated with startups, shutdowns, and malfunctions. The authorized emission events under the submitted definition include emissions associated with maintenance, startups, and shutdowns. Our understanding of State law is that the use of the term "may" creates discretionary authority or grants permission or a power. *See* Section 311.016 of the Texas Code Construction Act. Similarly, the submitted definition of "projected actual emissions" at 30 TAC 116.12(29) does not require that emissions resulting from startups, shutdowns, and malfunctions be included. The submitted definitions differ from the Federal SIP definitions and the State has not provided information demonstrating that these definitions meet the Federal SIP definitions. Specifically, the State has not provided: (1) A replicable procedure for determining the basis for which emissions associated with maintenance, startup, and shutdown will and will not be included in the baseline actual emissions, (2) the basis for including emissions associated with maintenance in baseline actual emissions, (3) the basis for not including maintenance, startup, and shutdown emissions in the projected actual emissions, and (4) provisions for how it will handle maintenance, startup, and shutdown emissions after March 1, 2016. Therefore, based upon the lack of a demonstration from the State, as is required for a customized Major NSR SIP revision submittal, EPA is disapproving the definitions of "baseline actual emissions" at 30 TAC 116.12(3) and "projected actual emissions" at 30 TAC 116.12(29) as not meeting the revised Major NSR SIP requirements.

Texas stated that it has excluded emissions associated with malfunctions from the calculation of baseline actual emissions and projected actual emissions because including such emissions would inflate the baseline and narrow the gap between baseline and project emissions. EPA agrees with the reasons Texas uses to exclude malfunction emissions from baseline actual emissions and projected actual emissions are comparable to the reasons EPA used for excluding malfunction emissions from other States in which EPA approved such exclusion. Notwithstanding Texas's exclusion of malfunctions from these definitions, Texas must address the other grounds for disapproval as discussed above. This includes mandating the exclusion of malfunction emissions in both definitions.

The Federal definition of the "baseline actual emissions" provides that these emissions must be calculated in terms of "the average rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period." The submitted definition of the term "baseline actual emissions" found at 30 TAC 116.12 (3)(A), (B), (D), and (E) differs from the Federal definition by providing that the baseline shall be calculated as "the rate, in tons per year at which the unit actually emitted the pollutant during any consecutive 24-month period."

Texas has not provided any demonstration, as is required for a customized Major NSR SIP revision submittal, showing how this different definition is at least as stringent as the Federal SIP definition. Therefore, EPA is disapproving the submitted definition of "baseline actual emissions" found at 30 TAC 116.12(3) as not meeting the revised major NSR SIP requirements.

EPA received comments from TCEQ, the Clinic, and industry regarding the proposed disapproval of these submitted SIP revisions. *See* our response to these comments in section IV.E.2 above. None of the provisions and definitions in the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR SIP requirements for non-PALs is severable from each other. Therefore, we are disapproving the portion of the February 1, 2006, SIP revision submittal pertaining to the revised Major NSR non-PALs SIP requirements as not meeting the Act and the revised Major NSR SIP regulations. *See* the proposal at 74 FR 48467, at 48475, our background for these submitted SIP revisions in section IV.E.1 above, and our response to comments on these submitted SIP revisions in section IV.E.2 above for additional information.

F. The Submitted Minor NSR Standard Permit for Pollution Control Project SIP Revision

1. What is the background for the submitted Minor NSR Standard Permit for Pollution Control Project SIP revision?

EPA approved Texas's general regulations for Standard Permits in 30 TAC Subchapter F of 30 TAC Chapter 116 on November 14, 2003 (68 FR 64548) as meeting the minor NSR SIP requirements. The Texas Clean Air Act provides that the TCEQ may issue a standard permit for "new or existing similar facilities" if it is enforceable and compliance can be adequately monitored. *See* section 382.05195 of the TCAA. EPA approved the State's Standard Permit program as part of the Texas Minor NSR SIP program on November 14, 2003 (68 FR 64548). In the final FRN, EPA noted that the submitted provisions provide for a

streamlined mechanism for approving the construction or modification of certain sources in categories that contain numerous similar sources. EPA approved the provisions for issuing and modifying standard permits because, among other things, the submitted rules required the following: (1) No major stationary source or major modification subject to part C or part D of the Act could be issued a standard permit; (2) sources qualifying for a standard permit are required to meet all applicable requirements under section 111 of the Act (NSPS), section 112 of the Act (NESHAPS and MACT), and the TCEQ rules (this includes the Texas SIP control strategies); (3) sources have to register their emissions with the TCEQ and this registration imposes an enforceable emissions limitation; (4) maintenance of records sufficient to demonstrate compliance with all the permit's conditions; and (5) periodic reporting of the nature and amounts of emissions necessary to determine whether a source is in compliance. TCEQ must conduct an air quality impacts analysis of the anticipated emissions from the similar facilities before issuing and modifying any standard permit. All new or revised standard permits are required to undergo public notice and a 30-day comment period, and TCEQ must address all comments received from the public before finalizing its action to issue or revise a standard permit. Based upon the above and as further described in the TSD for the approval action, EPA found that the submitted Texas Minor NSR Standard Permits Program was adequate to protect the NAAQS and reasonable further progress (RFP) and was enforceable.

One of the primary reasons why EPA found that the Standard Permits Program was enforceable is that these types of Minor NSR permits were to be issued for similar sources. The issuance of a Minor NSR permit for similar sources eliminates the need for a case-by-case review and evaluation to ensure that the NAAQS and RFP are protected and the permit is enforceable. The provisions of the Texas Standard Permits Program also ensured that the terms and conditions of an individual standard permit would be replicable. This is a key component for the EPA authorization of a generic preconstruction permit. Replicable methodologies eliminate any director discretion issues. Otherwise, if there are any director discretion issues, EPA requires that they be addressed in a case-by-case Minor NSR SIP permit.

When EPA approved the Texas Standard Permits Program as part of the Texas Minor NSR SIP, it explicitly did not approve the Pollution Control Project (PCP) Standard Permit (30 TAC 116.617). *See* 68 FR 64543, at 64547. On February 1, 2006, Texas submitted a repeal of the previously submitted PCP Standard Permit and submitted the adoption of a new PCP Standard Permit at 30 TAC 116.617—State Pollution Control Project Standard Permit.[24] One of the main reasons Texas adopted a new PCP Standard Permit was to meet the new Federal requirements to explicitly limit this PCP Standard Permit only to Minor NSR. In *State of New York, et al* v. *EPA,* 413 F.3d 3 (DC Cir. June 24, 2005), the Court vacated the Federal pollution control project provisions for NNSR and PSD. Although the new PCP Standard Permit explicitly prohibits the use of it for Major NSR purposes, TCEQ has failed to demonstrate how this particular Standard Permit meets the Texas Standard Permits NSR SIP since it applies to numerous types of pollution control projects, which can be used at *any* source that wants to use a PCP, and is not an authorization for similar sources.

Under the Texas Standard Permits Minor NSR SIP, an individual Standard Permit must be limited to new or existing similar sources, such that the affected sources can meet the Standard Permit's *standardized* permit conditions. This particular PCP Standard Permit does not lend itself to standardized, enforceable, replicable permit conditions. Because of the broad types of source categories covered by the PCP Standard Permit, this Standard Permit lacks replicable standardized permit conditions specifying how the Director's discretion is to be implemented for the individual determinations, *e.g.,* the air quality determination, the controls, and even the monitoring, recordkeeping, and reporting. Rather, the types of sources covered by a Pollution Control Project are better designed for case-by-case additional authorization, source-specific review, and source-specific technical determinations. For case-by-case additional authorization, source-specific review, and source specific technical determinations, under the minor NSR SIP rules, if these types of determinations are necessary, under the Texas Minor NSR SIP, the State is required to use its minor NSR SIP case-by-case permit process under 30 TAC 116.110(a)(1).

Because of the lack of replicable standardized permit conditions and the lack of enforceability, the PCP Standard Permit is not the appropriate vehicle for authorizing PCPs. EPA proposed to disapprove the PCP Standard Permit, as submitted February 1, 2006. *See* the proposal at 74 FR 48467, at 48475–48476, for additional information.

2. What is EPA's response to comments on the submitted Minor NSR Standard Permit for Pollution Control Project SIP revision?

Comment 1: TCEQ commented that its PCP Standard Permit has been used to implement control technologies required by regulatory changes, statutory changes, and/or EPA consent decree provisions. As such, control devices may be applied to numerous different facility types and industry types, ranging from storage tanks to fired units. TCEQ understands EPA's comments and will work with EPA to develop an approvable authorization(s) that will achieve the same goals and emission reductions.

Response: EPA appreciates TCEQ's understanding of our comments and intention to work with us to develop an approvable rule revision. However, our evaluation is based on the submitted rule currently before us.

Comment 2: The Clinic comments that the Texas PCP Standard Permit does not meet Federal NNSR and PSD requirements. *See New York* v. *EPA,* 413 F.3d 4 (DC Cir. 2005). The PCP Standard Permit also fails to meet the minimum standards for minor authorizations as provided by the Act at 42 U.S.C. 7410(a)(2)(C) and (C) and at 40 CFR 51.160(a) and (b). Texas's PCP Standard Permit is not limited to a particular source-category and can apply to various pollution control projects at any source type. *See* 30 TAC 116.617(a). Further, the permit itself does not have emission limits or monitoring; instead, a facility is permitted to include site-specific limits and monitoring requirements in its application for coverage under a PCP Standard Permit. *See* 30 TAC 116.617(d)(2). The PCP Standard Permit includes a generic statement that the permit must not be used to authorize changes for which the Executive Director at TCEQ determines whether "there are health effects concerns or the potential to exceed a national ambient air quality standard criteria pollutant or contaminant that results from an increase in emissions of any air contaminant until those concerns are addressed by the

[24] The 2006 submittal also included a revision to 30 TAC 116.610(d), that is a rule in Subchapter F, Standard Permits, to change an internal cross reference from Subchapter C to Subchapter E, consistent with the re-designation of this Subchapter by TCEQ. *See* section IV.H, and 74 FR 48467, at 48476, for further information on this portion of the 2006 submittal.

registrant." *See* 30 TAC 116.617(a)(3)(B). This provision itself, without specific emission limits and monitoring requirements in the PCP Standard Permit, in inadequate to protect the NAAQS, and is an acknowledgement that provisions on the face of the PCP Standard Permit are not sufficient to assure protection of the NAAQS and PSD increments. The commenter supports EPA taking action to disapprove and to further require facilities that have emissions authorized under the PCP Standard Permit to seek a Federally valid authorization.

Response: EPA agrees with the comments that the submitted PCP Standard Permit does not meet the requirements of the Texas Minor NSR Standard Permits SIP.

Comment 3: BCCA, TIP, TCC, GCLC, TxOGA, and TAB commented that the PCP standard permit does contain on its face all requirements applicable to its use. *See* 30 TAC 116.617(d). The rule requires that a permittee make a submittal to TCEQ, but does not require the Executive Director to act to approve the submittal. Under the rules, if the Executive Director does not act, the authorization under the permit stands. Review by the Executive Director is not to make case-by-case determination, but rather to review for impacts on air quality and disallow use if air quality would be negatively impacted. *See* 30 TAC 116.617(a)(3)(B). This is an important distinction. The Texas PCP permit is more stringent than a program that lacks a discretionary denial provision.

Moreover, the PCP is a minor NSR authorization. The CAA does not establish requirements for a State's minor NSR programs. The Federal regulations that govern minor NSR programs at 40 CFR 51.160–.164 provide States great flexibility in establishing SIP approvable minor NSR programs. Indeed, EPA's Environmental Appeals Board ("EAB") has recognized the flexibility provided States in establishing a non-PSD, non-nonattainment NSR permitting program, noting that Federal requirements do not mandate a particular minor NSR applicability methodology or test.[25]

In light of this flexibility, the Texas PCP standard permit is an acceptable part of the State's minor NSR SIP. Notably, EPA cites no statutory authority or provision of Part 51 in suggesting a bar on approval of general or standard permits. The manner in which TCEQ implements the PCP standard permit is reasonable and practical, and a decision to reject the PCP standard permit is a decision to reject an important minor NSR tool used by Texas sources to authorize environmentally beneficial projects in an expedited fashion. Site-specific traditional NSR permitting for such projects is impractical, inefficient and detrimental to the environment.

Response: EPA disagrees with this comment. We are not disapproving the Texas PCP Standard Permit because under the Texas Minor NSR SIP, Texas cannot issue general or standard permits. In fact, EPA has approved the Texas Standard Permits Program as part of the Texas Minor NSR SIP. EPA's approval authorizes Texas to issue so-called general permits, *i.e.,* the Texas standard permits. Our approval of the Texas Standard Permit Program as part of the Texas Minor NSR SIP was based on the statutory and regulatory requirements, including section 110 of the Act, in particular section 110(a)(2)(C), and 40 CFR 51.160, which require EPA to determine that the State has adequate procedures in place in the submitted Program to ensure that construction or modification of sources will not interfere with attainment of a National Ambient Air Quality Standard (NAAQS) or Reasonable Further Progress (RFP).

This particular submitted individual Standard Permit does not meet the requirements of the Texas Standard Permits Minor NSR SIP. The submitted revision allows the Executive Director to selectively review for impacts on air quality and disallow use if air quality would be negatively impacted or even revise the emission limit to avoid negative air quality impacts. It grants the Executive Director too much discretion to act selectively and make site-specific determinations outside the scope of the PCP Standard Permit and fails to include replicable procedures for the exercise of such discretion. It fails to include replicable procedures for the exercise of such discretion. Under the Texas Minor NSR Standard Permits SIP, each Standard Permit promulgated by Texas is required to include replicable standardized permit terms and conditions. Each Standard Permit is required to stand on its own. No further action on the part of the Executive Director for holders of a Standard Permit is authorized under the SIP because each individual Standard Permit is required to contain upfront all the replicable standardized terms and conditions. The replicability of a Standard Permit issued pursuant to the SIP rules eliminates any director discretion. EPA approval will not be required in each individual case as the TCEQ evaluates (and perhaps revises) a source's PCP Standard Permit. If the Director retains the authority to exercise discretion in the evaluation of each PCP Standard Permit holder's impact on air quality, this undermines EPA's rationale for approving the Texas Standard Permits Program as part of the Texas Minor NSR SIP. Under the SIP, any case-by-case determination must be made through the vehicle of the case-by-case Minor NSR SIP permit, not using a Minor NSR SIP Standard Permit as the vehicle. While Minor NSR SIP permit programs are given great flexibility, they cannot interfere with attainment and must meet the requirements for minor NSR. The Executive Director's selective application of his discretion on a case-by-case basis, without specific replicable criteria, exceeds the scope of EPA's approval of the Standard Permits Program in 30 TAC Subchapter F of 30 TAC Chapter 116 as approved on November 14, 2003 (68 FR 64548).

The submitted PCP Standard Permit revision has no replicable conditions that specify how the Director's discretion is to be exercised and delineated. We are particularly concerned that the Executive Director may exercise such discretion in case-specific determinations in the absence of generic, replicable enforceable requirements. These replicable methodologies and enforceable requirements should be in the submitted individual Standard Permit itself, not in the Executive Director's after the fact case-specific determinations made in issuing a customized Standard Permit to a source. If an individual Standard Permit requires any customizations for a holder, then this particular Standard Permit no longer meets the requirements for the Texas Standard Permit Program SIP. This customized Standard Permit has morphed into a case-by-case Minor NSR SIP permit and must meet the Texas NSR SIP requirements for this type of permit.

Comment 4: BCCA, TIP, TCC, GCLC, and TAB commented that the manner in which TCEQ has defined pollution control projects is reasonable and practical, and a decision to reject the PCP Standard Permit is a decision to reject an important minor NSR tool used by Texas sources to authorize environmentally beneficial projects in an expedited fashion. TCC further comments that EPA does not, and cannot, question that the Standard Permit for PCPs provides for the regulation of stationary sources as necessary to assure that that NAAQS are achieved. TCC also comments that Parts C (PSD) and D (NNSR) are not implicated because PCP Standard

[25] *In re Tennessee Valley Authority,* 9 EAD 357, 461 (EAB Sept. 15, 2000).

Permits are expressly made unavailable to major sources and major modifications. All commenters indicated that narrowing the scope of projects that can qualify for the expedited standard permit approval (or requiring TCEQ to promulgate source category-specific PCP standard permits for every source category in Texas) is impractical, inefficient, and detrimental to the environment.

Response: EPA agrees that the submitted PCP Standard Permit does not apply to major stationary sources and major modifications subject to PSD or NNSR. While the manner in which TCEQ has defined pollution control projects may be reasonable and practical, using the Texas Standard Permits SIP to issue one individual Standard Permit for all types of PCPs does not meet the SIP's requirements.

The scope of a Standard Permit promulgated by TCEQ is governed by the TCAA and the SIP's general regulations for Standard Permits in 30 TAC Subchapter F of 30 TAC Chapter 116. These do not provide for the issuance of a Standard Permit for dissimilar sources. They provide for the issuance of a Standard Permit for similar sources so that its permit terms and conditions are determined upfront in the promulgation of the individual Standard Permit. There is no need for any director discretion or customization of the individual Standard Permit. This is not to say that TCEQ is precluded from issuing various individual Standard Permits for PCPs; TCEQ can issue various individual Standard Permits for PCPs that cover similar sources.

Comment 5: ERCC commented that PCP authorizations are not unique to Texas and EPA's concerns with Texas PCP Standard Permit is too broad, is misplaced, and fails to recognize the regulatory restrictions in place, and the benefits that allow efficient emission reduction projects to proceed in the State. The commenter refers to two States with pollution control exemptions from the definition of modification which allow PCPs to proceed with significantly fewer limitations than the Texas PCP Standard Permit: Ohio and Oregon. Neither of these States limits PCP by a category of pollution control techniques or industrial sources. These SIP-approved provisions fail to provide any guidance for an application, director review, recordkeeping, or monitoring requirements. The Texas PCP program is highlighted for disapproval because it placed too much emphasis on the requirements and limitations of the PCP program. The Texas program has more safeguards than Oregon and Ohio. The Texas PCP program is solely a Minor NSR Program. By proposing disapproval of the Texas PCP program, EPA is holding Texas to a vastly more stringent approach and is designed to judge Texas in a way that EPA has not proposed for any other State.

Response: See response to Comments 3 and 4. EPA also wishes to note that that the cited Oregon and Ohio PCP exemptions from Major NSR were approved by EPA before the court held that EPA lacked the authority to exempt PCPs from the Major NSR SIP requirements. *See State of New York* v. *EPA,* 413 F 3d. 3 (DC Cir. 2005). These exemptions of PCPs from Major NSR are not the same as a Minor NSR Standard Permit for PCPs. Moreover, they have no relationship to the Texas Minor NSR Standard Permits SIP.

Comment 6: TAB commented on the history of the PCP programs at EPA and in Texas and states that Texas has been issuing Standard Permits for PCP Projects since 1994. TAB comments that the standard permit program was administered for several years with no suggestion of programmatic abuses, and more importantly, no examples given by anyone of unintended consequences. TAB also asserts that 13 years after Texas adopted its pollution control project standard permit, EPA finally commented on it in the proposal. TAB asserts that EPA cannot question that TCEQ's Minor NSR program, including the PCP Standard Permit, meets this provision of the Act.

Response: EPA disagrees with the comment. EPA had no need to comment on the administration of the general Standard Permit Program in this action because EPA approved Texas' general regulations for Standard Permits in 30 TAC Subchapter F of 30 TAC Chapter 116 on November 14, 2003 (68 FR 64548) as meeting the minor NSR SIP requirements. That approval describes how the Standard Permit rules met EPA's requirements for new minor sources and minor modifications. The scope of EPA's disapproval in this action is limited to Texas's submission of a SIP revision, on February 1, 2006, adopting a Standard Permit for PCPs at 30 TAC 116.617—State Pollution Control Project Standard Permit. CAA section 110 sets out the process for EPA's review of State SIP submittals. Nothing in the Act suggests EPA is foreclosed from disapproving a submittal because it failed to comment on it during the State's rulemaking process. For further response to the remainder of the comment, *see* response to comments 3 and 4.

Comment 7: TAB discussed numerous guidance memoranda that EPA used to support its position that the PCP Standard Permit is unapprovable because it is not limited to a particular narrowly defined source category that the permit is designed to cover and can be used to make site-specific determinations that are outside the scope of this type permit. The commenter states that these memos are not law, and cannot conceivably be used as an independent basis to deny approval of a SIP revision. Any EPA pronouncement that purports to be binding must be adopted through notice and comment rulemaking. *See Appalachian Power Company* v. *EPA,* 208 F.3d 1015, 1023 (DC Cir. 2000). The commenter concludes that if EPA wants to disapprove a submitted SIP revision of a Standard Permit because it is not limited to a particular narrowly defined source category and that allow site specific determinations, then EPA must adopt a rule that says so. TAB comments that even if the memos could legally support EPA's position, that the PCP Standard Permit is unapprovable because it not limited to a particular narrowly defined source category that the permit is designed to cover and can be used to make site-specific determinations that are outside the scope of this type permit, neither of the cited memos actually says so. The commenter reviewed each cited memo and found nothing to suggest any intent to fill gaps or qualify any provision of 40 CFR 51.160. TAB further comments on EPA's cites to a series of **Federal Registers** on actions taken on other States' minor NSR programs. The commenter states that these actions offer no explanation of how these particular actions illuminate EPA's proposal to disapprove Texas' PCP Standard Permit. TAB further comments on EPA's cites to a series of **Federal Registers** on actions taken on other States' minor NSR programs. The commenter states that these actions offer no explanation of how these particular actions illuminate EPA's proposal to disapprove Texas' PCP Standard Permit.

Response: EPA disagrees with this comment. Section 110 of the Act, in particular section 110(a)(2)(C), and 40 CFR 51.160, require the EPA to determine that the State has adequate procedures to ensure that construction or modification of sources will not interfere with attainment of a National Ambient Air Quality Standard (NAAQS). The CAA grants EPA the authority to ensure that the construction or modification of sources will not interfere with attainment of a National

Ambient Air Quality Standard (NAAQS). The memoranda cited in the proposal were cited for the purpose of providing documentary evidence of how EPA has exercised its discretionary authority when reviewing general permit programs similar to the Texas Standard Permits SIP. They also collectively provide an historical perspective on how EPA has exercised its discretion in reviewing regulatory schemes similar to the submitted PCP Standard Permit. The utility of these citations is not in the specific subject matter they address, but in their discussion of the regulatory principles to be applied in reviewing permit schemes that adopt emission limitations created through standardized protocols. For example, the memorandum titled *Approaches to Creating Federally-Enforceable Emissions Limits,* Memorandum from John S. Seitz, OAQPS, November 3, 1993, on page 5 discusses EPA recognition that emissions limitations can be created through standardized protocols. Likewise, the memorandum titled *Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and section 112 rules and General permits,* Memorandum from Kathie A Stein, Office of Enforcement and Compliance Assurance, January 25, 1995, discusses on page 6 the essential characteristics of a general permit that covers a homogenous group of sources.

Again, the **Federal Register** citations provided in the proposal serve to further highlight EPA's practical application of the policies enunciated in the above referenced memoranda. These documents demonstrate that EPA has consistently applied these policies with respect to approval of the minor source permit programs which feature rules which are similar to the Texas Standard Permits SIP. For example the **Federal Register** at 71 FR 5979, final approval of Wisconsin SIP revision, February 6, 2006, states on page 5981 that EPA regards the prohibitory rules and general permits are essentially similar and goes on to discuss requirements for approval of permit schemes of this nature. The cited notices address requirements for approval of general permit programs submitted as SIP revisions and are illustrative of regulatory policy applied by EPA in reviewing Standard Permit programs for SIP approval.

The cumulative effect of these documents is to provide the public with an insight to EPA's policy with regard to its application of discretionary authority in reviewing a variety of proposed general permit schemes. In this instance, EPA interprets the applicable statutes and rules to require that Standard Permits be limited to similar sources and they cannot be used to make site-specific determinations that are outside the scope of this type of permit. This is consistent with EPA's prior policy pronouncements on this subject as evidenced by the memoranda. EPA's interpretation is circumscribed by the statutory requirement that such a permit program not interfere with the attainment of the NAAQS. Consequently, the commenter's failure to find relevant information to illuminate EPA's decision to disapprove the submitted Texas' PCP Standard Permit is not a reflection on the utility of the cited documents.

Comment 8: TAB concludes by observing that there is no evidence of Standard Permit Program failure or adverse comments. The commenter criticizes EPA for not taking action on the PCP Standard Permit Program which the CAA required action long before 2009. EPA is further criticized for failing to review the record to determine the negative impacts of the PCP Standard Permit Program during the intervening time during which TCEQ has been issuing PCP authorizations under this program. EPA offers no example of a PCP Project that failed to protect public health or welfare, or could not be enforced, or that did not accomplish its valuable purpose of quickly, but carefully, authorizing emission reduction projects.

Response: EPA disagrees with this comment. The standard for review in this context is not the existence of adverse comments or failure in the implementation of a Standard Permit Program SIP. EPA reviews a SIP revision submission for its compliance with the Act and EPA regulations. CAA 110(k)(3). *See also BCCA Appeal Group* v. *EPA,* 355 F 3d. 817, 822 (5th Cir. 2003); *Natural Resources Defense Council, Inc.* v. *Browner,* 57 F.3d 1122, 1123 (DC Cir. 1995). This includes an analysis of the submitted regulations for their legal interpretation. The existence of adverse comments is not the exclusive criteria for review of submitted revisions. In this particular instance, EPA's review is limited to Texas's submission of a SIP revision for a new PCP Standard Permit at 30 TAC 116.617, not a SIP revision for general Standard Permits Program. EPA has already approved Texas' general regulations for Standard Permits in 30 TAC Subchapter F of 30 TAC Chapter 116 on November 14, 2003 (68 FR 64548) as meeting the minor NSR SIP requirements.

3. What are the grounds for disapproving the submitted Minor NSR Standard Permit for Pollution Control Project SIP revision?

EPA is disapproving the submitted Minor NSR Standard Permit for Pollution Control Project SIP revision because the PCP Standard Permit, as adopted and submitted by Texas to EPA for approval into the Texas Minor NSR SIP, does not meet the requirements of the Texas Minor NSR Standard Permits Program. It does not apply to similar sources. Because it does not apply to similar sources, it lacks the requisite replicable standardized permit terms specifying how the Director's discretion is to be implemented for the case-by-case determinations.

EPA received comments from TCEQ, the Clinic, and industry regarding the proposed disapproval of these submitted SIP revisions. *See* our response to these comments in section IV.F.2 above. Because the PCP Standard Permit, in 30 TAC 116.617, does not meet the Texas Minor NSR SIP requirements for Standard Permits, EPA is disapproving the PCP Standard Permit, as submitted February 1, 2006. *See* the proposal at 74 FR 48467, at 48475–48476, our background for these submitted SIP revisions in section IV.F.1 above, and our response to comments on these submitted SIP revisions in section IV.F.2 above for additional information.

G. No Action on the Revisions to the Definitions Under 30 TAC 101.1

We proposed to take no action upon the June 10, 2005, SIP revision submittal addressing definitions at 30 TAC Chapter 101, Subchapter A, section 101.1, because previous revisions to that section are still pending review by EPA. *See* 74 FR 48467, at 48476. We received no comments on this proposal. Accordingly, we will take appropriate action on the submittals concerning 30 TAC 101.1 in a separate action. As noted previously, these definitions are severable from the other portions of the two SIP revision submittals.

H. No Action on Provisions That Implement Section 112(g) of the Act and for Restoring an Explanation That a Portion of 30 TAC 116.115 Is Not in the SIP Because It Implements Section 112(g) of the Act

Texas originally submitted a new Subchapter C—Hazardous Air Pollutants: Regulations Governing Constructed and Reconstructed Sources (FCAA, § 112(g), 40 CFR Part 63) on July 22, 1998. EPA has not taken action upon the 1998 submittal. In the February 1,

2006, SIP revision submittal, this Subchapter C is recodified to Subchapter E and sections are renumbered. This 2006 submittal also includes an amendment to 30 TAC 116.610(d) to change the cross-reference from Subchapter C to Subchapter E. These SIP revision submittals apply to the review and permitting of constructed and reconstructed major sources of hazardous air pollutants (HAP) under section 112 of the Act and 40 CFR part 63, subpart B. The process for these provisions is carried out separately from the SIP activities. SIPs cover criteria pollutants and their precursors, as regulated by NAAQS. Section 112(g) of the Act regulates HAPs, this program is not under the auspices of a section 110 SIP, and this program should not be approved into the SIP. These portions of the 1998 and 2006 submittals are severable. For these reasons we proposed to take no action on this portion relating to section 112(g) of the Act. *See* 74 FR 48467, at 48476–48477. We received no comments on this proposal. Accordingly, we are taking no action on the recodification of Subchapter C to Subchapter (d) and 30 TAC 116.610(d).

In a related matter, we are making an administrative correction to an earlier action which inadvertently removed an explanation that 30 TAC 116.115(c)(2)(B)(ii)(I) is not in the SIP. When we approved 30 TAC 116.115 in the SIP on September 18, 2002, we excluded 30 TAC 116.115(c)(2)(B)(ii)(I) because it implemented the requirements of section 112(g) of the Act. *See* 67 FR 58679, at 58699. In a separate action, we approved revisions to 30 TAC 116.115 on April 2, 2010 (75 FR 16671), which are unrelated to the excluded provisions of 30 TAC 116.115(c)(2)(B)(ii)(I). However, that action inadvertently removed the explanation that excluded 116.115(c)(B)(ii)(I) from the SIP. In this action, we are making an administrative correction to restore into the Code or Federal Regulations the explanation that the SIP does not include 30 TAC 116.115(c)(B)(ii)(I).

I. No Action on Provision Relating to Emergency and Temporary Orders

We proposed to take no action upon the February 1, 2006, SIP revision submittal which recodified the severable provisions relating to Emergency Orders from 30 TAC Chapter 116, Subchapter E to a new Subchapter K. *See* 74 FR 48467, at 48477. We received no comments on this proposal. Accordingly, we will take appropriate action on the Emergency Order requirements in a separate action, according to the Consent Decree schedule.

J. Responses to General Comments on the Proposal

Comment 1: The following commenters support EPA's proposal to disapprove the Texas NSR Reform Program, 1-hour NNSR, 1997 8-hour NNSR, and PCP Standard Permit: HCPHES; several members of the Texas House of Representatives; the Sierra Club; the City of Houston, and the Clinic.

Response: Generally, these comments support EPA's analysis of Texas's NSR Reform Program, 1-hour NNSR, 1997 8-hour NNSR, and PCP Standard Permit, as discussed in detail at in the proposal at 74 FR 48467, at 40471–48476, and further support EPA's action to disapprove the Texas NSR Reform Program submission.

Comment 2: The SCMS and PSR sent numerous similar letters via e-mail that relate to this action. These comments include 1,789 identical letters from SCMS (sent via e-mail) and a comment letter from PSR, which support EPA's proposed ruling that major portions of TCEQ air permitting program do not adhere to the CAA and should be thrown out. While agreeing that the proposed disapprovals are a good first step, the commenters state that EPA should take bold actions such as halting any new air pollution permits being issued by TCEQ utilizing TCEQ's current illegal policy; creating a moratorium on the operations of any new coal fired power plants; reviewing all permits issued since TCEQ adopted its illegal policies and requiring that these entities resubmit their applications in accordance with the Federal CAA; and putting stronger rules in place in order to reduce global-warming emissions and to make sure new laws and rules do not allow existing coal plants to continue polluting with global warming emissions.

The commenters further state that Texas: (1) Has more proposed coal and petroleum coke fired power plants than any other State in the nation; (2) Is number one in carbon emissions; and (3) Is on the list for the largest increase in emissions over the past five years. Strong rules are needed to make sure the coal industry is held responsible and that no permits are issued under TCEQ's illegal permitting process. Strong regulations are vital to cleaning up the energy industry and putting Texas on a path to clean energy technology that boosts economic growth, creates jobs in Texas, and protects the air quality, health, and communities.

In addition, SCMS sent 273 similar letters (sent via e-mail) that contained additional comments that Texas should rely on wind power, solar energy, and natural gas as clean alternatives to coal. Other comments expressed general concerns related to: impacts on global warming, lack of commitment by TCEQ to protect air quality, the need for clean energy efficient growth, impacts upon human health, endangerment of wildlife, impacts on creation of future jobs in Texas, plus numerous other similar concerns. The PSR further commented that as health care professionals, they are concerned about the health effects they are seeing in their patients due to environmental toxins in the air and water.

Response: To the extent that the SCMS and PSR letters comment on the proposed disapproval of the submitted 1-hour ozone standard, 1997 8-hour ozone standard, and NSR Reform Programs, they support EPA's action to disapprove these submitted rules. The remaining comments are outside the scope of our actions in this rulemaking.

Comment 3: TCEQ understands that EPA's review was conducted by applying the current applicable law. The Executive Director will conduct a review of all EPA comments and propose changes to the rules proposed for disapproval.

TCEQ understands EPA's concerns with issues regarding, among other things, applicability, clarity, enforceability, replicable procedures, recordkeeping, and compliance assurance. Specifically, the Executive Director will consider rulemaking to address the following concerns:

- Clarify references for major stationary sources and major modifications to EPA rules for nonattainment and maintenance area definitions and removing rule language indicating that the 1-hour thresholds and offsets are not effective unless EPA promulgates rules, and clarifying the applicability of nonattainment permitting rules;
- Clarify the definition of baseline actual emission rate, and clarify the inclusion of maintenance, startup, and shutdown emissions when determining baseline actual emissions; and
- Add missing items and clarify the existing requirements to obtain and comply with a PAL to meet FNSR requirements.

New and amended rules will be subject to the statutory and regulatory requirements for a SIP revision, as interpreted in EPA policy and guidance on SIP revisions, as well as applicable Texas law. The revised program will ensure protection of the NAAQS, and

demonstrate noninterference with the Texas SIP control strategies and reasonable further progress.

In addition, and as noted, TCEQ will address EPA's concerns regarding public participation in a separate rulemaking action.

Response: EPA appreciates TCEQ's commitment to consider rulemaking to correct the deficiencies in the submitted 1-hour ozone standard, 1997 8-hour ozone standard, and NSR Reform Programs. However, our evaluation is based on the submitted rules that are currently before us.

Comment 4: The Clinic further asks that EPA take action to halt Texas's use of permits-by-rule that, like the PCP standard permit, fail to meet minimum standards for minor source permitting and for general permits and exclusionary rules. Texas has adopted and is applying a number of permits-by-rule that are not source specific, do not include specific emission limitations or monitoring, and are inadequate to protect the NAAQS. These include the permits-by-rule in Subchapter K of Chapter 106 of the Texas rules. In addition, like the PCP, some of these permits—rather than authorizing specific types of minor emission source categories—can be used to increase authorized emissions from any type of facility.[26] EPA has repeatedly stated that Texas's current use of permit-by-rule violates the Act and Texas's approved SIP.[27] Yet EPA has failed take action to stop the illegal use of permits-by-rule.

Response: Any action on Texas's use of permits-by-rule, as requested by the commenter, is outside the scope of our actions in this rulemaking.

Comment 5: Concerned Citizens of Grayson expressed concerns about a hot mix asphalt plant located near the small town of Pottsboro, TX, which is located near public schools and private residences and has caused significant disruptions in the lives of those liming nearby because or "the noxious stench repeatedly emitted from the plant." The commenters are concerned because the plant was authorized under a Standard Permit issued by TCEQ which only had public participation and comment when TCEQ issued the Standard Permit for hot mix asphalt plants and there was no opportunity for public participation and comment on a source that applied for authorization under a Standard Permit for a specific source after the Standard Permit has been authorized.

Response: These comments do not relate to the submitted Standard Permit for Pollution Control Projects that EPA is reviewing in this action. These comments, which relate to a Standard Permit for Hot Mix Asphalt Plants, are outside the scope of this action.

Comment 6: AECT believes that EPA's proposed disapproval has injected uncertainty into the Texas permitting program, will cause tremendous operational-uncertainty for companies-in light of significant air emission rule proposals considered by EPA (*e.g.* mercury MACT, PSD Tailoring Rule), this and other disapprovals may jeopardize or substantially delay the ability of electric generators to obtain necessary air permits to install pollution controls that will be necessary to comply with current and future rules; and prompt EPA approval of the proposed TCEQ NSR SIP Revisions is needed in order to provide the regulatory certainty necessary for economic development, creation of critically needed jobs, and generation of affordable, reliable electricity in Texas.

Response: We are disapproving the submitted Texas NSR Reform Program, 1-hour NNSR, and PCP Standard Permit programs because they do not meet applicable requirements of the Act, as discussed herein. EPA is required to review a SIP revision for its compliance with the Act and EPA regulations. *See* CAA section 110(k)(3); *see also BCCA Appeal Group* v. *EPA,* 355 F 3d.817, 822 (5th Cir 2003); *Natural Resources Defense Council, Inc.* v. *Browner,* 57 F.3d 1122, 1123 (DC Cir. 1995).

Comment 7: BCCA and TIP comment that under Texas's integrated air permitting regime, air quality in the State is demonstrating strong, sustained improvement. The commenters cite to substantial reductions in nitrogen oxides and improvements in the ozone concentrations in the Houston-Galveston and Dallas-Fort Worth ozone nonattainment areas.

Response: We are disapproving the submitted Texas NSR Reform Program, 1997 8-hour NNSR, 1-hour NNSR, and PCP Standard Permit programs because they do not meet applicable requirements of the Act, as discussed herein. EPA is required to review a SIP revision submission for its compliance with the Act and EPA regulations. CAA 110(k)(3); *See also BCCA Appeal Group* v. *EPA,* 355 F 3d. 817, 822 (5th Cir. 2003); *Natural Resources Defense Council, Inc.* v. *Browner,* 57 F.3d 1122, 1123 (DC Cir. 1995).

Even if the commenters' premises are to be accepted, they fail to substantiate their claim that the Texas NSR Reform Program, 1-hour NNSR, 1997 8-hour NNSR, and PCP Standard Permit programs have had a significant impact on improving air quality in Texas by producing data showing that any such gains are directly attributable to the submitted Programs, and are not attributable to the SIP-approved control strategies (both State and Federal programs) or other Federal and State programs. They provide no explanation or basis for how their numbers were derived.

Furthermore, since the commenters thought EPA was acting inconsistently, they should have identified SIPs that are inconsistent with our actions and provided technical, factual information, not bare assertions.

Comment 8: GCLC, TIP, BCCA, AECT, and TCC comment that EPA ignores the fact that the Texas NSR Program has had a significant impact on improving air quality in Texas. TCEQ commented that significant emission reductions have been achieved by the submitted Program through the large number of participating grandfathered facilities, which resulted in improved air quality based upon the monitoring data.

BCCA, TAB, TxOGA, and ERCC comment that the legal standard for evaluating a SIP revision for approval is whether the submitted revision mitigates any efforts to attain compliance with a NAAQS. EPA's failure to assess the single most important factor in the submitted Program, the promotion of continued air quality improvement, is inconsistent with case law and the Act and is a deviation from the SIP consistency process and national policy. EPA should perform a detailed analysis of approved SIP programs through the United States and initiate the SIP consistency process within EPA to ensure fairness to Texas industries.

Response: EPA is required to review SIP revisions submission for their compliance with the Act and EPA regulations. CAA 110(k)(3); *See also BCCA Appeal Group* v. *EPA,* 355 F 3d. 817, 822 (5th Cir. 2003); *Natural Resources Defense Council, Inc.* v. *Browner,* 57 F.3d 1122, 1123 (DC Cir. 1995). EPA is not disapproving the

[26] For example, 30 TAC 106.261, 106.262, 106.263, and 106.264.

[27] *See* "Letter to Dan Eden, TCEQ Deputy Director" from Carl Edlund, EPA Region 6, Director Multimedia Planning and Permitting Division (March 12, 2008) ("EPA has consistently expressed concern about PBRs that authorize a category of emissions, such as startup or shutdown emissions, or that modify an existing NSR permit.") (Attachment 10 of the Clinic's comments); "Letter to Richard Hyde, TCEQ, Director, Air Permits Division" from Jeff Robinson, EPA Region 6, Chief, Air Permits Section (November 16, 2007) (Attachment 11 of then Clinic's comments); "Letter to Steve Hagle, TCEQ, Special Assistant, Air Permits Director" from David Neleigh, EPA Region 6, Chief, Air Permits Section (March 30, 2006) (Attachment 12 of the Clinic's comments); "Letter to Lola Brown, TCEQ, Office of Legal Services" from David Neleigh, EPA Region 6, Chief, Air Permits Section (February 3, 2006) (Attachment 13 of the Clinic's comments).

entire Texas NSR SIP. Specifically, on September 23, 2009, EPA proposed to disapprove *revisions* to the Texas NSR SIP submitted by the State of Texas that relate to the Nonattainment NSR (NNSR) Program for the 1-Hour Ozone Standard and the 1997 8-Hour Ozone Standard, NSR Reform, and a specific Standard Permit. Further, EPA is not required to initiate the SIP consistency process within EPA unless the pending SIP revision appears to meet all the requirements of the Act and EPA's regulations but raises a novel issue. EPA is disapproving the submitted revisions because they fail to meet the Act and EPA's regulations. Because the submitted revisions fail to meet the requirements for a SIP revision, the SIP consistency process is not relevant.

Comment 9: The ERCC comments that to avoid negative economic consequences EPA should exercise enforcement discretion statewide for sources that obtained government authorization in good faith and as required by TCEQ, the primary permitting authority. EPA should not require any injunctive relief and should consider penalty only cases in this rulemaking.

Response: EPA enforcement of the CAA in Texas is outside the scope of our actions.

V. Final Action

Under section 110(k)(3) of the Act and for the reasons stated above, EPA is disapproving the following: (1) The submitted definition of "best available control technology" in 30 TAC 116.10(3); (2) Major NSR in areas designated nonattainment for the 1-hour ozone NAAQS; (3) Major NSR in areas designated nonattainment for the 1997 8-hour ozone NAAQS; (4) Major NSR SIP requirements for PALs; (5) Non-PAL aspects Major NNSR SIP requirements; and (6) submittals for a Minor Standard Permit for PCP. EPA is also proposing to take no action on certain severable revisions submitted June 10, 2005, and February 1, 2006.

Specifically, we are disapproving the following regulations:

- Disapproval of the definition of best available control technology at 30 TAC 116.10(3), submitted March 13, 1996, and July 22, 1998;
- Disapproval of revisions to 30 TAC 116.12 and 116.150 as submitted June 10, 2005;
- Disapproving revisions to 30 TAC 116.12, 116.150, 116.151; and disapproving new sections at 30 TAC 116.121, 116.180, 116.182, 116.184, 116.186, 116.188, 116.190, 116.192, 116.194, 116.196, 116.198, 116.610(a), and 116.617, as submitted February 1, 2006.

We are also taking no action on the provisions identified below:

- The revisions to 30 TAC 101.1—Definitions, submitted June 10, 2005;
- The recodification of the existing Subchapter C under 30 TAC Chapter 116 to a new Subchapter E under 30 TAC Chapter 116;
- The provisions of 30 TAC 116.610(d); and
- The recodification of the existing Subchapter E under 30 TAC Chapter 116 to a new Subchapter K under 30 TAC Chapter 116.

Finally, we are making administrative corrections to reinstate an explanation to the SIP-approved 30 TAC 116.115, that was inadvertently removed in a separate action on April 2, 2010 (75 FR 16671).

Sources are reminded that they remain subject to the requirements of the Federally approved Texas Major NSR SIP and subject to potential enforcement for violations of the SIP (*See* EPA's Revised Guidance on Enforcement During Pending SIP Revisions, dated March 1, 1991).

VI. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

This final action has been determined not to be a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993).

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* because this SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new information collection burdens but simply disapproves certain State requirements for inclusion into the SIP. Burden is defined at 5 CFR 1320.3(b). Because this final action does not impose an information collection burden, the Paperwork Reduction Act does not apply.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. This rule will not have a significant impact on a substantial number of small entities because SIP approvals and disapprovals under section 110 and part D of the Clean Air Act do not create any new requirements but simply approve or disapprove requirements that the States are already imposing.

Furthermore, as explained in this action, the submissions do not meet the requirements of the Act and EPA cannot approve the submissions. The final disapproval will not affect any existing State requirements applicable to small entities in the State of Texas. Federal disapproval of a State submittal does not affect its State enforceability. After considering the economic impacts of today's rulemaking on small entities, and because the Federal SIP disapproval does not create any new requirements or impact a substantial number of small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.,* v. *U.S. EPA,* 427 U.S. 246, 255–66 (1976); 42 7410(a)(2).

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 "for State, local, or Tribal governments or the private sector." EPA has determined that the disapproval action does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or Tribal governments in the aggregate, or to the private sector. This Federal action determines that pre-existing requirements under State or

local law should not be approved as part of the Federally approved SIP. It imposes no new requirements. Accordingly, no additional costs to State, local, or Tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications." "Policies that have Federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This action does not have Federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely disapproves certain State requirements for inclusion into the SIP and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175, Coordination With Indian Tribal Governments

This action does not have Tribal implications, as specified in Executive Order 13175 (59 FR 22951, November 9, 2000), because the SIP EPA is disapproving would not apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on Tribal governments or preempt Tribal law. This final rule does not have Tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on Tribal governments, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes. This action does not involve or impose any requirements that affect Indian Tribes. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997). This SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new regulations but simply disapproves certain State requirements for inclusion into the SIP.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through the Office of Management and Budget, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of those requirements would be inconsistent with the Clean Air Act. Today's action does not require the public to perform activities conducive to the use of VCS.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, (February 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA lacks the discretionary authority to address environmental justice in this action. In reviewing SIP submissions, EPA's role is to approve or disapprove State choices, based on the criteria of the Clean Air Act. Accordingly, this action merely disapproves certain State requirements for inclusion into the SIP under section 110 and subchapter I, part D of the Clean Air Act and will not in-and-of itself create any new requirements. Accordingly, it does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898.

K. Congressional Review Act

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

L. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 15, 2010. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to

enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

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

Dated: August 31, 2010.

Al Armendariz,

Regional Administrator, Region 6.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7410 *et seq.*

Subpart SS—Texas

■ 2. The table in § 52.2270(c) entitled "EPA–Approved Regulations in the Texas SIP" is amended by revising the entry for section 116.115 to read as follows:

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

EPA—APPROVED REGULATIONS IN THE TEXAS SIP

State citation	Title/subject	State approval/submittal date	EPA approval date	Explanation
*	*	*	*	*
Chapter 116 (Reg 6)—Control of Air Pollution by Permits for New Construction or Modification				
*	*	*	*	*
Subchapter B—New Source Review Permits				
*	*	*	*	*
Division 1—Permit Application				
Section 116.115	General and Special Conditions.	8/20/2003	4/2/2010, 75 FR 16671	The SIP does not include subsection 116.115(c)(2)(B)(ii)(I).
*	*	*	*	*

* * * * *

■ 3. Section 52.2273 is amended by adding a new paragraph (d) to read as follows:

§ 52.2273 Approval status.

* * * * *

(d) EPA is disapproving the Texas SIP revision submittals under 30 TAC Chapter 116—Control of Air Pollution by Permits for New Construction and Modification as follows:

(1) The following provisions in 30 TAC Chapter 116, Subchapter A—Definitions:

(i) 30 TAC 116.10—General Definitions—the definition of "BACT" in 30 TAC 116.10(3), adopted February 14, 1996, and submitted March 13, 1996; and repealed and readopted June 17, 1998, and submitted July 22, 1998;

(ii) The revisions to 30 TAC 116.12—Nonattainment Review Definition, adopted May 25, 2005, and submitted June 10, 2005;

(iii) The revisions to 30 TAC 116.12—Nonattainment and Prevention of Significant Deterioration Definitions, adopted January 11, 2006, and submitted February 1, 2006 (which renamed the section title);

(2) The following section in 30 TAC Chapter 116, Subchapter B—New Source Review Permits, Division 1—Permit Application: 30 TAC 116.121—Actual to Projected Actual Test for Emission Increase, adopted January 11, 2006, and submitted February 1, 2006;

(3) The following sections in 30 TAC Chapter 116, Subchapter B—New Source Review Permits, Division 5—Nonattainment Review:

(i) Revisions to 30 TAC 116.150—New Major Source or Modification in Ozone Nonattainment Area—revisions adopted May 25, 2005, and submitted June 10, 2005; and revisions adopted January 11, 2006, and submitted February 1, 2006;

(ii) Revisions to 30 TAC 116.151—New Major Source or Modification in Nonattainment Areas Other Than Ozone—revisions adopted January 11, 2006, and submitted February 1, 2006;

(4) The following sections in 30 TAC Chapter 116, Subchapter C—Plant-Wide Applicability Limits, Division 1—Plant-Wide Applicability Limits:

(i) 30 TAC 116.180—Applicability—adopted January 11, 2006, and submitted February 1, 2006;

(ii) 30 TAC 116.182—Plant-Wide Applicability Limit Permit Application—adopted January 11, 2006, and submitted February 1, 2006;

(iii) 30 TAC 116.184—Application Review Schedule—adopted January 11, 2006, and submitted February 1, 2006;

(iv) 30 TAC 116.186—General and Special Conditions—adopted January 11, 2006, and submitted February 1, 2006;

(v) 30 TAC 116.188—Plant-Wide Applicability Limit—adopted January 11, 2006, and submitted February 1, 2006;

(vi) 30 TAC 116.190—Federal Nonattainment and Prevention of Significant Deterioration Review—adopted January 11, 2006, and submitted February 1, 2006;

(vii) 30 TAC 116.192—Amendments and Alterations—adopted January 11, 2006, and submitted February 1, 2006;

(viii) 30 TAC 116.194—Public Notice and Comment—adopted January 11, 2006, and submitted February 1, 2006;

(ix) 30 TAC 116.196—Renewal of a Plant-Wide Applicability Limit Permit—adopted January 11, 2006, and submitted February 1, 2006;

(x) 30 TAC 116.198—Expiration and Voidance—adopted January 11, 2006, and submitted February 1, 2006;

(5) The following sections in 30 TAC Chapter 116, Subchapter F—Standard Permits:

(i) Revisions to 30 TAC 116.610—Applicability—paragraphs (a)(1) through (a)(5) and (b)—revisions adopted January 11, 2006, and submitted February 1, 2006;

(ii) 30 TAC 116.617—State Pollution Control Project Standard Permit—adopted January 11, 2006, and submitted February 1, 2006;

[FR Doc. 2010–22670 Filed 9–14–10; 8:45 am]

BILLING CODE 6560–50–P

Federal Register

Wednesday,
September 15, 2010

Part V

The President

Proclamation 8556—National Childhood Cancer Awareness Month, 2010

Proclamation 8557—National Historically Black Colleges and Universities Week, 2010

Proclamation 8558—National Days of Prayer and Remembrance, 2010

Proclamation 8559—Patriot Day and National Day of Service and Remembrance, 2010

Proclamation 8560—National Grandparents Day, 2010

Federal Register
Vol. 75, No. 178
Wednesday, September 15, 2010

Presidential Documents

Title 3—

The President

Proclamation 8556 of September 10, 2010

National Childhood Cancer Awareness Month, 2010

By the President of the United States of America

A Proclamation

Each year, thousands of children face the battle against cancer with inspiring hope and incredible bravery. When a child is diagnosed with cancer, an entire family and community are affected. The devotion of parents, grandparents, loved ones, and friends creates a treasured network of support for these courageous children. During National Childhood Cancer Awareness Month, we honor the young lives taken too soon and the survivors who face chronic health challenges, we celebrate the progress made in treatment and recovery, and we rededicate ourselves to fighting this disease so all children may have the chance to live a full and healthy life.

While survival rates for many childhood cancers have risen sharply over the past few decades, cancer is still the leading cause of death by disease for young Americans between infancy and age 15. Too many families have been touched by cancer and its consequences, and we must work together to control, and ultimately defeat, this destructive disease. I invite all Americans to visit Cancer.gov for more information and resources about the symptoms, diagnosis, and treatment of childhood cancers.

Tragically, the causes of cancer in children are largely unknown. Until these illnesses can be cured, my Administration will continue to support investments in research and treatment. The National Cancer Institute, the Federal Government's principal agency for cancer research, is supporting national and international studies examining the risk factors and possible causes of childhood cancers.

The health reforms included in the landmark Affordable Care Act advance critical protections for individuals facing cancer. Provisions in the law prohibit insurance companies from limiting or denying coverage to individuals participating in clinical trials, the cornerstone of cancer research. After recovering from cancer, children can no longer be denied insurance coverage due to a pre-existing condition. It also requires all new plans to provide preventive services without charging copayments, deductibles, or coinsurance, increasing access to regular checkups that can help detect and treat childhood cancers earlier. The Affordable Care Act eliminates annual and lifetime caps on insurance coverage and prohibits companies from dropping coverage if someone gets sick, giving patients and families the peace of mind that their insurance will cover the procedures their doctors recommend.

This month, we pay tribute to the health-care professionals, researchers, private philanthropies, social support organizations, and parent advocacy groups who work together to provide hope and help to families and find cures for childhood cancers. Together, we will carry on their work toward a future in which cancer no longer threatens the lives of our Nation's children.

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 Childhood Cancer Awareness Month. I also encourage all Americans to join me in recognizing and reaffirming our commitment to fighting childhood cancer.

IN WITNESS WHEREOF, I have hereunto set my hand this tenth day of September, 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. 2010–23197
Filed 9–14–10; 11:15 am]
Billing code 3195–W0–P

Presidential Documents

Proclamation 8557 of September 10, 2010

National Historically Black Colleges and Universities Week, 2010

By the President of the United States of America

A Proclamation

Early in our Nation's history, higher education was not possible for most African Americans, and simple lessons in reading and writing were often conducted in secret. With a unique mission to meet the educational needs of African Americans, Historically Black Colleges and Universities (HBCUs) have been valued resources for our country since their inception before the Civil War. Historically Black Colleges and Universities have opened doors and cultivated dreams, and the contributions of their founders, faculty, students, and graduates have shaped our growth and progress as a Nation. During National Historically Black Colleges and Universities Week, we honor these pillars of higher education in America, and we pay tribute to those who have worked to realize their promise.

Bastions of heritage and scholarship, HBCUs have produced African American medical professionals, lawyers, educators, and public officials throughout their history. Countless individuals have worked tirelessly to cultivate HBCUs, and their legacy is seen in graduates whose achievements adorn the pages of American history. From Booker T. Washington to Mary McLeod Bethune, Dr. W.E.B. DuBois to the Reverend Dr. Martin Luther King, Jr., HBCU visionaries and graduates have set powerful examples of leadership, built our middle class, strengthened our economy, served in our Armed Forces, and secured their place in the American story.

HBCUs are important engines of economic growth and community service and will continue to play a vital role in helping America achieve our goal of having the highest proportion of college graduates in the world by 2020. This year, I was proud to sign an Executive Order to strengthen the White House Initiative on HBCUs, which will collaborate with government agencies, educational associations, philanthropic organizations, the private sector, and other partners to increase the capacity of HBCUs to provide the highest-quality education to a greater number of students. Together, we will ensure HBCUs continue fostering determination in their students, instilling pride in their alumni, and adding rungs to our Nation's ladder of opportunity for future generations.

During National Historically Black Colleges and Universities Week, we celebrate the immeasurable contributions these crucibles of learning have made to our Nation. As we continue strengthening the capacity of HBCUs, let us also recommit to preserving and enriching their long tradition of hope and success, and to sustaining our collective effort to meet and exceed America's goals for educational excellence.

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 12 through September 18, 2010, as National Historically Black Colleges and Universities Week. I call upon all public officials, educators, librarians, and Americans to observe this week with appropriate programs, ceremonies, and activities

that acknowledge the tremendous achievements HBCUs and their graduates have made to our country.

IN WITNESS WHEREOF, I have hereunto set my hand this tenth day of September, 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. 2010–23198
Filed 9–14–10; 11:15 am]
Billing code 3195–W0–P

Presidential Documents

Proclamation 8558 of September 10, 2010

National Days of Prayer and Remembrance, 2010

By the President of the United States of America

A Proclamation

In commemoration of the tragedies of September 11, 2001, we come together as Americans each September to honor the memory of the women, men, and children lost in New York City, in rural Pennsylvania, and at the Pentagon. We renew our commitment to those who lost the comfort and companionship of loved ones and friends in those moments, and we mourn with them.

This year's National Days of Prayer and Remembrance are a time to express our everlasting gratitude for the countless acts of valor on September 11, 2001, and in the dark days that followed. Innocent men and women were beginning a routine day at work on a beautiful September morning when they tragically lost their lives in a horrific moment of violence. We are forever indebted to the firefighters, police officers, and other first responders who put their lives on the line to help evacuate and rescue individuals trapped in offices and elevators. Rushing into chaos and burning buildings, many gave their lives so others might live. We continue to draw inspiration from the unflagging service rendered by volunteers who contributed to the recovery effort, including civilians and servicemembers.

At this somber time, we also pause to remember the sacrifices of the men and women in uniform who have lost their lives serving in Iraq, Afghanistan, and elsewhere, while promoting freedom and security. When their country faced crisis and uncertainty, a new generation of Americans stepped forward and volunteered to serve. Their selfless contributions are immeasurable and must never be forgotten. We honor the members of America's Armed Forces who have left the comfort of home to protect our Nation. We pray for their protection from every danger as they carry out their vital missions.

At a time of national tragedy, we relied upon the strength and resilience that has marked the pages of American history. Many Americans turned to God, and lifted up their fellow Americans in prayer. On these solemn days, let us remember that from the destruction of that morning, we came together as a people and a country, united in our grief and joined in common purpose to save, serve, and rebuild. The legacy of the lives lost nine Septembers ago and in defense of our Nation—of husbands and fathers, wives and mothers, cherished children, and dear friends and loved ones—reinforces our resolve to unite with one another, for the country we all love and the values for which we stand.

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 Friday, September 10, through Sunday, September 12, 2010, as National Days of Prayer and Remembrance. I ask that the people of the United States honor and remember the victims of September 11, 2001, and their loved ones through prayer, contemplation, memorial services, the visiting of memorials, the ringing of bells, evening candlelight remembrance vigils, and other appropriate ceremonies and activities. I invite people around the world to participate in this commemoration.

IN WITNESS WHEREOF, I have hereunto set my hand this tenth day of September, 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. 2010–23199
Filed 9–14–10; 11:15 am]
Billing code 3195–W0–P

Presidential Documents

Proclamation 8559 of September 10, 2010

Patriot Day and National Day of Service and Remembrance, 2010

By the President of the United States of America

A Proclamation

Nine years ago, the United States of America suffered an unprecedented national tragedy. On September 11, 2001, nearly 3,000 individuals from across our Nation and from more than 90 others, lost their lives in acts of terrorism aimed at the heart of our country. The Americans we lost came from every color, faith, and station. They were cherished family members, friends, and fellow citizens, and we will never forget them. Yet, against the horrific backdrop of these events, the American people revealed the innate resilience and compassion that marks our Nation. When the call came for volunteers to assist our heroic first responders, countless men and women answered with a massive rescue and recovery effort, offering hope and inspiration amidst tremendous heartbreak. Today we remember those we lost on that dark September day, and we honor the courage and selflessness of our first responders, servicemembers, and fellow citizens who served our Nation and its people in our hour of greatest need.

Throughout America, patriotism was renewed through common purpose and dedicated service in the days and weeks following September 11. Many joined our Armed Forces to protect our country at home and abroad; others chose to serve in their own neighborhoods and communities, lending their skills and time to those in need. Fences and boundaries gave way to fellowship and unity.

In the wake of loss and uncertainty, Americans from every corner of our country joined together to demonstrate the unparalleled human capacity for good. To rekindle this spirit, I signed the Edward M. Kennedy Serve America Act last year, which recognizes September 11 as a National Day of Service and Remembrance. I called upon every American to make an enduring commitment to serve their community and our Nation. The response to that appeal has been inspirational, and last year more than 63 million Americans volunteered in their communities. I encourage all Americans to visit Serve.gov, or Servir.gov for Spanish speakers, for more information and resources on opportunities for service across America.

By any measure, these myriad acts of service have strengthened our country and fostered a new wave of active and engaged citizens of all ages and walks of life. Americans should be particularly proud of the example set by our Nation's young people, who came of age following the horrors of September 11, yet still believe a truly patriotic idea: that people who love their country can change it. Through selfless acts for country and for one another, patriots in every corner of our Nation continue to honor the memory of those lost on September 11, and they reaffirm our charge to reach for a more perfect Union.

By a joint resolution approved December 18, 2001 (Public Law 107–89), the Congress has designated September 11 of each year as Patriot Day, and by Public Law 111–13, approved April 21, 2009, the Congress has requested the observance of September 11 as an annually recognized National Day of Service and Remembrance.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim September 11, 2010, as Patriot Day and National Day of Service and Remembrance. I call upon all departments, agencies, and instrumentalities of the United States to display the flag of the United States at half-staff on Patriot Day and National Day of Service and Remembrance in honor of the individuals who lost their lives on September 11, 2001. I invite the Governors of the United States and the Commonwealth of Puerto Rico and interested organizations and individuals to join in this observance. I call upon the people of the United States to participate in community service in honor of those our Nation lost, to observe this day with appropriate ceremonies and activities, including remembrance services, and to observe a moment of silence beginning at 8:46 a.m. eastern daylight time to honor the innocent victims who perished as a result of the terrorist attacks of September 11, 2001.

IN WITNESS WHEREOF, I have hereunto set my hand this tenth day of September, 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. 2010–23201
Filed 9–14–10; 11:15 am]
Billing code 3195–W0–P

Presidential Documents

Proclamation 8560 of September 10, 2010

National Grandparents Day, 2010

By the President of the United States of America

A Proclamation

Throughout our history, American families have been guided and strengthened by the support of devoted grandparents. These mentors have a special place in our homes and communities, ensuring the stories and traditions of our heritage are passed down through generations. On National Grandparents Day, we honor those who have helped shape the character of our Nation, and we thank these role models for their immeasurable acts of love, care, and understanding.

Grandparents witness great milestones in the lives of their children and grandchildren. Whether with us when we learn to read or ride a bicycle, they celebrate early triumphs, console us when we are distressed, and cultivate our dreams. Through decades of hard work and sacrifice, our forebears have also enabled many of the rights and opportunities now accessible to all Americans. As a country and a people, our grandparents have made us who we are today.

National Grandparents Day presents a chance to show our profound appreciation and respect for the central roles that family elders play in our lives. The legacy of these selfless caregivers is not only reflected in the principles and sense of purpose they inspire in their loved ones, but also in their unique ability to reach across ages and enrich the lives of generations of Americans.

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 12, 2010, as National Grandparents Day. I call upon all Americans to take the time to honor their own grandparents and those in their community.

IN WITNESS WHEREOF, I have hereunto set my hand this tenth day of September, 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. 2010–23202

Filed 9–14–10; 11:15 am]

Billing code 3195–W0–P

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LIST OF PUBLIC LAWS

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The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

H.R. 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)

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